EN

This text is for information only.
A summary of this Decision is being published in all the Community languages in the Official Journal of the European Union.

Case No COMP/M.4180 –
Gaz de France/Suez

Only the French text is authentic.

REGULATION (EC) No 139/2004
ON THE CONTROL OF CONCENTRATIONS

Article 8(2)
date: 14/11/2006

COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 14 November 2006

C(2006) 5419 final

PUBLIC VERSION

COMMISSION DECISION

of 14 November 2006

declaring a concentration to be compatible with the common market and the EEA Agreement

(Case No COMP/M.4180 Gaz de France/Suez)

Commission Decision

of 14 November 2006

declaring a concentration to be compatible with the common market

and the functioning of the EEA Agreement

(Case No COMP/M.4180 – Gaz de France/Suez)

(Only the French text is authentic)

(Text with EEA relevance)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to the Agreement on the European Economic Area, and in particular Article 57 thereof,

Having regard to Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings[1] and in particular Article 8(2) thereof,

Having regard to the Commission decision of 19 June 2006 to initiate proceedings in this case,

Having given the undertakings concerned the opportunity to make known their views on the objections raised by the Commission,

Having consulted the Advisory Committee on Concentrations[2],

Having regard to the final report of the Hearing Officer in this case[3],

Whereas:

1 OJ L 24, 29.1.2004, p. 1.

2 OJ C ...,...200. , p. ....

3 OJ C ...,...200. , p. ....

1. On 10 May 2006, the Commission received prior notification of a concentration, in accordance with Article 4 of Regulation (EC) No 139/2004 ('the Merger Regulation'), whereby the Gaz de France group ('GDF', France) would merge, within the meaning of Article 3(1)(a) of the said Regulation, with the Suez group ('Suez', France) via an exchange of shares.

2. After a preliminary examination of the notification, the Commission considered that the transaction as notified fell under Regulation (EC) No 139/2004 and raised serious doubts as to its compatibility with the common market and the operation of the EEA Agreement.

I. THE PARTIES

3. GDF is an energy group present across the gas chain and related energy services and is active in exploration, production, transport, storage, distribution and natural gas sales, mainly in France, but also in Belgium, Germany, the United Kingdom, Luxembourg, Hungary and Spain. In Belgium, Gaz de France, along with Centrica, exercises joint control over SPE[4], which is present in the Belgian electricity and natural gas markets and provides energy services.

4. GDF was transformed from a state-funded industrial and commercial establishment into a public limited liability company by a law adopted on 9 August 2004. Gaz de France S.A. is thus under the exclusive control of the French State.

5. The Suez group is active in the utility industry and utility services. The group is organised around four operational branches into two spheres of activity, energy and the environment.

6. Suez's main energy subsidiaries are Electrabel (electricity and gas), Distrigaz (gas) Fluxys (transport and storage of gas), Elyo (renamed Suez Energy Services in January 2006), Fabricom, GTI, Axima and Tractebel Engineering in the energy service sector. According to the information provided by the parties, Suez Energie Europe holds a minority stake of 27.5% in Elia, manager of the electricity transmission network in Belgium.

II. THE TRANSACTION

7. By means of the notified merger, GDF will absorb Suez, which will cease to exist as a legal entity. The merger proposal will be submitted for approval by a qualified majority at the two groups' extraordinary general meetings and will not require the launching of a public offer on Suez's shares. The Boards of Directors of both groups have already approved the proposed merger, Suez on 25 February 2006 and GDF on 26 February 2006. The merger will take place by means of a one-for-one exchange of shares.

[4] GDF and Centrica each own 50% of a holding company that acquired 51% of SPE in 2005. Together, they exercise joint control over SPE. The former owners of SPE, ALG and Publilum, own 49% of SPE via another holding company, but do not exercise control. See Case M.3883 *GDF/Centrica/SPE*.

8. The merger can only take place once the French Parliament amends the law of 9 August 2004, in order to reduce the State's stake in GDF's capital to less than 50%[5].

III. CONCENTRATION

9. In view of the above, the notified transaction qualifies as a concentration within the meaning of Article 3(1)(a) of the Merger Regulation.

IV. COMMUNITY DIMENSION

10. Together, the companies involved in the proposed merger have a total turnover at global level exceeding EUR 5 billion[6] (EUR 63 843 million). Within the Community, each company has total turnover exceeding EUR 250 million (GDF: EUR [...][*] million and Suez: EUR [...][*] million); they do not, however, generate more than two thirds of their respective turnover within the Community in a single Member State. The notified transaction therefore has a Community dimension.

V. PROCEDURE

11. Having examined the notification, the Commission concluded that the notified transaction falls within the scope of the Merger Regulation and raises serious doubts as to its compatibility with the common market and the EEA Agreement. By decision of 19 June 2006, it therefore initiated proceedings under Article 6(1)(c) of the Merger Regulation.

12. On 7 July 2006, the parties submitted their written comments regarding this decision.

13. On 18 August 2006, the Commission sent the statement of objections to the parties, who responded on 1 September 2006. On 18 August 2006, the parties had access to the file, which was completed on 21 August. They have waived their right to an oral hearing under Article 14 of Commission Regulation (EC) No 802/2004[6bis]. The Commission afforded the parties repeated access to the file (on 9 October 2006 and 20 October 2006), which gave them the opportunity to make known their views on the objections levelled against them, in accordance with Article 18(1) of the Merger Regulation.

14. On 20 September 2006, the parties submitted commitments, which are described below. On 22 September 2006, the Commission launched a market test in order to better assess the commitments proposed. The Commission carefully analysed the replies it received from customers, competitors, suppliers and the Belgian and French regulators. On 29

---

[5] The French State will own 34% of the new group, the other significant shareholder being Groupe Bruxelles Lambert with 4.1%.

[6] Turnover calculated in accordance with Article 5(1) of the Merger Regulation and the Commission Notice on calculation of turnover (OJ C 66, 2.3.1998, p. 25).

[*] Parts of this document have been omitted to ensure that no confidential information is disclosed; they are contained in square brackets and marked by an asterisk.

[6bis] Commission Regulation (EC) No 802/2004 of 7 April 2004 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (OJ L 133, 30.4.2004, p. 1).

September 2006, the Commission informed the parties of the results of the market test and sent them non-confidential versions of 39 replies. Between 2 and 4 October 2006, the Commission sent nine other replies in a non-confidential form which it had received in the meantime. At a meeting on 4 October 2006, the Commission explained the results of the market test in greater detail to the parties.

15. On 10 October 2006, by decision in accordance with Article 10(1) second point, of the Merger Regulation and in agreement with the parties, the delays were prolonged by five working days.

16. On 13 October 2006, the parties submitted new commitments which are described in detail below. On 6 November 2006, the parties submitted the commitments of 13 October in their final version, supplemented by annexes. Those commitments are annexed to this Decision and form an integral part thereof.

17. On 25 October 2006, the Advisory Committee on Concentrations met and gave its opinion on the draft of this Decision.

VI. COMPETITION ANALYSIS

18. The sectors primarily concerned by this operation are the gas and electricity sectors in Belgium and the gas and district heating networks sectors in France.

A. Gas

A.1 European regulatory framework

19. The internal market for natural gas is regulated by Directive 2003/55/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in natural gas and repealing Directive 98/30/EC ('the Gas Directive')[7], which lays down common rules for the storage, transmission, supply and distribution of natural gas. The following are considered 'eligible' customers: all non-household customers (as from 1 July 2004 at the latest), and, as from 1 July 2007, all customers. The Gas Directive also imposes regulated access to transmission and distribution infrastructures and liquefied natural gas (LNG) facilities. As regards storage, Member States do, however, have the choice between regulated access or negotiated access. The integrated natural gas companies have to keep separate accounts for their transmission, distribution, storage and LNG activities. The Gas Directive also imposes a legal separation between the operators of transmission and distribution networks. When a network operator is part of a vertically integrated company, it must be legally independent of the organisation and the decision-making process in relation to other activities not related to transmission and distribution.

20. Moreover, Regulation (EC) No 1775/2005 of the European Parliament and of the Council of 28 September 2005 on conditions for access to the natural gas transmission networks[8], which entered into force on 1 July 2006, imposes additional technical rules

[7] OJ L 176, 15.7.2003, p. 57.

[8] OJ L 289, 3.11.2005, p. 1.

regarding third-party access, the principles governing the mechanisms for attributing capacity, transparency requirements and the procedures for managing congestion.

A.2 Belgium

A. 2.1 National framework

21. Belgium imports all of the natural gas it consumes, either via gas pipeline or as LNG. Belgium is supplied with natural gas by the Netherlands (38%), Norway (40%), Algeria (15%) and the spot market of Zeebrugge (7%). As from 2007, approximately 15% of the gas consumed in Belgium will come from Qatar, in lieu of Algeria. Moreover, Belgium is a gas transit country: the long-term reserved transit capacity is some 48 billion m3/year.

22. Natural gas consumption increased slightly in 2005 (+ 1.4%), from 187 330 TWh in 2004 to 189 853 TWh in 2005. This increase is mainly due to greater consumption for generating electricity, which increased by 5.6%. Belgium's Commission for Electricity and Gas Regulation (CREG) predicts average annual growth of 2.92% in the years to come.

23. It should be noted that two types of gas are supplied in Belgium: low-calorific, or 'L', gas (9.769 kWh/Nm³) and high-calorific, or 'H', gas (11.630 kWh/Nm³).

National liberalisation and regulation

24. Final customers connected to the natural gas transmission network have been eligible since 1 July 2004. In the Flemish Region, the market has been completely liberalised since 1 July 2003. In the Walloon Region, final customers whose annual consumption is greater than 0.12 GWh of gas per year per site, as well as business customers who submit a request to that end have been eligible since 1 July 2004. In the Brussels Region, business customers have been eligible since 1 July 2004. Household customers will become eligible on 1 January 2007 in Wallonia and in Brussels. At the time of this Decision, almost 90% of the Belgian natural gas market has been liberalised.

25. The federal regulatory authority, the Electricity and Gas Regulation Commission (CREG), and the three regional regulatory authorities, the Flemish Regulation Entity for the Electricity and Gas Market (VREG – Flanders), the Brussels Institute for Environmental Management (IBGE/BIM – Brussels) and the Walloon Energy Commission (CWaPE – Wallonia), are responsible, respectively, for ensuring the proper application of market regulations at federal and regional levels.

26. The Directives on the natural gas sector have been transposed at federal and regional levels. The federal authority transposed the Directives by means of the Law of 16 July 2001 amending the Law of 12 April 1965 concerning the transmission by pipeline of gaseous and other products and confirming the Royal Decree of 18 January 2001 on the provisional system aimed at covering the operating costs of the Electricity and Gas Regulation Commission (CREG) (the 'Gas Law'). The regional authorities transposed the Directives via the following provisions: for the Flemish Region, the Decree of 6 July 2001 on the organisation of the gas market ('Flemish Gas Decree'); for the Walloon Region, the Decree of 19 December 2002 on the organisation of the regional gas market

('Walloon Gas Decree'); and for the Brussels Region, the Order of 1 April 2004 on the organisation of the gas market ('Brussels Gas Order')[9].

27. The domestic transmission (routing) and storage activities of independent natural gas transmission company Fluxys are regulated as far as both third-party access (TPA) and tariffs are concerned. They are subject to the Law and to a Code of Conduct. However, Belgium's Council of State ordered the suspension of the Code of Conduct in so far as it applies to transit activities[10]. As far as the code's application to transit is concerned, the suspended code has not been replaced by any other decree implementing the Gas Law. Accordingly, no document concerning third-party access to transit capacity has been submitted for approval to the CREG[11]. Since 1 July 2006 only, it is Regulation (EC) No 1775/2005 that applies to transit activities. However, this Regulation does not entirely address the shortcomings in the application of the TPA rules to transit that were created by the Council of State ruling.

A.2.2 Infrastructures

28. Article 8(1) of the Gas Law entrusts management of the networks to the following operators exclusively: (i) the manager of the natural gas transmission network (GRT); (ii) the manager of the natural gas storage installation; and (iii) the LNG installation manager. The Gas Law has thus set up a legal monopoly for the management of these three types of gas facility.

A.2.2.1 Transmission/transit

29. Belgium has chosen to manage the high-pressure domestic transmission network as a monopoly. As a result of the Gas Law, Fluxys (a subsidiary of Suez) has managed the transmission network, on a temporary basis, since 23 March 2006, Fluxys is thus responsible for managing, maintaining and developing the transmission network.

30. The Belgian market is characterised by the coexistence of two networks: an H gas network (nominal calorific value of 11.63 kWh/m³(n)) and an L gas network (nominal calorific value of 9.769 kWh/m³(n)). These two networks are interconnected by means of two transformers, one in Lillo and one in Loenhout. The L network is supplied from the Netherlands (entry points in Zandvliet and Poppel) and the L gas irrigation zone is crossed by a double interstate pipeline or 'backbone', which connects the Netherlands to France. It is technically impossible to transport L gas on the H gas network and vice versa. It is, however, possible to convert H gas into L gas for injection into the L gas transmission network. Fluxys has two installations for converting H gas into L gas.

31. The H gas network covers the entire country, except for the Brussels Region. The L gas network is primarily located in Brussels and in the provinces of Antwerp, Limburg,

---

[9] The Commission has sent a letter of formal notice to Belgium informing it that it had incorrectly transposed Directive 2003/55/EC. In its letter, the Commission stated that Belgium had violated the provisions of the Directive with regard to the final designation of a system operator, third-party access to the network and the exemption relating to new major gas installations. See also IP/06/430 dated 4 April 2006, 'Commission attacks Member States that have not properly opened their energy markets'.

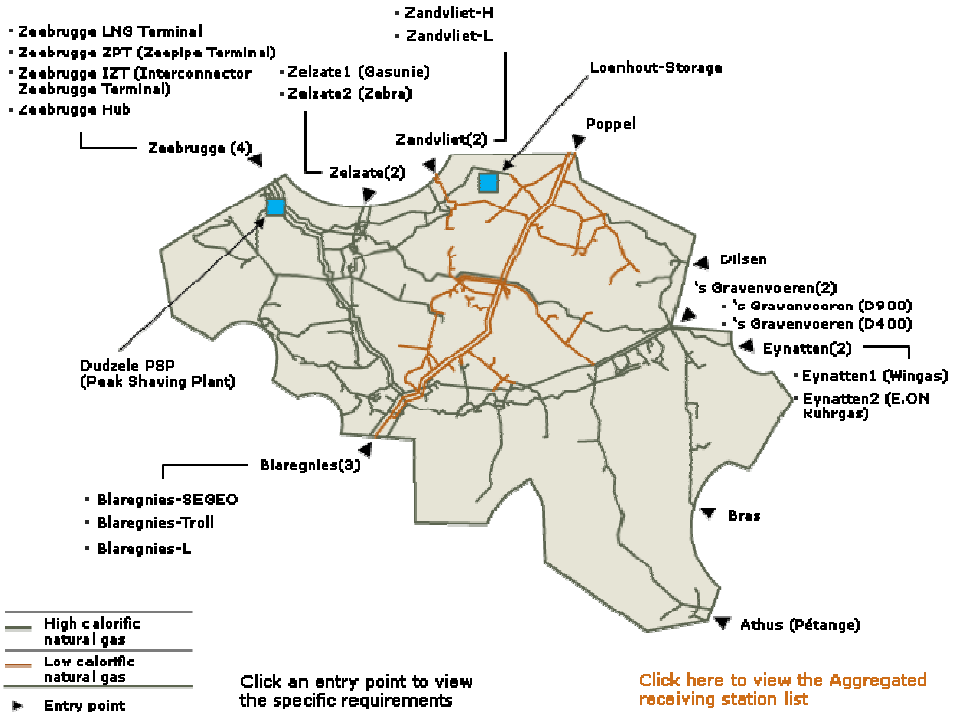
[10] Judgment No 126.817 of 5 January 2004 (*Distrigaz and Distrigaz & Co.* v *Belgian State*).

[11] CREG, reply dated 14 July 2006 to question 10 of the 6 July 2006 questionnaire, No 13256.

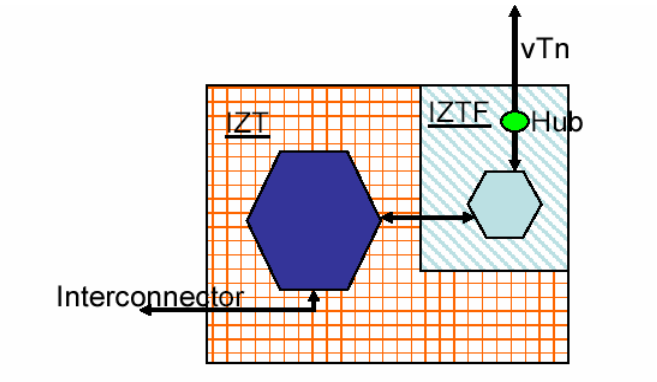
Flemish Brabant, Walloon Brabant and Hainault. There are no L gas transport networks in the Belgian provinces of West Flanders, East Flanders and Luxembourg.

32. The H gas is supplied from the United Kingdom, the Netherlands, Germany, France and the Zeebrugge LNG Terminal. The network also has two connections with Luxembourg (exit points from the Belgian network only). The H gas transit routes are SEGEO ('s-Gravenvoeren-Blaregnies, mixed transmission/transit pipeline), Troll (Zeebrugge-Blaregnies/Quévy, transit pipeline) and vTn/rTr (Eynatten/Zeebrugge/Zelzate, mixed transmission/transit pipeline). Two natural gas storage sites are connected to the H gas network: the LNG storage site in Dudzele and the aquifer storage site in Loenhout.

33. The table below illustrates the architecture of the Belgian natural gas transit and transmission network:



34. The Zeebrugge hub is located in the IZTF terminal (Interconnector Zeebrugge Terminal Fluxys), downstream from the metering station of this terminal when the flow comes from the Interconnector and goes towards Belgium, as indicated on the following diagram:



35. The hub was initially designed to route British gas towards the continent ('forward flow') and continental gas towards Great Britain ('reverse flow') via a submarine pipeline called the Interconnector. The hub is also connected, via the rTR/vTn pipelines, to the Fluxys LNG terminal for the purpose of importing LNG by boat, and to the Zeepipe terminal, a gas pipeline connecting the Norwegian deposits, in particular Troll, with Zeebrugge. The Zeepipe terminal is connected to the French border (Quévy) by a large transit gas pipeline, the Troll.

36. The Belgian gas network is used for international transit as well as domestic transmission. It is an integrated network, i.e. the pipelines used for international transit of gas are generally also used for domestic transmission of gas. Nevertheless, certain pipelines are used primarily for gas transit.

37. Regarding domestic gas transmission, Fluxys owns the transmission network, sells the transmission capacity and provides the operational management of the network.

38. Regarding natural gas transit, the situation differs according to pipeline:

    - The vTn/RTR pipeline (Zeebrugge/Zelzate/Eynatten) and the Troll pipeline (Zeebrugge/Blaregnies) belong to GIE Finpipe, of which Distrigaz owns 63.3%. All capacity has been transferred to Distrigaz & Co. SCA ('Distrigaz & Co.'), a subsidiary of Distrigaz, which markets the capacity while Fluxys is responsible for operational management.

    - The SEGEO pipeline (’s-Gravenvoeren/Blaregnies) belongs to Segeo SA ('Segeo'), of which Fluxys and GDF own 75% and 25% respectively. Capacity is made available to Etac BV, of which Distrigaz and GDF hold 75% and 25% respectively. Segeo is responsible for selling capacity, and Fluxys for operational management.

    - The Poppel/Blaregnies pipelines (backbones), used for transmission and transit of L gas, belong to Fluxys, which controls management and sale of capacity.

39. Belgium has eighteen entry points (which are part of the transmission/transit network), fifteen for H gas and three for L gas. It should be emphasised that the entry points are integral parts of the interstate pipelines on which they are located and therefore belong to the respective owners of these interstate pipelines.

A.2.2.2 Storage

40. Underground storage is used to adapt supply, which holds fairly steady during the year, to reflect the consumption of final customers, which is irregular and highest in the winter. Storage facilities are used therefore mainly to store gas in summer, deliver it in winter and make it possible to meet demand on very cold days. Storage sites are also used to rectify short-term imbalances (for example, over the weekend). That makes them an essential element of the secure supply and flexibility that all suppliers must provide. Consequently, they are essential infrastructure for the proper functioning of the natural gas market.

41. Belgium has only one underground storage site, in Loenhout, with a capacity of 580 million m³(n) ('working volume')[12]. Management of storage facilities must be entrusted to an independent legal entity. As a result of the Gas Law, Fluxys has been managing, on a transitional basis, the natural gas underground storage facilities of Loenhout and the Peak Shaving Facility in Zeebrugge (Dudzele). This installation also falls in the category of 'natural gas storage installation' as defined in Article 1 of the Gas Law. The buffer storage activities of the Zeebrugge LNG terminal, which consist of three LNG storage tanks with a nominal capacity of 87 000 m³ each and which are owned by Fluxys subsidiary Fluxys LNG, fall, on the other hand, in the category of 'LNG installation' as defined in Article 1 of the Gas Law.

42. In Belgium there is currently no installation storing L gas. The Loenhout storage installation, Belgium's sole installation for storing gas in a gaseous state, is currently used to store H gas[13]. The LNG storage installation in Zeebrugge (Dudzele) has a capacity of 55 million m³(n) and is directly connected to the H gas transmission network, into which the LNG is injected after being converted back into gas[14].

A.2.2.3 Methane tanker terminal

43. A methane tanker terminal is a port facility where LNG can be offloaded from methane tankers, temporarily stored, converted back into gas and conveyed to the adjacent transmission network.

44. The methane tanker terminal of Zeebrugge is the only LNG terminal in Belgian territory. Fluxys LNG, a subsidiary of Fluxys (which itself manages the transmission and storage networks in Belgium), owns this terminal and has a legal monopoly over its management. According to the notification, the current capacity of the Zeebrugge LNG terminal is 4.5 billion m³(n) a year and it will be 9 billion m³(n) as from 1 April 2007[15].

---

12 http://www.fluxys.be/Index_Storage.htm

13 Fluxys does, however, have an installation in Loenhout for converting H gas into L gas.

14 http://www.fluxys.be/Index_Storage.htm

15 Form CO, Vol. I, p. 339.

A.2.2.4 Gas distribution

45. Distribution refers to the transportation of natural gas from the transmission network to a low-pressure distribution network. This activity falls within the competence of the local authority utilities (intercommunales), which have exclusive rights in the matter.

46. Traditionally in Belgium, the local authority utilities responsible for distribution (intercommunales de distribution), which are partnerships of municipalities, managed the low-pressure gas distribution networks and the distribution of electricity/gas via these networks.

47. The local authority utilities can be broken down into local authority public-sector companies (intercommunales pures), whose partners are municipalities exclusively, and local authority mixed public- and private-sector companies (intercommunales mixtes), in which one of the partners is Electrabel.

48. Following the transposition of the Gas Directive and of Directive 2003/54/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity and repealing Directive 96/92/EC[16] ('Electricity Directive') at the regional level, those local authority utilities wishing to be appointed electricity or gas distribution network managers may now no longer at the same time supply electricity or gas to customers who are (newly) eligible.

49. In order to comply with these obligations, most municipalities have agreed with Electrabel, their partner in the local authority mixed public- and private-sector companies, on a division of activities within the mixed companies. Supply activities will be taken over by Electrabel Customer Solutions (ECS), a subsidiary of Electrabel, as customers become eligible. In the future, the activities of the local authority utilities will be limited to management of the distribution network. In exchange, the municipalities' stakes in the local authority mixed public- and private-sector companies will be increased. Electrabel's stakes will be reduced to minority stakes at the latest in 2007 in the three regions.

50. The result is that, temporarily, Electrabel holds majority stakeholdings in local authority mixed public- and private-sector companies, which, as managers of the distribution networks, are responsible for distribution.

51. The parties would emphasise that, under both the statutes of the mixed public- and private-sector companies and the relevant legislation, the municipalities exercise exclusive control over the mixed public- and private-sector companies, whatever the size of the stakeholding held by the private stakeholder. Under Belgium's regulatory framework, Electrabel does not have control of the local authority mixed public- and private-sector companies. Even more so given that Electrabel's stakeholdings in the local authority mixed public- and private-sector companies will be gradually reduced.

52. The parties consider that this conclusion has in fact been implicitly confirmed by both the Commission[17] and the Belgian Competition Council[18] in the ECS/Intercommunales

---

16 OJ L 176, 15.7.2003, p. 37.

17 COMP/M.3318-*ECS/Sibelga*, 19 December 2003.

decisions. They also put forward the fact that the transactions notified to the Commission at the time would not have been notifiable if Electrabel had had prior control of the local authority utilities. The parties thus conclude that Electrabel is not present in the gas distribution market in Belgium. Nor, in their view, is GDF present in this market.

53. Nevertheless, the market survey raised doubts regarding the local authority utilities' degree of independence from Suez/Electrabel. Firstly, it was specified that Electrabel reserves the right to appoint members of the boards of the local authority mixed public- and private-sector companies. Secondly, thanks to the cross-shareholdings between the local authority utilities and the Suez group, the former benefit directly from any increase in the profits of Suez Group subsidiaries and could therefore have an interest in favouring the incumbent operators. Thirdly, certain key services (such as connecting customers when they switch to a new repair-service supplier) are provided to the local authority mixed public- and private-sector companies by Suez group subsidiaries. This implies a certain dependence on the part of the local authority utilities on the Suez group's technical expertise.

54. Regarding the reference to previous Commission Decisions concerning the local authority utilities, the Commission rejects the argument of the parties, because the notified transactions concerned the transfer of eligible customers of the local authority utilities to ECS, which consequently became their default supplier. ECS's acquisition of the customers constituted acquisition of sole control within the meaning of Council Regulation (EEC) No 4064/89[18bis]. Even if Electrabel already had joint control of the local authority utilities (including their customers), then acquiring sole control of the customers constituted a change in the nature of that control, and was therefore notifiable[19].

55. The elements available to the Commission thus support the conclusion that Suez is currently in a position to exert at least significant influence on, and possibly control over, the local authority mixed public- and private-sector companies.

A.2.3 Relevant markets

56. In the Commission's decision-making practice, the various activities inherent in the gas sector can be separated in separate relevant markets. In this case and with regard to the gas sector in Belgium, the relevant product markets are as follows:

- the various gas-supply markets, which constitute separate markets according to the various categories of customer;
- the market for trading on the hub.

---

[18] See the decisions delivered by the Belgian Competition Council on 4 July 2003 (*Interest*, *IVEKA*, *IMEWO*, *INTERGEM*, *IVERLEK*, *IGAO* and *GASELWEST*), 11 September 2003 (*SIMOGEL*, *SEDILEC*, *INTERMOSANE 2* and *IMEA*), 13 October 2003 (*Sibelgaz*), 15 January 2004 (*INTERMOSANE*, *INTERLUX*, *SIMOGEL*, *SEDILEC*, *IDEG*, *IGH*) and 8 March 2004 (*SIBELGA*).

[18bis] Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (OJ L 395, 30.12.1989, p. 1).

[19] See paragraph 16 in the Commission Notice on the concept of concentration.

57. In the supply markets, the notified merger will give rise to significant overlaps between the activities of the parties; these markets are therefore affected horizontally.

58. There is a vertical relationship between these markets and the gas infrastructure markets, namely the transmission and distribution networks, the storage sites and the LNG facilities, which are upstream from the activities of supply and trade. In Belgium, these infrastructures are managed by legal monopolies. A precise definition of these markets is not necessary for the purposes of this Decision. Nevertheless, the situation concerning the ownership and management of and the rights to use the various infrastructures will be taken into account in the analysis of the concentration effects on the relevant markets.

59. Regarding gas provision, the progressive liberalisation of the gas sector at Community level and in Belgium has traditionally led the Commission to distinguish between two categories of customers of gas suppliers: (i) 'eligible' customers, who are free to choose their supplier and (ii) 'non-eligible' customers who do not yet have this choice. At present, only household customers in Wallonia and Brussels are not yet eligible. However, this situation will change between now and 1 January 2007, at which time all gas consumers in Belgium will be eligible.

60. In several decisions, the Commission has segmented gas supply to eligible customers into a number of separate product markets according to the type of customer. Similarly, in its recent GDF/Centrica/SPE decision[20] the Commission evoked such a segmentation of the Belgian gas supply markets while leaving open the precise definition of those markets.

61. In the parties' view, it is not necessary to sub-segment the market for the supply of gas to eligible customers in Belgium. In this regard, they would point out that the Belgian Competition Council recently followed this approach in its GDF International/L'Association Liégeoise du Gaz - ALG Négoce decision[21] by not making any distinction between gas consumers according to their consumption level.

62. The market survey showed, however, that the supply of gas to eligible customers should still be segmented into various product markets according to customer category, due to the differences in volumes and consumption profiles, the conditions of supply and the need for flexibility.

63. On the basis of its decision-making practice and of the market survey, the Commission considers that the gas supply markets to be analysed for the purposes of this Decision are as follows:

    – (i) supply of gas to dealers (including the local distribution companies);

    – (ii) supply of gas to gas-powered electricity plants;

    – (iii) supply of gas to large industrial customers;

    – (iv) supply of gas to small industrial and commercial customers; and

[20] Decision COMP/M.3883 *GDF/Centrica/SPE* of 7 September 2005.

[21] Decision of the Belgian Competition Council of 3 June 2004.

– (v) supply of gas to household customers.

L gas/H gas

64. In the parties' view, there are several arguments against distinguishing between L gas and H gas, in particular the absence of any significant price difference between them and the fact that both transmission networks and heating installations can be adapted to both types of gas.

65. The market survey, however, showed the need to distinguish between L gas and H gas for each relevant market. The position is different only with regard to the supply of gas to electricity producers, the volume of L gas consumed by power stations being very limited.

66. L gas and H gas require the use of separate delivery infrastructures, both for transmission and for storage, that are not interchangeable.

67. The Commission's market survey clarified that L gas and H gas do not have the same characteristics or properties and that certain manufacturing processes, in particular in the chemical industry, require the use of H gas. Facilities designed for L gas cannot process H gas, and vice versa, without expensive prior modification of the combustion systems. Moreover, regarding the customers connected to the distribution network, the decision to switch from one type of gas to another is not up to the final customers, because that would suppose that their distribution network manager made the decision to supply the entire network with the new type of gas. Regarding the ability to substitute one gas for another, it has already been said that major investments would be necessary to convert H gas into L gas (and vice versa) and to modify the facilities of final customers. This greatly reduces the substitutability of both supply and demand.

68. Similarly, a CREG study concluded that L gas and H gas are interchangeable to a limited degree only and that competition and access possibilities on the two markets are substantially different[22]. Using the 'small but significant non transitory increase in price' (SSNIP) test[23], the study confirms that the substitution costs on the demand side would be prohibitive[24]. For industrial customers, the costs consist of installing new pipelines, and for distribution networks, of inspecting and adapting facilities. Regarding substitution costs on the supply side, the study notes the high operating costs of the conversion plants and the absence of sufficient substitutability on the supply side[25].

69. These considerations clearly argue in favour of distinguishing between L gas and H gas in all supply markets for final customers.

---

22 Study F(040617-CDC-313) of the CREG of 17 June 2004 relating to competition in the L gas market.

23 The SSNIP test consists in simulating demand-side reactions to a non-transitory increase in relative prices of 5-10%.

24 Sections 21-34 of the study.

25 Sections 37-44 of the study.

A.2.3.1 Relevant product markets

A.2.3.1.1 Market for trading on the Zeebrugge hub

70. A gas-trading hub is a liquidity instrument that provides services to facilitate exchanges between actors on a market. Schematically, a hub facilitates trade between gas buyers and sellers, enabling them to find, in the short term, sufficient volumes of supplies or to sell excess capacity.

71. A gas hub can be linked to a physical installation as in Zeebrugge, Belgium. Gas flows are connected to and pass through this point. A hub can also be virtual; one then speaks of a notional point. Such a hub, which has no precise geographical location, makes it possible to trade gas arriving in a given zone. The National Balancing Point (NBP) hub in the United Kingdom and the Title Transfer Facility (TTF) hub in the Netherlands are examples.

72. As acknowledged by the parties in their notification, trading on the Zeebrugge hub constitutes a product market distinct from the other gas markets in Belgium. It operates differently from the supply markets. Supply is used to satisfy the demand of final customers or retailers based on fixed-term contracts and at a location generally chosen by the customer; on the hub, however, there is a more immediate meeting between the supply and demand of the various traders. This results in transactions whereby the gas is normally delivered to the hub. In addition, trading at the hub differs notably from supply to retailers in that generally all the traders act as buyers and sellers. Another characteristic making the Zeebrugge hub unique are the arrangements governing access to the hub, which is currently via the transit network (rTR/vTn). In 2005, all nominations towards the hub were made through the transit network, while less than 4% of the volumes nominated from the hub went through the transmission network, with the remainder going through the transit network[26].

A.2.3.1.2 Market for the supply of gas to dealers

73. This market includes the supply of gas to local authority utilities and third-party retailers. Third-party retailers include national and international companies (e.g. Nuon and Essent) that obtain gas supplies in Belgium that are subsequently sold to their final customers in Belgium.

74. Sales to local authority utilities will gradually decrease as the liberalisation of the Belgian gas market proceeds. It should be remembered that the local authority utilities have a legal monopoly to manage gas distribution networks in their respective territories. The applicable legal framework, however, provides for a separation of the activities of managing the distribution network and supplying gas to eligible customers. For this reason, the local authority utilities in Flanders stopped (re)selling gas on 1 July 2003, the date on which the gas markets in Flanders were fully liberalised. The local authority utilities in Wallonia and in the Brussels Region, for their part, are limited to supplying gas to household customers who are not yet eligible.

[26] Parties' reply of 6 October 2006 to the questionnaire of 4 October 2006, No 18756.

75. Household customers in Wallonia and the Brussels Region will be eligible as from 1 January 2007. Once all Belgian customers are eligible, on 1 January 2007, the local authority utilities will cease their supply activities and will no longer need to acquire gas.

76. However, from that time on household customers in Wallonia and Brussels will purchase their gas from different suppliers, in particular the 'default suppliers' or 'standard suppliers' designated by the local authority utilities. Because it is improbable that the majority of these suppliers will import all the needed gas, they will have to buy gas in Belgium. Consequently, the market for supplying gas to retailers will remain sizeable for years to come.

A.2.3.1.3 Market for the supply of gas to electricity producers

77. The market for the supply of gas to electricity plants differs from other supply markets in that the competitive conditions are different. Electricity plants consume far more gas than even the large industrial customers do. Moreover, the electricity plants are often directly connected to the transmission network, which distinguishes them from the small industrial and commercial customers and from the residential customers who are connected to the distribution network. Electricity producers can be distinguished from the large industrial customers by their consumption profile: whereas the large industrial customers have a relatively stable demand throughout the year, electricity plants' demand is subject to greater variation, particularly in function of the season. Consequently, electricity producers have flexibility needs different from those of other final customers. These factors are also reflected in the answers to the Commission's questionnaire: a majority of respondents consider the market for the supply of gas to electricity producers distinct from the other markets[27].

A.2.3.1.4 Market for the supply of gas to large industrial customers

78. Large industrial customers differ from other industrial and commercial customers and from household customers, in particular in the volume of their demand, which largely exceeds the volumes required by the other types of customer. Accordingly, large industrial customers generally obtain lower prices and are often connected directly to the transmission network.

79. The parties propose making a distinction between large industrial customers and small industrial and commercial customers based on an annual consumption threshold of 1 million m3 (12 GWh). They maintain that this threshold for distinguishing between the largest gas consumers and other consumers is present in Belgian gas legislation: the Gas Law[28] and the Walloon and Flemish decrees on the organisation of the gas market[29]. These legal instruments are said to have used the threshold of 1 million m3/12 GWh to

[27] In previous decisions, the Commission discussed whether a distinction should be drawn between the supply to different types of gas-fired power stations, especially as regards CCGTs or cogeneration plants (CHPs). For the purposes of this Decision, it is not necessary to go into a detailed segmentation of this (these) market (markets), because the competition analysis remains the same: the transaction will eliminate the best-placed potential competitor.

[28] Article 2 of the Gas Law.

[29] Article 27 of the Walloon Gas Decree and Article 13 of the Flemish Gas Decree.

adjust the timetable for liberalisation of the gas supply market[30]. A significant number of respondents to the Commission's questionnaire agree with the threshold proposed by the parties.

80. The CREG proposes making a distinction between large industrial customers and other customers based on their connection to the transmission or distribution network. However, the approach proposed by the parties and that of the CREG agree in so far as both approaches regard large industrial customers as a category of customer significantly different from other types of customer. When evaluated according to the CREG's criteria (connection to the transmission network), the market is smaller than when evaluated according to the criteria proposed by the parties (annual consumption higher than 1 million m3)[31]. This also corresponds with certain answers received by the Commission during the market survey, according to which the threshold of 12 GWh proposed by the parties is too low.

81. Nevertheless, the data provided by the CREG on the basis of its definition of the market largely confirm the data provided by the parties regarding the actors present in the market for large industrial customers and their respective market share. For these reasons, it is not necessary to decide exactly where the threshold is in order to regard a customer as a 'large industrial customer'. For the purposes of this Decision, the competition analysis will be carried out on the basis of the threshold proposed by the parties. The Commission considers that the results of this analysis would be substantially the same using the market definition adopted by the CREG.

A.2.3.1.5 Market for the supply of gas to small industrial and commercial customers

82. According to the parties, this market includes all industrial and commercial customers consuming less than 1 million m3 / 12 GWh annually. The statistics of the CREG, which cover all customers (industrial and commercial customers plus household customers in Flanders) connected to the distribution network, confirm the aggregate figures provided by the parties on the market for gas supply to small industrial and commercial customers and to household customers in Flanders. The competition analysis will be carried out using the threshold proposed by the parties. The market for the supply of gas to small industrial and commercial customers is different, for the time being at least, from the markets for the supply of gas to household customers in Wallonia and in Brussels, because these customers are not yet eligible. As shown below, there are considerable differences between supplying gas to small industrial and commercial customers and supplying it to household customers, even once the latter market has been liberalised, as is the case in Flanders.

---

[30] Moreover, the parties refer to the *GDF/Centrica/SPE* decision (COMP/M.3883) of 7 September 2005, in which the Commission, according to the parties, maintained this threshold in its analysis of the gas markets in Belgium. However, the decision in question does not mention this threshold.

[31] Approximately 50 TWh (CREG) compared with 82 TWh (parties).

A.2.3.1.6 Market for the supply of gas to household customers

83. In its previous decisions, the Commission examined whether there was a separate product market for the supply of gas to household customers but left the question open[32]. Under Belgium's current regulatory framework, only household customers in Flanders are eligible. Household customers in Wallonia and Brussels are not yet eligible and must currently purchase gas from their local authority utility. This situation will change when the market is completely liberalised on 1 January 2007 in Wallonia and the Brussels Region.

84. In Flanders, the market for household customers was liberalised on 1 July 2003, at the same time as for other customers. It appears, however, that competition in this market has developed differently from in other supply markets, including the market for small industrial and commercial customers. According to the figures provided in the notification, Suez (via ECS) acquired a considerably higher market share of (Flemish) household customers [70-80%]* than small industrial and commercial customers [60-70%]*. This is mainly due to the major role played by the default suppliers (in particular ECS), to which all former customers of the local authority utilities who had not chosen any supplier were transferred once they became eligible. It appears that many more small industrial and commercial customers changed supplier than did household customers.

85. Even though the gas supply markets for household customers in Wallonia and Brussels are not yet open to competition, a prospective analysis should take into account the probable effects of the proposed transaction on these markets, for which the date of 1 January 2007 has already been set for liberalisation. In these two regions, the lag between the liberalisation of supply to small industrial and commercial customers (1 July 2004) and to household customers demonstrates that two distinct markets already exist. Moreover, the default suppliers to household customers in these two regions will be determined by the local authority utilities, which could create further differences[33].

86. For these reasons, the Commission considers that, for the purposes of this Decision, the market for H gas supply (with the exception of Brussels, where household customers are supplied exclusively with L gas) and the market for L gas supply to household customers are markets distinct from the other gas supply markets.

A.2.3.2 Relevant geographic markets

A.2.3.1.1 Zeebrugge hub trading market

87. In the parties' view, the Zeebrugge hub in Belgium, the National Balancing Point in the United Kingdom and the Title Transfer Facility in the Netherlands are part of the same market.

88. According to the parties, these three hubs are already very interconnected since their areas of influence largely overlap. Thus, they say, the Dutch (TTF) and British (NBP)

---

[32] See the recent decision of 15 March 2006, COMP/M.3886 (*DONG/Elsam/Energi E2*) and the decision of 14 December 2005, COMP/M.3696 (*E.ON/MOL*).

[33] See also in this connection the competition analysis set out below of markets for the supply of gas to household customers.

networks are connected to the Belgian transmission and transit network (Zeebrugge). The parties also point out that the NBP and Zeebrugge hubs are directly connected to each other, since they are located at either extremity of the Interconnector (connecting Zeebrugge and Bacton, UK), the capacity of which is being increased.

89. In addition, the three hubs will be even more closely inter-linked when the BBL gas pipeline between the Netherlands (Balgzand) and the United Kingdom (Bacton), scheduled for late 2006, opens.

90. The parties would also highlight the convergence of prices seen between these hubs. Any fluctuations in prices, according to them, have been within a narrow band. Cases where prices at the hubs have diverged significantly could be resolved rapidly, notably by major infrastructure investments.

91. Finally, the parties point out that the gas exchanges at these three hubs are all operated by APX Gas. APX, an independent Dutch company, created a subsidiary, APX Gas, which since 2004 has been electronically managing gas transactions at the NBP, TTF and Zeebrugge hubs (through APX Gas Zeebrugge B.V., in which APX and Fluxys subsidiary Huberator are shareholders). APX Gas can monitor transactions on the three hubs, using a single application and on a single screen.

92. In its statement of objections, however, the Commission expressed doubts concerning the parties' hypothesis of a single market comprised of the three hubs[34]. The mitigated results of the market survey indicated that, although prices at these three hubs partially correlated with each other and often fluctuated in the same direction, significant price differences between the hubs persisted, in particular during the winter of 2005-06[35]. Moreover, in its statement of objections the Commission pinpointed insufficient transmission and transit capacity and the resulting constraints as the principal obstacle to establishing a 'geographical link' between the three hubs.

93. Regarding the NBP and Zeebrugge hubs in particular, the statement of objections referred to a detailed analysis prepared by British regulator Ofgem. Ofgem had analysed prices, including transmission costs, during the period January 2000 to April 2006[36]. The analysis showed that, on 17% of the days during this period, the difference in prices between the NBP and Zeebrugge was greater than 7.5% i.e., the approximate costs of using the Interconnector[37].

---

[34] It should be noted that competition concerns emerge solely if one conceives of a trading market on the Zeebrugge hub only. In any geographic market including Zeebrugge and either the NBP or TTF, the market survey did not give any indication of serious obstacles to effective competition.

[35] For example, the CREG report, titled *The proposed concentration between Gaz de France and Suez*, shows that 'prices at the hub [of Zeebrugge] are in no way linked to prices in the Netherlands. On certain occasions during the winter of 2005-06, natural gas prices at the Zeebrugge hub were more than double the prices in the Netherlands' (paragraph 6, p. 13). Given the marked price differences between the Zeebrugge hub and the TTF, the analysis below focuses on the relationship between Zeebrugge and the NBP, hubs that seem to be more convergent.

[36] Reply by Ofgem to questionnaire dated 14 June 2006.

[37] A comparison of the prices between the NBP and the TTF shows that since October 2004 on 43% of the days, the price differences were greater than 7.5%.

94. In their reply to the statement of objections, the parties cited notably the 'obvious' convergence of prices between the Zeebrugge and NBP hubs since 2004[38]. The parties attribute the price differences observed by Ofgem to start-up problems at the Zeebrugge hub. According to the parties, 'this situation [of differences during the Zeebrugge hub's initial phase] is over, because a net increase in liquidity at the hub has been noted in later years, as has a better interconnection between the two hubs following the extension of the Interconnector'[39].

95. Thereafter, the Commission again consulted Ofgem and asked it to carry out the same analysis for the last 24 months, i.e., the period July 2004 - June 2006. That analysis showed that the difference between the price at the NBP and the price at the Zeebrugge hub was greater than 7.5% on 8% of the days during this period[40]. There is thus increasing convergence between the prices at the two hubs, in particular in comparison with the four previous years. However, Ofgem also reproduced an analysis of price differences at the three hubs: NBP, Zeebrugge and TTF. Ofgem observed that prices at the three hubs diverged significantly during certain periods, in particular during the winter of 2005-06. Ofgem's data show that the differences between the TTF and the two other hubs are much more pronounced than the differences between the NBP and the Zeebrugge hub.

96. Based on the parties' reply and its own complementary investigations, the Commission agrees that prices at the NBP and Zeebrugge are increasingly converging. This convergence will likely continue, given the plans to increase the Interconnector's capacity. According to Ofgem, the extension of the interconnection between Belgium and Great Britain should, if the markets function in a competitive manner, result in increased convergence of the markets and less divergence, because constraints on transmission will be reduced[41].

97. Ofgem rightly states that differences in prices may be due to causes other than limits on capacity, in particular the various balancing arrangements. The Commission's complementary investigation revealed that the Belgian balancing regime, despite displaying certain elements of hourly balancing, comes very close to the daily balancing used in the United Kingdom.

98. In the statement of objections, the Commission identified another probable cause for the price divergences between the NBP and the Zeebrugge hub, namely the control exercised by Distrigaz & Co. over the infrastructures linking the Zeebrugge hub with the Belgian network and with other pipelines and the resulting access difficulties for other operators. This obstacle will be eliminated, however, by the remedies proposed by the parties. The commitments proposed by the parties with a view to increasing the hub's liquidity and thereby reducing the barriers to entry to the Belgian gas markets provide for the transfer of the marketing rights for the transit network (which connects to the hub) to Fluxys and submission to the Code of Conduct.

---

38 Points 4 and 11 *et seq*. of the parties' reply.

39 Point 12 of the parties' reply.

40 Reply by Ofgem dated 19 September 2006 [17524] to question 1 of the Commission's questionnaire.

41 Reply by Ofgem dated 19 September 2006 [17524] to question 2 of the Commission's questionnaire.

99. In the light of the above, the Commission concludes that competitive conditions on the Zeebrugge and NBP hubs have considerably converged and it expects this convergence to continue owing to the commitments facilitating access to the hub. For the purposes of this Decision, these two hubs can therefore be regarded as belonging to the same market. However, the Commission concludes that the TTF does not form part of this same market in view of the price differences which, compared with the Zeebrugge hub and the NBP, are more frequent and more significant than between these two hubs.

A.2.3.2.2 Markets for the supply of gas

100. In accordance with the decisions of the Commission and the Belgian Competition Council, the parties consider that the various markets for the supply of gas to eligible customers in Belgium operate at the national level.

101. However, in the aforementioned ECS/Sibelga decision, the Commission left open the question whether the various supply markets in Belgium were national or regional in nature.

102. Similarly, in its recent GDF/Centrica/SPE decision, the Commission found that all gas supply markets in Belgium were national in nature. However, regarding the market for the supply of gas to household customers, the Commission discussed the possibility of a regional dimension (Flanders, Wallonia, Brussels Region) while leaving the question open. It cited differences in regulatory conditions, which were not homogeneous across the regions, in particular as regards the opening of household customer gas supply to competition.

103. The Commission's market survey provided some indication that the household customer market should be considered regional. Firstly, each of the three regions has different regulations regarding the supply of gas to household customers. These differences also include different dates for opening the market to competition. Moreover, the three regions attach varying importance to L gas for supply to household customers. For example, household customers in the Brussels Region are supplied almost exclusively with L gas, while the remainder of the country is supplied with H or L gas according to the location of the final user.

104. Secondly, opening up the household customer markets in Wallonia and the Brussels Region will probably lead to a gradual alignment of competitive conditions in the three regions, as was the case with the other customer categories. That would demonstrate that these markets had a national dimension. Nevertheless, for the purposes of this Decision it is not necessary to decide whether the household customer markets are national or regional, because the notified merger would impede effective competition significantly whatever market definition is used.

105. In conclusion, the relevant gas markets in Belgium affected by the notified transaction are:

- Market for the supply of gas to electricity producers (national)
- Markets for the supply of H and L gas to dealers (national)
- Markets for the supply of H and L gas to large industrial customers (national)
- Markets for the supply of H and L gas to small industrial customers (national)

- Markets for the supply of H and L gas to household customers (national or regional). If these markets were to be considered regional, the relevant product market would include only L gas in the Brussels Region.

A.2.4 Competition analysis

106. The Commission considers that the merger as notified would significantly impede effective competition in the various Belgian gas markets, particularly by enhancing the dominant position of Distrigaz, the incumbent operator in Belgium. The boost to Distrigaz's position would result from the dual impact of the proposed merger: firstly, Distrigaz would incorporate GDF's Belgian operations and, secondly, the transaction would remove the strong competitive pressure hitherto exerted by GDF. GDF is currently Distrigaz's main competitor and it also has huge potential for growth, thanks to its unique combination of different strengths.

107. Given that it is already extremely difficult to enter the Belgian gas markets and the merger would raise certain barriers to entry even further, other current or potential competitors are unlikely to be able to take over GDF's role and thus offset the loss of competitive pressure that would result from the proposed merger.

Introduction

108. In the Belgian gas markets the notified merger would lead to significant overlaps between the parties' activities, particularly in several gas supply markets. Upstream of these supply markets the parties both have access to gas in Belgium at wholesale level.

109. According to the CREG, there is a physical wholesale market which includes importers' direct sales to their final customers in Belgium and their sales to retailers operating on the distribution networks who are not themselves responsible for shipping[42]. In previous decisions the Commission has also defined a wholesale gas market using criteria similar to the CREG's[43]. In their reply to the decision under Article 6(1)(c) the parties contest the existence of a wholesale market other than the market for gas supply to retailers. However, the parties acknowledge the importance of the question of access to gas resources for operators active in markets further down the line. In fact, regardless of whether a wholesale market is defined in the strict sense of the term or the matter is considered from the point of view of access to gas, the notified merger would undeniably lead to an overlap between the parties' activities at wholesale level or at the level of access to gas.

110. According to the CREG's calculations, 84% of H gas volumes and 88% of L gas volumes sold by importers for consumption in Belgium in 2005 were sold by Suez[44]. These figures alone show that Suez already has a predominant position as regards access to the gas consumed in Belgium. The proposed transaction would add to this GDF's sales

---

42 CREG, Etude relative à la concentration prévue entre Gaz de France et Suez, 6 March 2006, p. 11, and the CREG's reply of 14 July 2006 to question 46 of the Commission's questionnaire.

43 Cf. Commission decision of 14 March 2006, COMP/M.3868 *DONG/Elsam/Energi E2*.

44 CREG, Etude relative à la concentration prévue entre Gaz de France et Suez, 6 March 2006, p. 11. These figures were implicitly confirmed by the notification (p. 205 of Form CO, Vol. 1): according to the table which appears there, Distrigaz (referred to as 'supplier/importer') sold [...]* TWh, or [80-90%]* of total Belgian consumption of approximately 205 TWh in 2005.

which, in 2005, accounted for 10% of the H gas volumes and 12% of the L gas volumes sold by importers for consumption in Belgium. Consequently, the new entity would account for 94% of the H gas and all of the L gas consumed in Belgium. Given the very limited scope for new entrants (for details see below), this situation of dominance is unlikely to change in the short or medium term. The merger would therefore lead to competitors being almost entirely dependent on the new entity in the downstream markets.

111. In their reply to the statement of objections, the parties argue, on the basis of economic research, that suppliers other than Suez and GDF could supply large volumes of gas in Belgium from 2008 onwards. According to this research, there will be a significant increase in the amount of gas available, for example as a result of the construction of new infrastructure in the United Kingdom in particular, which would enable UK operators to export gas from the United Kingdom to Belgium[45]. The study submitted by the parties identifies as other sources RasGas's reservations at the LNG terminal and gas surpluses in Italy and Spain that could be exported (or re-exported) to Belgium. The arguments used in this study are discussed in detail in the paragraphs that follow.

112. As far as the volumes of gas available are concerned, it should be noted that one of the potential entrants identified in the memorandum is RasGas, an ExxonMobil/Qatar Petroleum joint venture, which has reserved a capacity of [3-6]* bcm/year at the LNG terminal in Zeebrugge. However, the volume of reservations at the LNG terminal does not necessarily correspond to the volumes actually nominated, as illustrated by the current example of Distrigaz (see below). The market survey on the availability of gas showed that, as a general rule, only 60-80% of capacity reserved at the LNG terminals is actually used.

113. Moreover, a large amount, representing [60-70]*% of the volume reserved (minimum of [...]*), will be sold by RasGas directly (ex-ship) to Distrigaz under a [long-term]* contract[46]. In their reply to the statement of objections, the parties deny that the gas sold by RasGas to Distrigaz would be discharged at Zeebrugge using RasGas's reservations. Referring only to a press release from Distrigaz, the parties claim that RasGas's methane carriers would be discharged using Distrigaz's reservations. However, in any case, even if RasGas did have available capacity of [3-6]* bcm/year it is unlikely that corresponding volumes of gas would be offered on the Belgian market. Firstly because, as explained above, the volumes of gas discharged are usually significantly lower than the volumes of the reservations. And secondly, as the parties also acknowledge, Belgium is a transit country, and RasGas will very probably sell most of its LNG discharged in Zeebrugge in other European countries. Neither RasGas nor its parent companies ExxonMobil and Qatar Petroleum have any activities or experience in supplying gas to final customers in Belgium. Their business model is based rather on the sale of regasified LNG directly at the terminal or via a hub. However, in 2005, less than 4% of the volumes of nominations from the hub constituted transmissions to the Belgian network, whereas more than 96% of volumes nominated were intended for transit to other

[45] Paragraph 85 of the reply.

[46] Cf. LNG Sale and Purchase Agreement of 28 February 2005 between RasGas and Distrigaz, provided by Suez in its reply of 8 August 2006 to the questionnaire of 4 August 2006 [14652].

countries[47]. RasGas will have only a limited interest in selling its LNG in Belgium, given its large contract with Distrigaz, the incumbent operator in Belgium. Since RasGas has not yet concluded any sales contracts concerning the LNG for which it has reservations at the Zeebrugge terminal[48], it cannot even be ruled out that it might sell additional volumes to the parties.

114. Another point to emphasise is that because of the continuing congestion (see below in the section on entry barriers) any use of transit or other capacity to serve Belgian clients will almost automatically mean abandoning clients in other countries whose needs were previously met using these volumes. This is because of capacity shortages; reservations cannot simply be increased, only reallocated. So any reallocation of reservations in order to supply Belgian clients will almost inevitably be at the cost of supplies to clients in countries downstream from the transit pipelines.

115. The parties claim that from 2008 there would be surplus H gas in other European countries. The report by [a consulting company]*[49], economic consultants commissioned by the parties, estimates that gas operators active in the United Kingdom, Italy and Spain would have sizeable gas surpluses available for sale on the Belgian and French markets from 2008, subject to transport and transit constraints. By redirecting these surpluses, charterers could supply the Belgian and French markets. The parties believe that these surpluses would cover at least 66% of H gas consumption in Belgium and 55% of H gas consumption in France.

116. The parties consider that the gas surpluses which would be available in the United Kingdom would be due to the completion of several new infrastructure projects (pipeline from the Norwegian Ormen-Lange field, the BBL interconnector with the Netherlands and at least two British LNG terminals).

117. The large gas surpluses in Italy will, it is claimed, become available by 2008, and Italy can then become a net exporter of gas. These forecasts are based in particular on the completion of two LNG gas terminals by 2008, one in Brindisi, the other in Rovigo.

118. The parties also predict large supply surpluses in Spain by 2008. If French LNG terminal capacity were under-utilised, Spanish suppliers could divert this excess supply to France.

119. The Commission contests the arguments of the [consulting company]*'s report and consequently rejects the parties' conclusions. The [consulting company]* report seems to be not only biased in terms of methodology but also founded on speculation rather than factual analysis. The results of the Commission's market survey amply demonstrate the purely speculative nature of the [consulting company]* report's conclusions.

120. In terms of its methodology, the [consulting company]*'s analysis contains several examples of bias. On the supply side, one of the problems concerns the credibility of the

---

47 Parties' reply of 6 October 2006 to the Commission's questionnaire of 4 October 2006, No 18756.

48 RasGas's reply of 27 September 2006 to the Commission's questionnaire of 22 September 2006, No 17979.

49 Cf. 'Prospective Analysis of the Wholesale Gas Market in Belgium and France in Connection with the Proposed Merger of Suez and Gaz de France' by [a consulting company]*, Annex A to the parties' reply to the statement of objections of 1 September 2006.

investment in import infrastructure planned by the parties in the medium to long term. According to the market survey, the incentive to invest appears to be highly sensitive to changes in the markets rather than to planning considerations. This introduces an element of bias into the assessment of the parties' efforts to create new infrastructure.

121. The [consulting company]*'s analysis also seems to be static. Any of the parties' current and potential competitors wishing to redirect gas to these markets would face certain additional costs due to operational constraints (such as the technical specifications of access to the networks crossed, access to storage via injection and withdrawal, re-balancing by zone, if transit was diverted, etc.).

122. The incentive to sell gas in Belgium or France in 2008 will therefore depend on the margins engendered by the costs and prices in these markets. These margins will have to be compared with those generated on the UK, Italian and Spanish markets. The parties have tried to quantify the surpluses available in terms of volume, but have not carried out a comparative analysis in terms of margin. Such an analysis is, however, essential in order to quantify the incentives to sell gas in a particular market.

123. Finally, it is important to note that the available capacity at the entry points in Belgium, as estimated by the parties, does not necessarily correspond to the maximum technical capacity at the points of entry as estimated by the CREG[50], the parties' figures having been overestimated. Finally, the gas surpluses in the UK, Italian and Spanish markets assume that the gas operators active in these markets do not invoke the contractual flexibility clauses allowing for a reduction in part of the withdrawals in long-term take-or-pay contracts[51].

124. As regards the empirical evidence about the alleged quantities of surplus gas, the market survey does not support the [consulting company]*'s findings. In particular, according to the Commission's market survey, gas surpluses in the United Kingdom, Italy and Spain from 2008 will be non-existent or limited in volume and in any case insufficient to compete effectively with the new entity in Belgian and French markets.

125. Moreover, a large proportion of these potential surpluses would be in the form of LNG. This significantly reduces the likelihood of the surpluses being diverted to Belgium and France for two main reasons. Firstly, rerouting LNG surpluses assumes that regasification capacity would be available at the LNG terminals in Zeebrugge or the French LNG terminals in Montoir, Fos Tonkin and Fos Cavaou (which will come into operation at the end of 2007). But according to the CREG and the parties[52], the rates of capacity reservation of the LNG terminals in Zeebrugge, Fos Tonkin, Montoir and Fos Cavaou are [90-100]* %[53], [90-100]*%[54], [80-90]*%[55] and [90-100]*%[56] respectively.

---

50 Reply to Phase II questionnaire of 14 July 2006.

51 EDF's reply of 19 September 2006, No 17491.

52 Reply to Phase II questionnaire of 14 July 2006 and parties' reply of 27 July 2006.

53 Reserved by Distrigaz ([20-30]*% for [a long period]*), ExxonMobil/Quatar Petroleum ([40-50]* % for [a long period]*) and Tractabel ([10-20]* % for [a long period]*).

54 Reserved by Gaz de France Négoce.

Furthermore, because LNG purchasing is a global business[57], LNG surpluses are likely to be rerouted to markets that are more attractive in terms of price, for example in North America or Asia[58]. At the same time, surplus LNG that was not directly rerouted by methane carrier would not be able to compete very effectively (once the cost of regasification and transport was included) with LNG supplied directly to the country of potential import[59]. Finally, another share of the surpluses could be diverted to other European markets such as Germany, where demand for gas is likely to increase considerably because of the moratorium on nuclear power[60].

126. The United Kingdom is experiencing a decline in national production coupled with an increase in domestic consumption[61]. It is currently a net exporter of gas during the brief summer period, but remains a net importer overall[62]. In theory, gas could reach Belgium via the Interconnector (reverse flow) but would have difficulty reaching the French border[63]. In 2008, according to the market survey, excess supply would be between [5-10%], declining sharply very soon afterwards, resulting in a gas supply deficit from 2009/10 onwards[64]. Consequently, any gas surpluses would be quickly absorbed by growing domestic demand for gas and would be insufficient to increase the liquidity of the Belgian market through large-scale exports. It would also appear that in the long run the price of gas in the United Kingdom will remain higher than on the continent, thus reducing the incentives to export to Belgium[65].

127. Italy is experiencing a very sharp increase in domestic demand, largely because of increasing use of natural gas for electricity generation[66]. In 2008, according to the market survey, there would be no surplus supply[67], or any surplus supply that there was would be very short term and would be quickly absorbed by the growing domestic demand for gas.

---

55 Reserved by Gaz de France Négoce from 2008.

56 Reserved by Gaz de France Négoce from 2008 ([60-70]* %) and Total ([20-30]* %).

57 Transport by methane carriers does not seem to be constrained either by distance or by factors relating to a network of gas pipelines.

58 Wingas's reply of 15 September 2006, N. 17302; ENI's reply of 21 September 2006, No 17599; EDF's reply of 19 September 2006, No 17491; Total's reply of 19 September 2006, No 17502.

59 Total's reply of 19 September 2006, No 17502.

60 EDF's reply of 19 September 2006, No 17491.

61 Centrica's reply of 18 September 2006, No 17450.

62 Ibid.

63 Ibid.

64 Total's reply of 19 September 2006, No 17502; Centrica's reply of 18 September 2006, No 17450.

65 Total's reply of 19 September 2006, No 17502.

66 Autorità dell'Energia's reply of 20 September 2006, No 17527.

67 ENI's reply of 21 September 2006, No 17599.

Gas supply would go into deficit by the start of the period 2010/2015[68]. Moreover, the market survey concludes that the Brindisi and Rovigo terminals, a cornerstone of the [consulting company]*'s analysis, will be seriously delayed and may not be completed before 2012[69]. In addition, there is no direct interconnector between Italy and France[70]. The interconnector goes via the Swiss Transigaz network in the direction France/Italy. The connection with Belgium uses the Swiss and German networks in the direction Belgium/Italy. Reversing the flows in the direction Italy/Belgium or Italy/France would require technical modifications which would depend on the network operators[71].

128. Like Italy, Spain is experiencing a very strong growth in domestic demand (around 6% per year[72]), mainly because of increasing use of natural gas for electricity generation. In 2008, according to the market survey, the net balance of supply and demand would be between -1% and 2%, and a net supply deficit is forecast for 2009/2010[73]. Moreover, the Spanish market is poorly connected with the French market because of the limited capacity of the gas pipelines (Lacal and Euskadour) linking Spain to the French TIGF zone. In addition, because the flow is almost exclusively in the direction France/Spain, reversing the flows (in the direction Spain/France) would require major technical modifications[74]. Entry capacity would also have to be reserved, primarily at Larrau[75], into the TIGF network, as would capacity on the interzone connections within France. Until now [90-100]*% of this capacity has been reserved by GDF and Total. The entry capacity into French territory via the TIGF zone therefore appear to be very limited. Any surplus Spanish gas is more likely to be absorbed by the growing domestic demand in Spain.

129. To sum up, the Commission believes that the parties' claims regarding the possible existence of gas surpluses which could, from 2008, be diverted to Belgium and France are highly speculative. The specific market survey confirmed the Commission's point of view and largely refuted that of the [consulting company]* report. Consequently, the Commission's conclusions about the lack of liquidity in the Belgian gas markets (independent of the parties) remain valid.

---

68 EDF's reply of 19 September 2006, No 17491; Centrica's reply of 18 September 2006, No 17450.

69 Autorità dell'Energia's reply of 20 September 2006, N. 17527; EDF's reply of 19 September 2006, No 17491. Cf. also the article 'Italy's Ten LNG Projects: Tough Sailing even for Frontrunners', WGI, July 26, 2006, p. 8.

70 Total's reply of 19 September 2006, No 17502.

71 Ibid.

72 Comisión Nacional de Energía's reply of 15 September 2006, No 17308.

73 EDF's reply of 19 September 2006, No 17491.

74 Ibid.

75 Larrau is mainly an exit point, which is [90-100]* % reserved by GDF. Entry into French terrirtory via Larrau and Biriatou is extremely limited, representing only about 1.5% of total annual entry capacity into France.

A.2.4.1 Horizontal effects

A.2.4.1.1 Hub trading market

130. In the trading market on the two hubs of Zeebrugge and the NBP, which for the purposes of this Decision are considered as belonging to the same geographic market, the proposed merger would not result in a significant impediment to effective competition. According to the figures provided by the parties, their combined market share does not exceed [0-5]*%.

	2005	
	Traded in TWh	**Position (%)**
Suez (Distrigaz + Electrabel)	[...]*	[0-5]*
Gaz de France (GDF + Gaselys)	[...]*	[0-5]*
Total parties	**[...]***	**[0-5]***
Total traded	**6003**	**100**

Source: notification (pp. 105 *et seq.*) and own calculations

131. Similarly, the CREG, in its July 2006 study into the functioning of the Zeebrugge hub, found that there is no sign of dominance on the part of one or more operators on the Zeebrugge hub alone[76]. According to the study, the combined volumes traded by the two largest operators at the Zeebrugge hub do not exceed 17% of all volumes traded. Given that the parties' position is weaker at the NBP than at the Zeebrugge hub, their combined position in a market comprising the NBP and the Zeebrugge hub would be weaker than at the Zeebrugge hub alone. Moreover, the market survey did not come up with any evidence of a significant impediment to effective competition in this market.

132. At all events, the parties' commitment to relinquish Distrigaz & Co.'s control of the Zeebrugge hub access infrastructure will reduce the access difficulties of the other operators competing with Distrigaz as traders on the hub. These access difficulties were part of the competition problems identified in the statement of objections. The remedies proposed with a view to increasing the hub's liquidity in order to reduce the barriers to entry to the Belgian gas markets provide for the relinquishment of access control by Distrigaz. Similarly, and with the same aim of increasing the Belgian market's liquidity, the remedies provide a solution to the other problems relating to the functioning of the hub which the statement of objections identified: they thus guarantee the continuity of back-up services and the application of the Code of Conduct to the regulation of access to the hub.

A.2.4.1.2 Gas supply markets

Overview of the Belgian gas supply markets

133. In the notification the parties posit a single gas supply market for all eligible customers. However, the Commission has identified several factors suggesting that the relevant markets are smaller, as explained in detail in the 'Relevant markets' section above. In

[76] Study F060719-CREG-554 of 19 July 2006 on measures needed to improve the functioning and liquidity of the Zeebrugge hub, point 52.

what follows, the competition analysis will therefore examine these distinct markets as defined above.

134. Nevertheless, the data supplied by the parties for gas supply markets to eligible customers as a whole show the overall impact of the notified merger on all of these gas supply markets. These data were also confirmed by the data supplied by the CREG[77].

Table 1: Overall markets for the supply of gas to final eligible customers in Belgium

	2003		2004		2005	
	Sales in TWh	**Position (%)**	**Sales in TWh**	**Position (%)**	**Sales in TWh**	**Position (%)**
Distrigaz	[...]*	[70-80]*	[...]*	[50-60]*	[...]*	[50-60]*
ECS	[...]*	[15-20]*	[...]*	[20-30]*	[...]*	[20-30]*
Total Suez	**[...]***	**[80-90]***	**[...]***	**[80-90]***	**[...]***	**[80-90]***
GDF	[...]*	[0-5]*	[...]*	[0-5]*	[...]*	[5-10]*
ALG Négoce	[...]*	[0-5]*	[...]*	[0-5]*	[...]*	[0-5]*
Luminus	[...]*	[0-5]*	[...]*	[0-5]*	[...]*	[0-5]*
SPE	[...]*		[...]*	[0-5]*	[...]*	[0-5]*
Total GDF[78]					**[...]***	**[10-15]***
Total Suez + GDF	**[...]***	**[90-100]***	**[...]***	**[90-100]***	**[...]***	**[90-100]***
Wingas	[...]*	[0-5]*	[...]*	[0-5]*	[...]*	[0-5]*
BP	[...]*	[0-5]*	[...]*	[0-5]*	[...]*	[0-5]*
Nuon	[...]*	[0-5]*	[...]*	[0-5]*	[...]*	[0-5]*
Essent	[...]*	[0-5]*	[...]*	[0-5]*	[...]*	[0-5]*
EBEM	[...]*	[0-5]*	[...]*	[0-5]*	[...]*	[0-5]*
Total	**135.1**	**100**	**175.27**	**100**	**188.42**	**100**

Source: Notification

135. As explained in the 'Relevant markets' section above, a distinction has to be made between H gas and L gas. The following table shows the competitive position in the overall markets for the supply of H gas on the one hand and in the overall markets for the supply of L gas on the other. It must be stressed that the combined position of the parties in the L gas supply markets is even stronger than in the H gas supply markets, largely because of the GDF group's more highly developed operations in the L gas sector.

77 CREG, reply of 14 July 2006 to question 47 of the questionnaire of 6 July 2006 [13256].

78 As the new SPE group was only formed in June 2005, the parties feel that the term 'total GDF' is not relevant for the years 2003 and 2004.

Table 2: Overall markets for the supply of H gas and L gas to final eligible customers (2005)

	H Gas		L Gas	
	Sales in TWh	**Position (%)**	**Sales in TWh**	**Position (%)**
Distrigaz	[...]*	[60-70]*	[...]*	[20-30]*
ECS	[...]*	[15-20]*	[...]*	[40-50]*
Suez (Distrigaz+ ECS)	[...]*	[80-90]*	[...]*	[70-80]*
GDF	[...]*	[5-10]*	[...]*	[5-10]*
SPE (incl. ALG and Luminus)	[...]*	[0-5]*	[...]*	[10-15]*
TOTAL GDF	[...]*	[10-15]*	[...]*	[15-20]*
Suez + GDF	[...]*	[90-100]*	[...]*	[90-100]*
Wingas	[...]*	[5-10]*	[...]*	[0-5]*
Nuon	[...]*	[0-5]*	[...]*	[0-5]*
Essent	[...]*	[0-5]*	[...]*	[0-5]*
EBEM	[...]*	[0-5]*	[...]*	[0-5]*
Total	**142.68**	**100**	**45.74**	**100**

Source: Notification

136. The tables above show that Suez is the dominant operator, with a market share that has remained at or above 80% for the past three years. According to the case law of the Court of Justice of the European Communities and the Court of First Instance, very high market shares can in themselves constitute proof of a dominant position[79]. The Court of Justice stated that this was the case where there was a market share of 50%[80]. It should be pointed out that Suez has succeeded in stabilising its market shares by means of Electrabel Customer Solutions (ECS), which is the default supplier for most of the eligible customers who have not chosen a supplier. Moreover, in their reply to the decision to launch Phase II (Article 6(1)(c) decision), the parties did not contest the fact that Suez has a dominant position in the gas supply markets in Belgium.

137. The notified merger would enhance this dominant position by adding GDF's market share, which amounts to [10-15]*% for the H gas supply market and [15-20]*% for the L gas supply market. GDF operates in the Belgian gas supply markets via GDF Belgique ([5-10]*% market share for both H gas and L gas), a wholly owned subsidiary, and the SPE group (market share of over [0-5]*% for H gas and [5-10]*% for L gas), which GDF controls jointly with Centrica. As a result of the proposed transaction, therefore, the parties would have a combined share in overall Belgian supply markets of [90-100]*% for H gas and [90-100]*% for L gas. Consequently, the transaction would lead to an

[79] Judgment of the Court of First Instance of 14 December 2005 in Case T-210/01 *General Electric* v *Commission*, not yet reported, paragraph 115; with reference to Case 85/76 *Hoffmann-La Roche* v *Commission* 1979 ECR 461, paragraph 41 and Case T-221/95 *Endemol* v *Commission* 1999 ECR II-1299, paragraph 134. Cf. on this point also paragraph 17 of the Commission's guidelines on the appraisal of horizontal mergers.

[80] Cf. judgment of the Court of Justice in Case C-62/86 - *AKZO* v *Commission* 1991 ECR I-3359, paragraph 60.

increase in the HHI[81] from 6756 to 8484, or a delta of 1728, in the case of H gas, and from 6580 to 9167, or a delta of 2587, in the case of L gas.

138. This overview shows that GDF is currently the new entrant that has been most successful in entering the Belgian market, thus emerging as Suez's main competitor. The other competitors remain confined to market shares that are significantly smaller than GDF's. The notified merger would thus eliminate the most active competitor and thereby seriously undermine the impact of liberalisation on the Belgian gas supply markets.

Analysis by individual market

A.2.4.1.2.1 Market for the supply of gas to electricity producers

139. In the market for gas supply to electricity producers Suez has a [90-100]*% market share for H and [90-100]*% for L gas[82]. These very high market shares, which were confirmed by the CREG[83], in themselves indicate the existence of a dominant position. GDF is not yet engaged in supplying gas to electricity producers. The only competitor at the moment is Wingas, which supplies gas to a power station in Zandvliet in the Antwerp port district. This power station is located on the site of BASF, one of Wingas's two parent companies[84], and primarily serves to supply electricity to BASF's Antwerp site.

Table 3: Gas supply to electricity producers (2005)

	H and L gas		H gas		L gas	
	Sales in TWh	**Position (%)**	**Sales in TWh**	**Position (%)**	**Sales in TWh**	**Position (%)**
Suez	[...]*	[90-100]*	[...]*	[90-100]*	[...]*	[90-100]*
GDF	[...]*	[0-5]*	[...]*	[0-5]*	[...]*	[0-5]*
Suez + GDF	[...]*	[90-100]*	[...]*	[90-100]*	[...]*	[90-100]*
Wingas	[...]*	[0-5]*	[...]*	[0-5]*	[...]*	[0-5]*
Total	**56.39**	**100**	**54.77**	**100**	**1.62**	**100**

Source: Notification

140. However, the supply contract between Suez and SPE, the second largest power station operator in Belgium, is about to expire, and there is therefore a real and significant opportunity to enter the market.

141. In the absence of the notified merger, GDF would be best placed to enter the market at this point. It has direct access to the gas producers and has sufficient entry capacity rights. GDF has established itself as a large and reliable supplier of industrial customers

81 HHI = Herfindahl-Hirschmann Index. This index reflects the degree of concentration in a given market. For more details, see paragraphs 16 *et seq.* of the Commission's guidelines on the assessment of horizontal mergers.

82 The Commission would point out that the volume of L gas consumed by the power stations is very small.

83 CREG, reply of 14 July 2006 to question 47 of the questionnaire of 6 July 2006 [13256].

84 Wingas is a joint venture between BASF (Wintershall) and Gazprom.

and has gained expertise in France in the supply and even operation of gas-fired power stations. As the parent company of SPE, GDF would have a good chance, or at least a better chance than other competitors, including Wingas, of winning an SPE tender to supply its power stations. As SPE's electricity generating capacity consists largely of gas-fired power stations, the volume of contracts which it has to redistribute is considerable[85]. GDF is thus potentially the main competitor of Suez in the market for gas supply to electricity producers.

142. The notified merger would therefore eliminate GDF as the best placed potential competitor, thereby strengthening Suez's dominant position in the market for the supply of gas to electricity producers, and would significantly impede effective competition in this market.

A.2.4.1.2.2 Market for the supply of gas to dealers

143. In the market for gas supply to dealers, which includes sales to local authority utilities, default suppliers (e.g. ECS) and other retailers (e.g. Essent, Nuon), Suez is already dominant, with market shares of [80-90]*% for H gas and [80-90]*% for L gas. GDF's market shares vary between [10-15]*% for H gas and [10-15]*% for L gas. Consequently, as a result of the notified merger the parties would have an unrivalled position as suppliers and would dominate [90-100]*% of the market for both H gas and L gas. In the case of L gas, it is important to remember that Suez and GDF are the sole importers of L gas into Belgium and therefore any L gas retailer in Belgium would necessarily have to obtain its supplies from the new entity, which would have a monopoly. The merger would also eliminate GDF, the only competitor to have succeeded in establishing itself in these markets.

144. The proposed merger would therefore enhance Suez's dominant position in the markets for the supply of H gas and L gas to dealers, thereby significantly impeding effective competition in these markets.

Table 4: Gas supply to dealers (2005)

	H and L gas		H gas		L gas	
	Sales in TWh	**Position (%)**	**Sales in TWh**	**Position (%)**	**Sales in TWh**	**Position (%)**
Suez	[...]*	[80-90]*	[...]*	[80-90]*	[...]*	[80-90]*
GDF	[...]*	[10-15]*	[...]*	[10-15]*	[...]*	[10-15]*
Suez + GDF	[...]*	[90-100]*	[...]*	[90-100]*	[...]*	[90-100]*
Total	74.76	100	36.98	100	37.78	100

Source: Notification

[85] According to the notification (p. 110, Form CO, Vol. 1), the annual gas consumption of the power stations operated by SPE is [10-20]* TWh.

A.2.4.1.2.3 Market for the supply of gas to large industrial customers

145. Suez is dominant in the market for supply of gas to large industrial customers, with market shares of [70-80]*% for H gas and [80-90]*% for L gas. GDF has market shares of [15-20]*% for H gas and [15-20]*% for L gas[86]. The only significant competitor is Wingas, which supplies only H gas. As a result of the proposed transaction the parties' combined market share would therefore amount to [80-90]*% for H gas and [90-100]*% for L gas, for which the new entity would become the sole supplier. By eliminating GDF, the competitor which has been most successful in entering these markets, the notified merger would enhance Suez's dominant position in the markets for supplying H gas and L gas to large industrial customers, thereby significantly impeding effective competition in these markets.

Table 5: Supply of gas to large industrial customers (2005)

	H and L gas		H gas		L gas	
	Sales in TWh	**Position (%)**	**Sales in TWh**	**Position (%)**	**Sales in TWh**	**Position (%)**
Distrigaz	[...]*	[60-70]*	[...]*	[60-70]*	[...]*	[50-60]*
ECS	[...]*	[10-15]*	[...]*	[5-10]*	[...]*	[20-30]*
Suez (Distrigaz+ ECS)	[...]*	[70-80]*	[...]*	[70-80]*	[...]*	[80-90]*
GDF	[...]*	[15-20]*	[...]*	[15-20]*	[...]*	[15-20]*
SPE (incl. ALG and Luminus)	[...]*	[0-5]*	[...]*	[0-5]*	[...]*	[0-5]*
TOTAL GDF	[...]*	[15-20]*	[...]*	[15-20]*	[...]*	[15-20]*
Suez + GDF	[...]*	[90-100]*	[...]*	[80-90]*	[...]*	[90-100]*
Wingas	[...]*	[5-10]*	[...]*	[10-15]*	[...]*	[0-5]*
Nuon	[...]*	[0-5]*	[...]*	[0-5]*	[...]*	[0-5]*
Total	**82.04**	**100**	**62.03**	**100**	**20.01**	**100**

Source: Notification

A.2.4.1.2.4 Market for the supply of gas to small industrial and commercial customers

146. In the market for the supply of gas to small industrial and commercial customers Suez is currently dominant, with market shares of [60-70]*% for H gas and [70-80]*% for L gas. GDF has market shares of [20-30]*% for H gas and [10-15]*% for L gas[87]. As a result of

[86] On the basis of its market definition (taking into account only those customers connected to the transmission system; see above) the CREG gives slightly higher market shares for Suez and slightly lower ones for GDF. As the volume of the market is smaller according to the CREG's definition, this implies that a significant proportion of GDF's industrial customers who are considered as large industrial customers by the parties are connected to the distribution system. Cf. CREG, reply of 14 July 2006 to question 47 of the questionnaire of 6 July 2006 [13256].

[87] The CREG's statistics, which include all customers (industrial and commercial and households in Flanders) connected to the distribution network, confirm the aggregate figures produced by the parties for the markets for the supply of gas to small industrial and commercial customers, on the one hand, and households in Flanders, on the other.

the proposed transaction the parties' combined market share would therefore amount to [80-90]*% for the supply of H gas and [80-90]*% for the supply of L gas to small industrial and commercial customers. Nuon operates in this market and has a share of under 10%, while Essent's market share remains at less than [0-5]*% and Wingas does not operate in this market at all.

147. GDF's competitive strength in the market for the supply of gas to small industrial and commercial customers is partly based on its ability to offer 'dual fuel' deals, thanks to its immediate access to both gas and electricity (via its subsidiary SPE). As explained in greater detail below in the part concerning Belgian electricity markets, 'dual fuel' deals are particularly important in the markets for the supply of gas and electricity to small industrial and commercial customers and households. For the reasons mentioned, these groups of customers are more likely than others to rely on the same supplier for gas and electricity. As explained in paragraphs 162 *et seq.* and paragraphs 201 *et seq.*, GDF is the competitor of Suez which has the best access to gas in Belgium. GDF also has direct access to SPE's electricity generation capacity. SPE's capacity is located in Belgium, entailing lower delivery costs than those of Dutch competitors.

148. The competitors for supplying L gas (Nuon and Essent) are both retailers that would have to obtain their supplies from the group that would result from the proposed merger. The competitiveness of these L gas retailers would be reduced even further by the merger because their purchase price would include the mark-up of the future monopolist, which would at the same time be their competitor in the market for the supply of gas to small industrial and commercial customers. The notified merger would therefore strengthen Suez's dominant position in the market for the supply of both H and L gas to small industrial and commercial customers, thereby significantly impeding effective competition in these markets.

Table 6: Supply of gas to small industrial and commercial customers (2005)

	H and L gas		**H gas**		**L gas**	
	Sales in TWh	**Position (%)**	**Sales in TWh**	**Position (%)**	**Sales in TWh**	**Position (%)**
Distrigaz	[...]*	[0-5]*	[...]*	[0-5]*	[...]*	[0-5]*
ECS	[...]*	[60-70]*	[...]*	[60-70]*	[...]*	[70-80]*
Suez (Distrigaz+ ECS)	[...]*	[60-70]*	[...]*	[60-70]*	[...]*	[70-80]*
GDF	[...]*	[0-5]*	[...]*	[0-5]*	[...]*	-[0-5]*
SPE (incl. ALG and Luminus)	[...]*	[15-20]*	[...]*	[20-30]*	[...]*	[10-15]*
TOTAL GDF	[...]*	[15-20]*	[...]*	[20-30]*	[...]*	[10-15]*
Suez + GDF	[...]*	[80-90]*	[...]*	[80-90]*	[...]*	[80-90]*
Nuon	[...]*	[5-10]*	[...]*	[5-10]*	[...]*	[10-15]*
Essent	[...]*	[0-5]*	[...]*	[0-5]*	[...]*	[0-5]*
Total	**24.06**	**100**	**12.91**	**100**	**11.15**	**100**

Source: Notification

A.2.4.1.2.5 Market for the supply of gas to eligible households

149. At the moment, the markets for the supply of H and L gas to households are open to competition only in Flanders, where household customers have been eligible since 1 July 2003. Households in Wallonia and the Brussels Region will be eligible from 1 January 2007.

150. The Court of First Instance has held that the absence of competition in the gas markets, as provided for in the Gas Directive, precludes any conclusion to the effect that the conditions of Article 2(3) of the Merger Regulation are met[88]. In particular, the Commission is not able to assess whether the concentration prevents the introduction of effective competition within the timeframe of the binding calendar of the Gas Directive[89].

151. However, the competitive situation existing on the date of adoption of the contested decision or on the date of the opening of the markets in question to competition is an objective fact which is not affected by the non-fulfilment of a legal criterion[90]. Moreover, in its judgment in Case 87/05 (*EDP*) the Court of First Instance held that the Commission may analyse the immediate effects of a transaction if they exist and may take them into account in its overall assessment of the transaction[91]. In this case, the immediate effect of the merger, as modified by the commitments, would have been to bring forward the opening of certain markets compared to the calendar envisaged in the Gas Directive[92].

152. Moreover, when the Commission examines a merger it must ascertain whether it would lead directly and immediately to a significant impediment to effective competition. In its assessment it may, where appropriate, take into account the effects of a merger in the near future[93].

153. In the present case, the merger as notified would have no immediate effect on the timetable for opening up the market for gas supply to households in Wallonia and Brussels. For the purposes of the Commission's overall assessment, therefore, no immediate positive effect on competitive conditions in this market can be discerned. On the contrary, although this market will not formally be open to competition until the end of 2006, the merger is likely to have an immediate effect on potential competitors' preparations for the opening of the market to competition. In particular, the merger would immediately eliminate GDF as a potential competitor to Distrigaz in Wallonia and Brussels and would create barriers to entry for other potential competitors. These barriers are likely to have the immediate effect of deterring investment with a view to entering the market after January 2007. The merger is also likely to remove the incentive for Suez to anticipate the effects of the opening of the market by already offering more competitive prices or other conditions in order to promote customer loyalty.

---

88 Judgment of 21 September 2005 in Case T-87/05 *EDP - Energias de Portugal SA* v *Commission*, not yet reported, paragraphs 116 *et seq*.

89 Case T-87/05, paragraph 127.

90 Case T-87/05, paragraph 131.

91 Case T-87/05, paragraph 124.

92 Case T-87/05, paragraph 125.

93 Case T-5/02 *Tetra Laval* v *Commission* 2002 ECR II-4381, paragraph 153.

154. At the date of adoption of this Decision, the opening-up to competition of the markets for the supply of gas to households, pursuant to Belgian law and the Gas Directive, is imminent. Consequently, the merger would have immediate effects on the business decisions of both the parties to the merger and third parties, which in turn would have effects on competitive conditions in the very near future. The Commission therefore believes it is appropriate to take into consideration the effects on competition which are already imminent and which will occur fully as from January 2007 in these markets.

155. In view of the liberalisation process which is imminent and certain, it is important to examine the effects of the merger on the competitive situation not only in the Flemish Region but also in the Walloon and Brussels Regions.

156. Regardless of the definition of the geographic markets, GDF has a competitive advantage in the household gas supply market because it can offer 'dual fuel' deals thanks to its direct access to both gas and electricity (via its subsidiary SPE). As explained in the part concerning small industrial and commercial customers and in that concerning Belgian electricity markets, this facility is also an important advantage for competing in the household gas supply market.

157. Suez is dominant in Flanders, with a market share of [70-80]*% for both H and L gas. According to the notification, consumption is split equally between H and L gas, each having a [40-50]*% market share[94]. Suez is active in supplying households via its subsidiary ECS, which has been designated as the default supplier by several local authority utilities in Flanders. GDF is active in particular via Luminus, a subsidiary of SPE, and has achieved a market share of [15-20]*%. As a result of the proposed transaction the parties would have a combined market share of [90-100]*%. The notified merger would therefore strengthen Suez's dominant position in the markets for supplying H gas and L gas to households in Flanders, thereby significantly impeding effective competition in these markets.

[94] Cf. p. 175, Form CO, Vol. 1. This estimate was supposedly based on the volumes measured at the different entry points to the distribution network and applies to the sales of all suppliers.

Table 7: Household gas supply market in Flanders (2005)

	H and L gas		H gas		L gas	
	Sales in TWh	**Position (%)**	**Sales in TWh**	**Position (%)**	**Sales in TWh**	**Position (%)**
Distrigaz	[...]*	[0-5]*	[...]*	[0-5]*	[...]*	[0-5]*
ECS	[...]*	[70-80]*	[...]*	[70-80]*	[...]*	[70-80]*
Suez (Distrigaz+ ECS)	[...]*	[70-80]*	[...]*	[70-80]*	[...]*	[70-80]*
GDF	[...]*		[...]*		[...]*	
Luminus	[...]*	[15-20]*	[...]*	[15-20]*	[...]*	[15-20]*
SPE City Power	[...]*	[0-5]*	[...]*	[0-5]*	[...]*	[0-5]*
TOTAL GDF	[...]*	[15-20]*	[...]*	[15-20]*	[...]*	[15-20]*
Suez + GDF	[...]*	[90-100]*	[...]*	[90-100]*	[...]*	[90-100]*
Nuon	[...]*	[0-5]*	[...]*	[0-5]*	[...]*	[0-5]*
Essent	[...]*	[0-5]*	[...]*	[0-5]*	[...]*	[0-5]*
EBEM	[...]*	[0-5]*	[...]*	[0-5]*	[...]*	[0-5]*
Total	**25.94**	**100**	**12.97**	**100**	**12.97**	**100**

Source: Notification

158. Household gas supplies in Wallonia will be fully liberalised on 1 January 2007. All household customers in Wallonia are currently supplied by the local authority utilities. The local authority utility in Liège has already designated Luminus, a member of the SPE group, as default supplier for household customers who do not choose a supplier by 1 January 2007[95]. The parties estimate that Suez (via ECS) and GDF (via Luminus in particular) will have market shares of [40-50]*% and [30-40]*% respectively in 2007. The proposed transaction will thus eliminate GDF, which would, according to the parties' forecasts, be Suez's main competitor in the liberalised market. The notified merger would therefore give the new group a dominant position in the Walloon market for the supply of H and L gas to household customers, thereby significantly impeding effective competition in these markets.

95 http://www.alg.be/news_libe.html.

Table 8: Parties' estimates for the household gas supply market in Wallonia (2007)[96]

	H and L gas	
	Sales in TWh	**Position (%)**
Distrigaz	[...]*	[0-5]*
ECS	[...]*	[40-50]*
Suez (Distrigaz+ ECS)	[...]*	[40-50]*
GDF	[...]*	[0-5]*
ALG Négoce	[...]*	[30-40]*
Luminus	[...]*	[0-5]*
SPE	[...]*	[0-5]*
TOTAL GDF	[...]*	[30-40]*
Suez + GDF	[...]*	[80-90]*
Nuon	[...]*	[15-20]*
Essent	[...]*	[0-5]*
Total	**10.4**	**100**

Source: Notification

159. For the Brussels Region, where household customers are supplied with L gas only and will be eligible as from 1 January 2007, the parties estimate that Suez (via ECS) will have a market share of [90-100]*% in 2008, while GDF will reach approximately [0-5]*%[97]. The parties regard Nuon and Essent as their main competitors. Although GDF's position, according to the parties' forecasts, is not as strong as in Flanders or Wallonia, GDF is still regarded by the parties as one of Suez's main competitors after the liberalisation of the market in 2007. The proposed transaction would therefore eliminate a potentially important competitor in the liberalised market, giving the new group a dominant position in the market for the supply of L gas to households in Brussels and thereby significantly impeding effective competition in this market.

[96] NB: The parties' estimates attribute bigger market shares to ALG Négoce. However, following its designation as default supplier by ALG, Luminus is likely to achieve higher market shares than ALG Négoce.

[97] The parties have furnished estimates for 2008 because 1 January 2007 was set as the date of opening-up of the Brussels market only during the course of the present proceeding.

Table 9: Parties' estimates for the household gas supply market in Brussels (2008)[98]

	Gas L	
	Sales in TWh	**Position (%)**
Distrigaz	[...]*	[0-5]*
ECS	[...]*	[90-100]*
Suez (Distrigaz+ ECS)	[...]*	[90-100]*
GDF	[...]*	[0-5]*
ALG Négoce	[...]*	[0-5]*
Luminus	[...]*	[0-5]*
SPE	[...]*	[0-5]*
TOTAL GDF	[...]*	[0-5]*
Suez + GDF	[...]*	[90-100]*
Nuon	[...]*	[0-5]*
Essent	[...]*	[0-5]*
Total	**7.45**	**100**

Source: Notification

160. At national level the proposed transaction would lead to increases in the market shares as shown in the following table. Even though the positions of the parties and third parties differ from their respective positions at regional level, the conclusion remains the same: Suez (via ECS) would have a dominant position in a national gas supply market too (for both H and L gas). This dominant position would be strengthened by the acquisition of GDF, which is easily the largest competitor. The notified merger would therefore significantly impede effective competition in a national household gas supply market, too.

[98] It should be noted that the Commission has based its analysis of the Brussels market on the parties' estimates for 2008, the first full year after liberalisation.
The parties' estimates attribute bigger market shares to ALG Négoce. However, following its designation as default supplier by ALG, Luminus is likely to achieve higher market shares than ALG Négoce.

Table 10: Belgian household gas supply market

	H and L gas		H gas		L gas	
	Sales in TWh	**Position (%)**	**Sales in TWh**	**Position (%)**	**Sales in TWh**	**Position (%)**
Distrigaz	[...]*	[0-5]*	[...]*	[0-5]*	[...]*	[0-5]*
ECS	[...]*	[70-80]*	[...]*	[60-70]*	[...]*	[80-90]*
Suez (Distrigaz+ ECS)	[...]*	[70-80]*	[...]*	[60-70]*	[...]*	[80-90]*
GDF	[...]*	[0-5]*	[...]*	[0-5]*	[...]*	[0-5]*
ALG Négoce	[...]*	[0-5]*	[...]*	[5-10]*	[...]*	[0-5]*
Luminus	[...]*	[10-15]*	[...]*	[10-15]*	[...]*	[10-15]*
SPE City Power	[...]*	[0-5]*	[...]*	[0-5]*	[...]*	[0-5]*
TOTAL GDF	[...]*	[15-20]*	[...]*	[20-30]*	[...]*	[10-15]*
Suez + GDF	[...]*	[90-100]*	[...]*	[90-100]*	[...]*	[90-100]*
Nuon	[...]*	[5-10]*	[...]*	[5-10]*	[...]*	[0-5]*
Essent	[...]*	[0-5]*	[...]*	[0-5]*	[...]*	[0-5]*
EBEM	[...]*	[0-5]*	[...]*	[0-5]*	[...]*	[0-5]*
Total	**38.64**	**100**	**18.22**	**100**	**20.42**	**100**

Source: Notification; calculation based on actual sales in Flanders and parties' estimates for Wallonia and the Brussels Region. Estimated sales in the Brussels Region are considered entirely as sales of L gas, whereas sales in Wallonia are divided in the same proportions as in Flanders, i.e. [40-50]*%/[40-50]*%.

A.2.4.2 The notified merger would eliminate Suez's leading competitor

161. In addition to combining market shares, the second horizontal effect of the notified merger would consist in the elimination of GDF as the competitor which, since entering the Belgian gas markets, has exerted the strongest competitive pressure on Suez. GDF has succeeded in establishing itself as Suez's main rival because of a series of competitive advantages which no other new entrant enjoys to the same extent.

162. GDF's competitive strength is due to a combination of the following advantages:

- it is an incumbent operator in a large country bordering on Belgium
- it has a large and diversified gas portfolio, including LNG
- it has access to both H and L gas in Belgium
- it has L gas storage capacity in France
- it has priority access rights for H gas storage in Belgium
- it co-owns and manages certain transmission axes (SEGEO) and jointly controls certain entry points
- GDF has major reservations and capacity at certain entry points to the Belgian network.

A.2.4.2.1 Incumbent operator in a large country bordering on Belgium

163. Although GDF is not the only operator currently or potentially active in the Belgian market that is also an incumbent operator in a neighbouring country, it differs from the other incumbents in a number of ways. The close links between France and Belgium and the presence of numerous large French companies constitute competitive advantages. GDF's long-standing business relationships with these companies in France make it a privileged partner in Belgium too.

A.2.4.2.2 Access to a large and diversified gas portfolio, including LNG

164. According to the data supplied in the notification, GDF is the third largest importer of natural gas in the European market (with [5-10]*% of total purchases by volume), after ENI ([10-15]*%) and E.ON Ruhrgas ([10-15]*%). Again according to the notification, GDF is the largest European importer of LNG (with [20-30]*% of the total volume imported in the EEA). It therefore has a very large and particularly diversified gas portfolio, which gives it sufficient flexibility and the capacity to supply the Belgian market (like certain other operators too, of course).

A.2.4.2.3 Access to H and L gas in Belgium

165. L gas (nominal calorific value of 9.769 kWh/m³(n)) plays an important part in gas supply in Belgium. Roughly 30% of Belgian natural gas consumption is of L gas[99], and in the

[99] CREG, reply of 14 July 2006 to question 26 of the questionnaire of 6 July 2006 [13256].

Brussels Region L gas accounts for virtually all gas supplies. As was clear from the tables in the preceding section, L gas represents a significant proportion of all the supply markets, with the sole exception of the market for supply to power stations. In the case of both large and small industrial and commercial customers it is important to remember that these companies often operate on several sites, not all of which are necessarily supplied with the same type of gas. In order to be able to offer a comprehensive package and to be able to satisfy all its customers' current and potential demands, a gas supplier must be able to offer the full range of products and must thus include L gas in its portfolio.

166. At the moment only Wingas is pursuing a market entry strategy based solely on H gas. Wingas seems to be limiting itself at present to supplying gas to large industrial customers and to the power station on the Zandvliet site of its parent company, BASF. According to the figures provided in the notification, supplies to this power station account for almost [20-30]*% of Wingas's supplies in Belgium. Other new entrants, such as Nuon and Essent, are pursuing a strategy based on supplying both H and L gas. Access to L gas is therefore essential for a supplier wishing to enter the Belgian gas markets successfully at all levels.

167. In their reply to the statement of objections, the parties intimate that only a limited number of customers use both H gas and L gas[100]. In support of their argument the parties cite figures from Distrigaz. Although the parties may be right about the portfolio of Distrigaz's clients, the situation is clearly different for a new entrant like GDF. GDF's largest L gas customer in Belgium is also its third-largest H gas customer in that country[101].

168. The Netherlands and Germany are the sole producers of L gas in Europe. Most German L gas production is sold on the domestic market and the rest of what it requires is imported from the Netherlands. No L gas from Germany is supplied to the Belgian market[102].

169. The market survey has demonstrated that GDF and Suez are the only operators which have L gas in Belgium. Both parties have very long-term contracts with [...]*[103], which sells almost all Dutch L gas[104]. According to the information supplied by the parties, Suez has a contract with [...]* which runs until [...]* and covers at least [90-100]*% of its imports in 2005[105]. GDF has one contract with [...]* which runs until October [...]*, with

---

100 Point 272 of the reply.

101 Pages 216 *et seq.* of the notification (Vol. I).

102 CREG, reply of 14 July 2006 to question 26 of the questionnaire of 6 July 2006 [13256].

103 […]*.

104 According to the CREG, the share of supply contracts agreed with alternative producers (operating on small fields) remains very small in practice. CREG, Reply of 14 July 2006 to question 26 of the questionnaire of 6 July 2006 [13256].

105 Parties' reply of 14 August 2006 (paper version of the electronic reply of 11 August 2006) to question 10 of the questionnaire of 4 August 2006, No 15038.

an ACQ of […]* to […]* m3, and another for a volume of [...]* m3, which runs until October [...]*, with the option for GDF of requesting an extension until October [...]*[106].

170. Competitors like Nuon and Essent wishing to sell L gas in Belgium are forced to obtain their supplies from Distrigaz or GDF in Belgium. According to the information gathered by the Commission, the entry capacity to the Belgian network at Poppel and Zandvliet is entirely reserved by Distrigaz and GDF, at least until [...]*. Beyond [...]*, GDF has already made transit reservations for half of the entry capacity. However, the market survey showed that the capacity upstream, on the Dutch side, is entirely reserved up to 2016[107]. Moreover, because of its long-term supply contracts with [...]*, and because there is no other potential importer, there is no urgent need for Distrigaz to make these reservations. Distrigaz makes transmission reservations to [...]*, and it appears from data supplied by Fluxys that transmission reservations beyond 31 December 2007 are very rare[108]. Given that it is impossible for Distrigaz's and GDF's competitors to import L gas on their own account, they are reduced to the role of L gas retailers. Because they have to obtain their supplies from their direct competitors, i.e. Distrigaz and GDF, it is practically impossible for them to compete effectively[109].

171. It is technically possible to convert H gas into L gas using a converter which 'dilutes' the H gas with nitrogen. There are two installations for converting H gas into L gas in Belgium, in Loenhout (on the same site as the surface installations for the underground storage facility) and in Lillo (near Antwerp). The capacity of these installations in conversion mode is 400 000 m3 (n)/h (expressed in L gas), and the conversion service is available from 15 November of one calendar year to 28 February of the following year, with the possibility of an extension for the month of March (subject to payment of an additional charge of 47 300 euros)[110]. Input for the Loenhout conversion installation is only guaranteed when the storage facility is in emission mode. In addition, technical constraints mean that this converter can only function when the outside temperature is below 0°C, and ideally below -5°C[111]. The conversion facilities therefore operate for a limited period of the year only.

172. Customers connected to the L gas transmission or distribution networks, however, require gas supplies all year long. This is also illustrated by GDF's very constant imports of L gas, although some of this may be placed in the gas storage facilities which GDF manages in France. But Suez, too, which has no storage site in Belgium or France, also maintains its L gas imports at a significant level during the summer months (the monthly

---

106 Parties' reply of 14 August 2006 (paper version of the electronic reply of 11 August 2006) to question 10 of the questionnaire of 4 August 2006, No 15038.

107 Cf. http://www.gastransportservices.nl/gastransport/nl/2006/informatiediensten/transportinformatie (Lange termijn indicatie capaciteiten). This refutes the argument that 'all Dutch operators could transport L gas as far as Belgium by using the services of GTS and Fluxys' (paragraph 261 of the reply).

108 Fluxys's replies of 2 August 2006 [No 14444] and 17 August 2006 [No 15203].

109 See also the CREG's reply of 14 July 2006 to question 26 of the gas questionnaire of 6 July 2006 [13256].

110 See. Fluxys's reply of 19 July 2006 (date of registration) to question 25 of the gas questionnaire of 6 July 2006 [13514] and Section 2.7 of 'Conditions and Tariffs' (natural gas transport services) on the Fluxys website http://www.fluxys.be/pdf/2006/20060101_Conditions_and_Tariffs_Transport_F.PDF

111 CREG, reply of 14 July 2006 to question 25 of the gas questionnaire of 6 July 2006 [13256].

average for L gas imports between June and August 2005 was roughly [40-50]*% of the monthly average for the whole year)[112].

173. According to the CREG, the gas conversion installations are [90-100]*% reserved by Distrigaz. The Commission's investigation confirmed that Distrigaz has reserved [90-100%]* of the capacity and has used it to a very limited extent only.

174. In the light of the foregoing, the Commission concludes that GDF is currently the only competitor of Distrigaz that has L gas in Belgium and that exerts competitive pressure on Distrigaz in the various markets for the supply of L gas. In addition to these effects on the L gas supply markets, GDF is the only one of Distrigaz's competitors with a complete gas portfolio. It is therefore the only competitor of Distrigaz capable of offering a comprehensive package containing both L and H gas to current and potential customers. Because of its complete portfolio, GDF's position in the markets for the supply of H gas is also stronger. As demonstrated above, no other current or potential new entrant can match this major competitive advantage in the Belgian markets.

A.2.4.2.4 High flexibility due to L gas storage capacity in France

175. GDF not only has access to L gas in Belgium but can also store L gas in France on the storage site complex which it manages in Picardie. In addition, because GDF has reserved ample transmission capacity for L gas between Poppel (on the Belgian/Dutch border) and Blaregnies (on the French/Belgian border), it is able to reimport any volume of L gas it requires into Belgium.

176. Because of its large reservations of the physical flow in the north-south direction at Blaregnies, GDF also controls the volume of the reverse flow available in the south-north direction. GDF thus can, and does[113], make conditional reservations in the direction from France to Belgium which are in reality fully equivalent to, but less expensive than firm reservations. The normal 'condition' inherent in conditional reservations (a physical flow at least equivalent to the capacity requested) is purely theoretical for GDF at Blaregnies. This is because GDF itself has reserved over [80-90]*% of the exit capacity at Blaregnies for the physical flow in the direction of France[114] and, by adjusting the nominations accordingly, it can easily influence the capacity effectively available in the 'reverse flow' direction as it pleases. GDF has thus reserved conditional capacity for transmission from France to Belgium (with an upward trend) and in 2005 carried out reverse flow deliveries at Blaregnies in the direction of Belgium amounting to [5-10]* TWh of L gas[115].

177. Because of this possibility of storing L gas in France and transporting it to the Belgian market, GDF has a very valuable competitive advantage over Distrigaz, there being no

---

112 Parties' reply of 10 August 2006 (paper version of the electronic reply of 9 August 2006) to question 3 (Annex Q3) of the questionnaire of 4 August 2006, No 14855.

113 Parties' reply of 17 August 2006 (paper copy of the electronic reply of 16 August 2006) to questions 4 and 5 of the questionnaire sent to Fluxys on 6 July 2006, as modified on 27 July, 9 August and 12 August 2006, No 15203.

114 Parties' e-mail of 17 August 2006 (20:16) in reply to questions 4 and 5 of the questionnaire sent to Fluxys on 6 July 2006, as modified on 27 July, 9 August and 12 August 2006.

115 Notification, Form CO, Vol. 1, p. 60. This volume represents [80-90]*% of GDF's L gas sales in Belgium.

storage site for L gas in Belgium. Distrigaz is therefore forced either to reserve storage capacity in France from its main competitor, GDF[116], or to buy flexibility upstream, for example by adjusting the volumes supplied by [...]*[117]. However, greater flexibility in upstream supply will increase Distrigaz's costs. A comparison between the monthly imports of L gas by Distrigaz and GDF shows that GDF's consumption pattern is much [...]* across the seasons than Distrigaz's. For example, in 2005 imports in the (winter) month with the highest volume in the year were more than [...]*% of imports in the (summer) month with the lowest volume in the year for Distrigaz. The corresponding ratio for GDF was [...]*%. Such differences in the flexibility profile are normally reflected in purchase prices. It is also important to remember that both the contracted volumes and the volumes of L gas imported by GDF at the entry point in Poppel are [...]* than those of Distrigaz, which should normally be reflected in more advantageous purchase prices. In their reply to the statement of objections the parties deny that the price GDF pays for its supplies of L gas from [...]* is lower than that paid by Distrigaz. However, it does not really matter whether GDF's purchase prices are more advantageous than Distrigaz's. The important thing is that the volume and profile of its supplies and its access to storage in France make GDF at least as competitive for L gas as Distrigaz.

178. No current or potential competitor other than Distrigaz and GDF has the same sort of flexibility for L gas. Neither the German nor the Dutch competitors have the transmission capacity to import into Belgium L gas that might be stored in the Netherlands. As for possible storage in Germany, the fact remains that there is no L gas connection between Germany and Belgium. As a result, competitors wishing to sell L gas in Belgium are forced to obtain their supplies and the necessary flexibility from Distrigaz or GDF. In future, therefore, there would be only one source of L gas and flexibility of access in Belgium. It would then become even more difficult for these operators to compete with the new entity in the downstream supply markets.

179. In the light of the foregoing, the Commission concludes that, because of its access to L gas storage, GDF has a degree of flexibility that enables it to exert very strong competitive pressure on Distrigaz as regards the supply of L gas to the various categories of customer in Belgium.

A.2.4.2.5 Priority access rights for H gas storage in Belgium

180. There are two H gas storage sites in Belgium operated by Fluxys - the Loenhout underground storage facility (storage capacity: 580 million m3(n) workable capacity) and, for LNG, the Dudzele Peak Shaving Station (storage capacity: 261 000 m3 LNG, equivalent to 55 million m3(n)), which is located close to the Zeebrugge LNG terminal[118]. The CREG, through its contacts with market players, is aware that there is a

---

[116] Distrigaz has reserved a large volume of conditional transmission capacity at Blaregnies L for 2006 and 2007, showing that Distrigaz is indeed storing L gas in France. Cf. parties' reply of 17 August 2006 (paper copy of the electronic reply of 16 August 2006) to questions 4 and 5 of the questionnaire sent to Fluxys on 6 July 2006, as modified on 27 July, 9 August and 12 August 2006, No 15203.

[117] To a lesser extent, Distrigaz could also use the conversion installations or interrupt supply to customers.

[118] Capacities: Fluxys website http://www.fluxys.be/Index_Storage.htm

and Fluxys LNG website http://www.fluxyslng.net/Infra_Storage.htm

strong unmet demand for capacity[119]. The Commission's market survey confirmed the CREG's analysis.

181. For the 2004/2005 and 2005/2006 storage years, as well as for the current 2006/2007 storage year (running from 15 April 2006 to 14 April 2007), [90-100]*% capacity at Dudzele was and is reserved by Distrigaz.

182. At Loenhout, Distrigaz had [90-100]*% of injection and send-out capacity at its disposal in the 2004/2005 storage year and [80-90]*% of that capacity in 2005/2006. During those years, GDF was the only alternative operator to have access to storage capacity at Loenhout ([5-10]*% of injection and send-out capacity in 2004/2005 and [10-15]*% in 2005/2006). For the current storage year, Distrigaz holds [80-90]*% of injection and send-out capacity and GDF holds [10-15]*%[120]. A third operator has [0-5]*% of this capacity.

183. GDF therefore enjoys priority access to storage in Belgium. Not only is its storage capacity growing steadily from year to year, but its access to storage is far in excess of that of its competitors, most of whom have no access at all. GDF's privileged access to storage is largely due to the structure of its client base, since the scarce storage capacity is reserved on a priority basis for users of the network providing gas to gas distribution installations (by virtue of Article 15/11 of the Gas Law)[121] . According to Fluxys, in the past all storage capacity was allocated in accordance with this right to priority[122].

184. Under the terms of Article 36 of Fluxys's 'Principales Conditions d'accès au réseau de transport pour les activités de stockage en Belgique' (Principal conditions of access to the transmission network for storage activities in Belgium), the right to priority allocation is calculated once a year, on 4 January, based on the capacities withdrawn to supply distribution companies on that day. In other words, it is an operator's share of the market for the supply of customers connected to the distribution network on the reference date (4 January) which determines its rights for the next storage year, which begins on 15 April.

185. GDF would seem to have been particularly successful in creating a client portfolio of customers connected to the transmission network and to the distribution network entitling it to priority access to storage. Once the right of access to storage has been allocated for a year, this capacity is available to GDF to use as it wishes (as is the case with any other owner of capacity). That is to say, Fluxys does not check whether the volumes stored are actually supplied to customers connected to the distribution network or to other customers (e.g. retailers or customers connected to the transmission network). GDF is therefore able to use the flexibility resulting from its access to storage to achieve a better balance between the demands of its clients and the volumes of gas it has available in Belgium. As a result, GDF has to 'purchase' less flexibility in its import

---

119 CREG, reply dated 14 July 2006 to question 21 of the gas questionnaire of 6 July 2006 [13256].

120 Reply from Suez and GDF to questions 6 and 7 of the questionnaire of 4 August 2006.

121 Fluxys, reply of 19 July 2006 (date registered) to question 21 of the gas questionnaire of 6 July 2006 [13514].

122 Idem.

contracts and can therefore offer its gas for sale in Belgium at more competitive prices. Its privileged access to storage in Belgium consequently affords GDF a competitive advantage which makes it the only competitor of Distrigaz with a significant 'on the spot' flexibility.

186. The CREG has also confirmed that access to storage offers a significant operational and commercial flexibility for those who have it[123]. This flexibility makes it possible not only to engage in arbitration but also to manage hour-to-hour and day-to-day imbalances, and to be highly responsive to certain customers who need to be supplied in a very short time.

187. GDF's excellent position in comparison with that of the other new entrants is also reinforced by the allocation rule described above, which takes account of market shares on the reference date only. Thus, market shares on 4 January determine access to storage for a period which finishes only 15 months later and in particular includes the following winter. The point has therefore been made that this rule favours operators who already have access to storage, notably Distrigaz but also GDF. A new entrant, on the other hand, who acquires a customer connected to the distribution network in the course of the year after 4 January, has no chance of obtaining storage capacity for the current storage year, particularly as there is no secondary storage market in Belgium.

188. GDF therefore benefits on two counts from the Belgian rules on the allocation of storage capacity. Firstly, GDF has priority access because of the structure of its clientele and, secondly, this priority access is protected by the rule on the reference date. As shown by its growing share of the storage capacities allocated, GDF has been able to take advantage of the flexibility gained through access to storage in order to acquire more clients connected to the distribution network every year. This has again entitled to it to supplementary capacity and has thus created a virtuous circle both for GDF and for competition in the Belgian gas market.

189. As will be shown below in the analysis of barriers to entry, GDF is also the competitor (actual or potential) which is best placed to make use of storage capacity for H gas abroad. Unlike the Dutch and German sites, French sites are located at a more economically viable distance from the Belgian border (i.e. less than 200 km in the case of aquifer sites). More importantly, the point of entry to the Belgian network (Blaregnies) provides adequate transmission capacity throughout the year, unlike 's-Gravenvoeren and Eynatten. Indeed, it is clear from the replies from the parties that a number of requests for entry capacity for transmission at 's-Gravenvoeren and Eynatten have been refused over the last [20-30]* months[124]. In the case of requests for entry capacity for transit, there have been [10-20]* refusals at 's-Gravenvoeren, [10-20]* at Eynatten 1 and [10-20]* at Eynatten 2 over the same period[125]. Moreover, as explained in detail below, Fluxys states on its website that no firm capacity is available at the

[123] CREG, reply of 9 October 2006 to question 2 of the Commission's questionnaire of 5 October 2006, No 18849.

[124] Reply from the parties dated 14 August 2006 (paper copy of the e-mail reply of 11 August 2006) to question 4 of the questionnaire of 4 August 2006, No 15038.

[125] Reply from the parties dated 14 August 2006 (paper copy of the e-mail reply of 11 August 2006) to question 5 of the questionnaire of 4 August 2006, No 15038.

Eynatten 1 and 2 entry points or at 's-Gravenvoeren in January and February 2007, the months when a shipper needs stored volumes, and that the situation is hardly any better for the winter of 2007/2008 (according to the Fluxys website)[126].

A.2.4.2.6 Joint ownership and joint management of certain transit routes (SEGEO) resulting in joint control of certain entry and exit points

190. GDF has a 25% holding in SEGEO, the company which owns and manages the international H gas pipeline linking 's-Gravenvoeren on the Belgian-Dutch border with Blaregnies on the Franco-Belgian border. This holding gives GDF joint control with Fluxys, which owns the other 75%[127]. GDF is also the largest user of this pipeline, with [90-100]*% of reservations made, corresponding to [60-70]*% of total technical capacity (at the Blaregnies exit point).

191. In their reply to the statement of objections the parties contested the suggestion that GDF's holding in SEGEO would facilitate GDF's access to this pipeline. However, they did confirm that SEGEO is jointly controlled by Fluxys and GDF[128]. Reservations of transit capacity are made up of capacity at the point of entry, transit capacity per se and exit capacity. In Belgium, a shipper who has reserved transit capacity is not therefore required to reserve entry and/or exit capacity as it is included in the transit capacity[129].

192. GDF's direct access to the entry and exit points of Segeo's pipeline, which is also used to transport gas to customers in Belgium, means that it is in a pre-eminent position to import gas into Belgium for sale. GDF has accordingly made both firm and conditional reservations as well as significant nominations for the reimportation of H gas from Blaregnies into Belgium. As regards the conditional reservations, as explained above for L gas, GDF takes advantage of its own firm reservations for the transit of H gas from the Netherlands to France in the direction of the physical flow to guarantee that sufficient capacity will be available for the 'reverse flow' towards Belgium, for which GDF has made conditional transmission reservations.

193. GDF therefore enjoys a dual benefit from its holding in SEGEO. Firstly, it enjoys easier access to capacity at the 's-Gravenvoeren point of entry for transporting H gas to Blaregnies. Secondly, it is able to import into Belgium gas transmitted to Blaregnies by means of reverse flow because of its reservations, which are semi-firm owing to the large volumes of gas nominated by GDF in the physical direction.

194. No other competitor, apart from Suez, has similar holdings in a company which owns and manages transmission or transit infrastructures in Belgium. For the reasons set out above, GDF's holding in SEGEO represents a major competitive advantage over its competitors.

---

126 http://www.fluxys.be/pdf/2006/20060405_freecapacitytabel.pdf

127 Cf. notification, Form CO, Vol. 1, p. 25.

128 Points 315 *et seq.* of the reply.

129 Reply from GDF and Suez dated 9 August 2006 to question 1 of 4 August 2006.

A.2.4.2.7 Large reservations and capacity available to GDF at certain points of entry to the Belgian network

195. It is important to point out in this connection that Blaregnies is the only place on the Belgian border where there is substantial excess entry capacity and this capacity is de facto almost exclusively at the disposal of GDF, since GDF is the operator with by far the largest volumes of gas on the French side of the Franco-Belgian border. Moreover, the (smaller) volumes which other operators (e.g. [...]* shippers) send to Blaregnies, notably via the Troll pipeline, are not generally available for re-entry into Belgium since they have already been sold in France (mostly to GDF) and to a lesser extent in Italy and Spain.

196. In fact, it is the Blaregnies L entry point which makes possible the conditional entry of L gas. As explained above, there is sufficient available and semi-firm conditional capacity at this entry point because of the volumes shipped to France by GDF. GDF has taken advantage of the situation and made significant reservations of conditional entry capacity in order to supply its Belgian customers with L gas transited from Poppel to France and brought back into Belgium at Blaregnies, this time for transmission[130].

197. In the case of H gas, Blaregnies SEGEO entry point, jointly controlled by GDF, offers both firm and conditional capacity. Most of the firm reservations are made by GDF. Once again, GDF has [90-100%]* of the reservations (and the corresponding nominations)[131] from Belgium to France and thus makes available as semi-firm a large conditional capacity. On 1 January 2006 and 1 January 2007, only [20-30]*% ([90-100%]* for GDF) and [0-5]*% of marketable firm capacity was reserved. GDF [had 90-100%]* firm reservations on 1 January 2006, while on 1 January 2007 Distrigaz and a third party (with a minimal volume of [0-5]*% of that reserved by GDF) also had firm capacity. There are no conditional reservations at Blaregnies SEGEO at the present time[132].

198. Finally, the Blaregnies Troll entry point offers conditional capacity which is actually available as a result of the reservations (and nominations) by GDF and other shippers (e.g. from [...]*) who supply among others the French markets. On 1 January 2006 and 1 January 2007, only [30-40]*% of marketable conditional capacity was reserved. GDF

---

130 Reply from the parties dated 17 August 2006 (paper copy of the e-mail reply of 16 August 2006) to questions 4 and 5 of the questionnaire sent to Fluxys on 6 July 2006, as modified on 27 July, 9 August and 12 August 2006, No 15203.

131 Capacity reservations give entitlement to use transmission or transit capacities during the period for which the reservation was made (reservations are normally measured in $m^3(n)/h$). Nominations refer to the actual use of previously reserved capacity (nominations are normally measured in m^3 or in MWh). As a rule, nominations therefore necessitate prior reservations whereas reservations do not always result entirely in nominations as it sometimes happens that reservations are not used.

132 Reply from the parties dated 17 August 2006 (paper copy of the e-mail reply of 16 August 2006) to questions 4 and 5 of the questionnaire sent to Fluxys on 6 July 2006, as modified on 27 July, 9 August and 12 August 2006, No 15203. The parties explained to the Commission that the reservations for the entry points into Belgium should be analysed using a method known as the snapshot method. For that reason the analysis was carried out using 1 January as the reference date.

accounts for [70-80]*% and [60-70]*% respectively of the reservations made for 1 January 2006 and 1 January 2007[133].

199. In their reply to the statement of objections, the parties argued that actual or potential competitors, such as Wingas, E.ON Ruhrgas or ENI, could do the same as GDF. These operators, which also have transit reservations, could use them to make 'reverse flow' reservations to supply Belgian customers. However, GDF's situation differs fundamentally from that of its competitors in that, firstly, no other border point offers as much available capacity as Blaregnies. Secondly, the competitors mentioned mainly have reservations on the vtn/RTR which links the Interconnector (IZT) with Eynatten, which has very strong flows in both directions, unlike SEGEO, Troll or Schlochteren (L gas) which have a unilateral flow running from North to South. As for the other operators with reservations on Troll (heading South), the CREG doubts whether they would be able to nominate reverse flow at Blaregnies without running the risk of interruption to their supply[134].

200. At the two Eynatten entry points no conditional capacity (and very little firm capacity) is available until March 2008, making reverse flow entry impossible[135]. While conditional capacity is still available at the IZT, it should be remembered that these volumes are largely transited by German and other companies for export to the UK. It is therefore more difficult for these operators to replace the gas intended for export than it is for GDF to replace some of the gas flowing to France, its principal market, where it has a large portfolio of sources to compensate for the volumes re-exported to Belgium.

201. This analysis therefore shows that, in contrast to the other entry points, the various Blaregnies entry points offer the largest available entry capacity, and that GDF is in fact the operator which benefits the most from this available capacity.

A.2.4.3 Barriers to entry reinforce the horizontal effects

202. A feature of the Belgian gas markets is the large number of barriers which make it very difficult for new competitors to enter the market or for existing competitors to expand their share. These barriers are mainly the result of restrictions on access for third parties to the gas available in Belgium and to the various gas infrastructures which are largely controlled by the Suez group. Some of these barriers will be raised even higher as a consequence of the proposed transaction. They thus make it highly unlikely that the competitive pressure on Suez exerted hitherto by GDF will be replaced by other actual or potential competitors. The deterrent effect of these barriers is also illustrated by the fact that three major European energy groups which had tried to enter these markets have abandoned or suspended their Belgian operations in recent years. The parties recognise, moreover, that entering new markets is often difficult and costly. They thus estimate that

---

133 Reply from the parties dated 17 August 2006 (paper copy of the e-mail reply of 16 August 2006) to questions 4 and 5 of the questionnaire sent to Fluxys on 6 July 2006, as modified on 27 July, 9 August and 12 August 2006, No 15203.

134 See CREG's reply of 9 October 2006 to question 2 of the Commission's questionnaire of 5 October 2006, No 18849.

135 http://www.fluxys.be/pdf/2006/20060405_freecapacitytabel.pdf

the synergies resulting from the 'non-duplication of entry tickets to certain markets' will have an impact on cash flows of €100 million a year[136].

A.2.4.3.1 Access to gas

203. As discussed earlier, 84% of H gas volumes and 88% of L gas volumes sold by importers for consumption in Belgium were sold by Suez in 2005. In the same year, GDF accounted for 10% of H gas volumes and 12% of L gas volumes. Following the notified merger, the new group would therefore have access to 94% of the H gas and all the L gas consumed in Belgium.

204. Suez and GDF import gas into Belgium primarily on long-term contracts. In the case of H gas, [70-80]*% of the volumes imported by Suez and [80-90]*% of the volumes imported by GDF in 2005 were based on long-term contracts lasting more than [10-20]* years. In the case of L gas, [90-100]*% of volumes imported by Suez and GDF in 2005 were based on long-term contracts lasting more than [10-20]* years.

205. As will be explained below in the section on access to infrastructures, the Zeebrugge hub would be able to provide only limited liquidity to players wishing to enter the Belgian market. Also, because of the underdevelopment of the medium and long-term market on the hub, it would be very risky for a new entrant to base its entire supply on gas purchased at the hub.

206. The new group's strong position in terms of the gas available in Belgium will be further reinforced by the new gas supply sources which GDF will bring with it at European level. GDF is the fourth largest purchaser of gas in the world and has put together the most diversified supply portfolio in Europe[137]. Of course, the other European incumbents also have sizeable long-term supply contracts. Nevertheless, the parties take the view that the supply volume of the new entity would clearly exceed that of its principal European competitors[138]. What is more, they are expecting synergies in the short term of €250 million as a result of optimising their gas supplies[139].

207. GDF has excellent access to LNG, which increases the diversity and flexibility of its portfolio. According to the notification, GDF imports [5-10]* Gm3 of LNG into Europe, or [20-30]*% of all European imports. According to its annual report for 2005, 24% of GDF's supplies (a total of 669 TWh) were LNG, which is closer to 11- 14 Gm3. The

---

136 Financial communiqué from the parties dated 4 May 2006 - Confirmation of the merger timetable and upward revision of synergies.
http://www.gazdefrance.com/upload/documents/archives/20060504_synergies_fr_1146718862.pdf

137 GDF website: http://www.gazdefrance.com/public/page.php?iddossier=176

138 Cf. notification, Form CO, Vol. 1, pp. 45 *et seq*.: [60-70]* Gm3 for the new group ([40-50]* Gm3 for GDF and [20-30]* Gm3 for Suez) compared with [60-70]* Gm3 for ENI, [50-60]* Gm3 for E.ON Ruhrgas, [40-50]* Gm3 for Centrica and [20-30]* Gm3 for Gas Natural. However, GDF's annual report for 2005 (p. 28) gives a total supply volume of 669 TWh, which corresponds more closely to 55-60 Gm3. It is therefore likely that the notification underestimates the parties' total volume.

139 Financial communiqué from the parties dated 4 May 2006 - Confirmation of the merger timetable and upward revision of synergies.
http://www.gazdefrance.com/upload/documents/archives/20060504_synergies_fr_1146718862.pdf

notification states that Suez imported [5-10]* Gm3 of LNG, or [5-10]*% of all European imports in 2005. The new group would therefore be by far the largest importer of LNG in Europe. It would own [...]* tankers (with [...]* more on order) and it regularly charters a further [...]* tankers; it would also control access to [...]* (and now [...]*) of the largest LNG tanker terminals in Europe, in particular the two terminals very important for Belgium, namely Zeebrugge and Montoir.

A.2.4.3.2 Access to infrastructures

208. The supply of gas requires access to infrastructures such as transmission and distribution networks, LNG tanker terminals and storage facilities. Access is obtained by means of capacity reservations and the resulting nominations. While the reservations create the right to use a given capacity at a certain time, the nominations are the exercising of that right, that is to say, actually making use of the reserved capacity. Such reservations are crucially important to competition.

209. Some of these infrastructures are controlled directly by the Suez group, mainly through its subsidiary Distrigaz & Co., which markets the bulk of the transit capacity. Other infrastructures are operated by Fluxys, which is also controlled by Suez.

A.2.4.3.2.1 Control of Fluxys

210. Suez owns 57.2% of Fluxys's shares and includes the company in its consolidated accounts. Under Article 22 of Fluxys's Articles of Association[140]' each share entitles the holder to one vote. Suez therefore also has 57.2% of the votes in Fluxys.

211. Throughout the notification, Fluxys is presented as a subsidiary of the Suez group[141]. However, in their reply to the Article 6(1)(c) decision the parties began to raise doubts about Suez's control over Fluxys[142]' pointing out that Fluxys is legally independent of Suez and that it is a public limited company, listed on the stock exchange. Similarly, at a meeting with the case team on 26 July 2006 the parties maintained that Suez did not control Fluxys because it did not have the right to appoint a majority of the company's directors.

212. The arguments put forward by the parties were not sufficient to overturn the view that Fluxys is controlled by Suez, however. First of all, Suez holds a majority of the voting rights in the general meeting and therefore exerts control over Fluxys[143]. Fluxys's shareholder agreement states that the parties [to the agreement] must ensure that 13 of the 21 directors of Fluxys are selected from candidates put forward by Suez. On the matter of control within the meaning of Regulation (EC) No 139/2004, it is meaningless that four of these directors are so-called 'independent directors'. The decisive factor for the question of control is the right of Suez to demand that they be appointed. For these reasons, the parties' arguments disputing Suez's control of Fluxys must be rejected.

---

[140] http://www.fluxys.be/pdf/2006/Fluxys_ArticlesOfAssociation_060509_FR.pdf

[141] For example, see pp. 11 and 26 *et seq*. of form CO, Vol. 1.

[142] Points 38-43 of the reply.

[143] Cf. Commission Notice on the concept of concentration, point 13.

213. In their reply to the statement of objections, the parties maintain that the question of who controls Fluxys within the meaning of Regulation (EC) No 139/2004 is irrelevant. The Commission is forced to disagree. Although legally Fluxys is a separate company from Distrigaz, it nevertheless forms part of the Suez group and is included in Suez's consolidated accounts. The Commission has taken note of the provisions of the Gas Law to which the parties refer and which are designed to ensure the independence of the system operator. However, these provisions do nothing to shed doubt on the existence of control by Suez over Fluxys within the meaning of Article 3 of the Merger Regulation. It is also clear from the ongoing discussions between the CREG and Fluxys concerning possible conflicts of interest for Fluxys regarding the management of the LNG terminal and investment plans for the transmission network that the Belgian regulator is not entirely convinced that these rules always succeed in their objective of ensuring independent management.

A.2.4.3.2.2 Transmission and transit network

214. Belgium has an integrated transmission and transit network. This means that the same network (i.e. the same pipelines) is used both for internal transmission to exit points within Belgium and for transit across Belgium from one neighbouring country to another. One notable exception is the Zeebrugge hub, whose connection to the network is regarded as a transit connection.

215. The technical aspects of this transmission/transit network are managed by Fluxys, which means for example that all the nominations of shippers for transmission and transit must pass through Fluxys. However, the marketing of capacity on the integrated network is shared: while Fluxys is in charge of marketing (national) transmission capacity and transit capacity for L gas, transit capacity for H gas is largely (notably rTr/VTN; Troll and SEGEO) marketed by the owners or operators of the international transit pipelines, particularly Distrigaz & Co and SEGEO. This system of separate marketing of capacity on the integrated transmission/transit network makes the management of the network considerably more complicated and reduces transparency for shippers as regards the capacity available for reservations.

216. Reservations of transit capacity include capacity (i) at the point of entry, (ii) on the journey across the Belgian network and (iii) at the point of exit. The situation is similar for reservations of transmission capacity, with the difference that they include capacity at the exit point in Belgium. This system means that reservations for transmission and transit are competing for capacity at points of entry, which therefore become potential bottlenecks. It is significant that the most important points of entry are located on the transit routes marketed by Distrigaz & Co and SEGEO (e.g. IZT, ZPT, Eynatten, 's-Gravenvoeren, Blaregnies (Troll and SEGEO), Zeebrugge hub and LNG terminal). In addition, transit reservations tend to be made on a long-term basis (several years) whereas transmission reservations are usually shorter term.

Shortage of available entry capacity

217. According to information published by Fluxys, no firm capacity is available at any point of entry in January and February 2007, with the exception of Zandvliet H and Blaregnies SEGEO[144]. For the other months until March 2008, the firm capacities available are

[144] http://www.fluxys.be

always less than 3% for ZPT and IZT, 4% for 's-Gravenvoeren and 5% for the two entry points at Eynatten. The only entry points with available firm capacity are Blaregnies SEGEO and Zandvliet H. The Blaregnies SEGEO and Zandvliet H entry points are very unusual; H gas from France, which could enter via Blaregnies SEGEO, is odorised, whereas gas is not odorised in Belgium. The gas must therefore be channelled through a deodorising plant. In the case of the Zandvliet H entry point it seems from information provided by the CREG that the upstream capacity (on the Dutch side) is insufficient. This is confirmed by the manager of the Dutch network, who does not announce any spare capacity at the exit point in question until the end of 2012[145]. Moreover, this entry point is located on a local network of 66 bars (rather than the customary pressure of 80 bars) which substantially reduces the number of off-take points which can be attached there by contract.

218. It seemed from information provided by the parties that there are overbookings at certain entry points. In their reply to the statement of objections the parties explained that these apparent overbookings were the result of IZT Entry-exit Agreements and transit contracts from ZPT to IZT and the hub[146]. The Commission has consulted the CREG on this point and it confirmed the explanations given by the parties.

219. The entry point at which the effects of the merger would be most marked is 's-Gravenvoeren, the main point of entry for H gas from the Netherlands. Distrigaz and GDF had reserved [40-50]*% and [40-50]*% of the firm capacity there on 1 January 2006 respectively; for 1 January 2007 they have reserved [40-50]*% and [40-50]*% of firm capacity.

220. In their reply to the statement of objections the parties contested the absence of free capacity as indicated on the Fluxys website. They referred to their reply of 24 May 2006 to the Commission's questionnaire of 14 May 2006. In this reply, Fluxys allegedly provided a table for the various entry points giving a 'snapshot' of the situation as regards reserved capacity on one date selected at random [by Fluxys] for each quarter between April 2006 and December 2012. The table supposedly showed that there was still capacity available at all the points of entry into Belgium with the exception of Poppel and Zandvliet L, by taking a 'snapshot' of the reservations registered on 15 April 2007, 15 July 2007, 15 April 2008 and 15 January 2009.

221. However, the parties admitted that, even on the basis of the data provided on 24 May 2006, the 's-Gravenvoeren, Poppel and Zandvliet L, and Eynatten 1 and 2 entry points are fully booked for 15 October 2007. It should be stressed that 's-Gravenvoeren and Eynatten are the main points of entry into Belgium for Dutch and German competitors.

222. The parties concluded that all the points of entry into Belgium, with the exception of Poppel and Zandvliet L, have capacity available at least 85% of the time[147].

---

145 http://www.gastransportservices.nl/gastransport/nl/2006/informatiediensten/transportinformatie

146 Points 149 *et seq*. of the reply.

147 Point 94 of the reply.

223. The parties' reply gives rise to the following remarks. First of all, from the point of view of the method used, the 'snapshot' approach advocated by the parties gives only a very imperfect picture of the situation as regards congestion at the points of entry and within the system. This is due to the fact that customer supply contracts are generally for a minimum of 12 months. Consequently, before entering into such a contract, a supplier must ensure that it will have enough firm capacity to be able to meet its contractual obligations. This capacity must be firm because if it were interruptible or conditional the supplier would run a considerable commercial risk vis-à-vis its customers. Firm capacity must therefore be available every day of the year; it is not enough that the capacity should be available on only four days, 'selected at random', as proposed by the parties. For these purposes, the parties' argument that capacity is available 'at least 85% of the time' is not relevant either.

224. For this reason the Commission asked Fluxys, in successive subsequent questionnaires, to provide monthly data[148]. However, Fluxys explained to the Commission that it was not possible to provide monthly data or maximum reservations for a given month. In its reply of 17 August 2006, Fluxys finally provided the data for 1 January of every year from 2005 to 2008. It should be noted that the data provided on 17 August 2006 differ substantially from those provided on 24 May 2006 and the information published on Fluxys's website. Because of these inconsistencies, the Commission has used the table on firm capacity available as published on Fluxys's website, as this source appears to be the most reliable. Firstly, this information was checked by Fluxys prior to publication. Secondly, all the players who are active on the Belgian market or who plan to enter it have access to this table. This is accordingly the reference document consulted by every supplier which is in the process of negotiating a contract with a (potential) customer. If this document, published on Fluxys's website, indicates that there is no firm capacity available in the winter of 2006/2007 at any entry point (and only marginal availability for the other months at the major entry points), with the exception of Blaregnies SEGEO and Zandvliet H, this will in itself have a deterrent effect on operators which are less likely to conclude a contract if they are not sure of being able to fulfil it.

225. In the case of L gas, the parties also admit that there is no firm capacity available at the relevant entry points (Poppel et Zandvliet L) until the end of 2007. The parties claim that 49% of capacity will be available on 1 January 2008. On the question of L gas, it is worth noting that only GDF and Suez have supply contracts (which are actually long-term contracts) with [...]*for delivery to the Belgian-Dutch border. The market survey showed that there is no available capacity at Hilvarenbeek, the corresponding exit point for the Dutch network[149]. No one other than the parties would thus be able to transport L gas to the Belgian-Dutch border. GDF has already made transit reservations ([50-60]*% of capacity) and there is no urgency for Distrigaz to make its transmission reservations for L gas for 2008 onwards during 2006 or 2007.

226. It is clear from this analysis, which the Commission stands by despite the parties' arguments, that all the capacity at the entry points which are reasonably accessible for new entrants is fully booked for next winter and that these entry points have only a

[148] Questions 4 and 5 of the questionnaire sent to Fluxys on 6 July 2006. Following several discussions with Fluxys these questions were modified on 27 July, 9 August and 12 August 2006.

[149] Cf. http://www.gastransportservices.nl/gastransport/nl/2006/informatiediensten/transportinformatie (Lange termijn indicatie capaciteiten)

marginal amount of firm capacity available for the other months. Lack of capacity during the winter has a direct effect on the competitiveness of would-be entrants. If they are unable to guarantee a constant supply of gas to their customers they have no chance of keeping them and still less of acquiring new customers. The absence of available firm capacity in January and February is a particular deterrent, of course, since it is in the winter months that there is the greatest customer demand.

Diversion is not possible or else is costly

227. In their reply to the statement of objections, the parties maintained that potential competitors with transit capacity might divert this gas to serve customers in Belgium[150]. The parties' memorandum maintains that by 2008 large amounts of gas will be available in the contract portfolios of Suez's competitors and that the firm transmission capacity will also be available to deliver these volumes to Belgian consumers.

228. According to the replies of several market players as well as the parties themselves, transit capacities are reservations of routes, that is to say 'point-to-point', and it is therefore impossible to 'divert' gas directly during transit to supply customers in Belgium[151].

229. However, an operator with transit capacity could, in theory, purchase transmission capacity reservations from Fluxys. As these transmission capacity reservations would include the reservation of the point of entry, the operator would be able to avoid the bottleneck at the entry to the network.

230. In practice, the strategy suggested by the parties would be of little interest to an operator with an entry reservation. Firstly, the operator would incur additional costs for the reservation of transmission capacity on top of the costs already incurred for the reservation of transit capacity. These costs could not be recovered, whether or not a secondary market emerged for transit capacities, as, for the reservation of transmission capacity, the operator in question must obviously need the capacity at the entry point which forms part of his reservation of transit capacity. As for selling on the remainder, that is to say the journey across Belgium and the exit capacity, there is not normally any demand.

231. Most importantly, however, this operator has normally already allocated the volumes which he is able to send across Belgium as a result of his capacity reservation to customers in the country or countries of destination. As there is no firm capacity available for sending additional volumes, any volume 'diverted' to Belgian customers would then no longer be available to the operator for supplying his long-standing customers to whom the gas is being transited through Belgium.

232. In their reply to the statement of objections, the parties stated that GDF supplies virtually all its clients in Belgium by diverting gas in transit[152]. In fact, however, as explained

---

150 Cf., in particular, the memorandum from [a consulting company]* mentioned earlier.

151 Cf., e.g., reply from Wingas dated 20 July 2006 to question 7 of the questionnaire of 12 July 2006, No 13664.

152 Point 157 of the reply.

above, GDF does not divert gas in transit but reinjects it at the exit points, that is to say after it has passed through the entire transit route, by using conditional (transmission) entry capacity. To do this, GDF must first reserve transit capacity to bring the gas to the Blaregnies exit point, then secondly, and in addition, it must reserve transmission capacity to supply the gas to its customers in Belgium. So GDF does not 'divert the gas in transit for direct transmission to customers in Belgium, but reserves additional transmission capacity on top of the transit reservation, which consequently generates extra costs.

233. The Commission stands by its opinion as expressed in the statement of objections that the diversion of transit reservations to supply gas directly to Belgian customers is not possible. This is mainly due to the 'point-to-point' system which applies to transit. It also seems that Distrigaz & Co. excludes any diversion of gas in its transit agreements. This analysis is also confirmed by the example cited by the parties in their reply[153]: 'it is the opinion of [...]* that the use of transit capacity for the transport of gas to be sold in Belgium is technically and commercially feasible' ([...]* underlining). However, the wording of the relevant question was as follows: 'Is it (i) technically, (ii) legally and (iii) commercially feasible to use transit capacity for the transport of gas to be sold in Belgium?'[154]: [...]*'s non-confidential reply clearly indicates that, in legal terms, i.e. under the terms of the contract, it is impossible to divert transit gas in order to supply customers in Belgium. This has also been confirmed by a number of confidential replies.

234. For an operator who has transit reservations there are only two possibilities for supplying gas to customers in Belgium - either to transit the gas first and then reinject it in 'reverse flow' from the point of exit, as GDF does, or to reserve transmission capacity at the initial entry point. As already explained, both options involve additional costs, a point which the parties acknowledge in relation to the first option. On the second option, however, the parties maintain that there are no additional costs, arguing that a shipper who diverts gas in transit in Belgium will at the same time save on the downstream transmission capacity [i.e. in the country of destination] which will either not yet have been reserved or will already have been reserved and can usually be resold[155]. However, the parties' argument fails to take account of the fact that the shipper, in order to be able to make the 'savings' described, must give up its downstream client if it supplies the gas originally intended for it to a Belgian customer. It is also necessary, therefore, to take into consideration the loss of revenue as a result of relinquishing the downstream customer.

235. The parties also state that the unused transit capacity in Belgium could either be resold on the secondary market or, assuming that the shipper had not managed to resell it, [...]*[156]: The Commission has two comments to make on these arguments. Firstly, the market survey indicated that the 'secondary' market for transit reservations is not yet fully developed in Belgium (as with other European countries), and, secondly, it seems

153 Point 160 of the reply.

154 Question 7 of the Commission's questionnaire of 12 July 2006 to gas competitors in Belgium.

155 Point 172 of the reply.

156 Point 172 of the reply.

that the market players are not meant to know about [...]*, since the parties considered this information to be confidential in the non-confidential version of their reply.

236. In the light of the above, the Commission concludes that the diversion of gas from a transit reservation to supply Belgian customers is not possible and that both options for using a transit reservation to transmit gas to a Belgian client, either by reserving transmission capacities at the initial entry point or by reserving transmission capacities ('reverse flow') at the exit point, involve additional costs.

Congestion of the network

237. The CREG recently (in Spring 2006) analysed the congestion situation on the Belgian transmission network, particularly as regards access to the network for domestic transmission. This study also examines the arguments put forward by Fluxys in its memo of 21 April 2006[157]. The CREG concluded that there is a persistent state of (contractual) congestion on the Belgian network, that this situation is the result of inadequate investment in recent years and, lastly, that the situation could lead to a global physical congestion at a time of peak demand[158].

238. The parties state that [...]* requests for transmission capacity were turned down by Fluxys between 1 January 2004 and 14 July 2006. According to the information supplied by the parties, these refusals affected actual or potential competitors of Suez, such as [...]*,[...]* and [...]*. However, a comparison with the information provided by the CREG[159] indicates that this figure of [...]* refusals seems to be the result of grouping together several requests by the same shipper either for different points of supply or for different periods. According to the CREG, such refusals of requests for access to capacity occur on a regular basis and are not exceptional; the reasons given by Fluxys are often congestion of the network either on entry or within the network itself[160]. The parties point out that the [...]* refusals represent less than 0.3% of all requests for transmission capacity reservations received by Fluxys over that period. However, it must be remembered that the number of refusals alone is not the most significant indicator; the volume of the capacity refused is more important. Moreover, the CREG's statistics indicate that it had been informed by Fluxys a year earlier of 24 refusals of access to its transmission network. These 24 refusals can be summarised as 12 refusals of access to requests considered by the CREG to be 'realistic'. This implies that the number of refusals of access is in fact higher than the figures provided by the parties would suggest. It should also be pointed out that only formal and 'binding' requests have to be notified

157 'Nota aan CREG betreffende de huidige toestand van het vervoersnet in verband met potentiele congestie', cf. Fluxys, Reply of 19 July 2006 (date registered) to question 21 of the gas questionnaire of 6 July 2006 [13514], Annex 13.

158 CREG, reply dated 14 July 2006 to question 6 of the gas questionnaire of 6 July 2006 [13256].

159 According to the CREG, a higher number of refusals of access was observed over a period of a year. These refusals concerned other competitors too, in addition to those mentioned by the parties.

160 This information is also in the possession of Fluxys which, under the terms of Article 21 of the Code of Conduct, is required to notify the CREG of any refusal of access to its network.

by Fluxys to the CREG[161]. Thus, a large number of serious (but not formal) requests which Fluxys is unable to grant are not notified to the CREG, since before submitting a binding request a shipper often has detailed discussions with Fluxys. There are also shippers who do not make a binding request if they know at the end of these preliminary talks that Fluxys does not have sufficient capacity. For that reason too, the number and the scale of the refusals are certainly higher than the figures suggested by the parties. In any case, the fact that requests have been refused is a clear indication of congestion and thus confirms the CREG's conclusions.

239. In their reply to the statement of objections, the parties point out, as well as repeating the arguments discussed above, that the Code of Conduct provides for a mechanism in the event of congestion[162]. The parties maintain that this mechanism has never been used and they deduce from this that there is no congestion. However, the procedure set out in Article 48(2) of the Code of Conduct is very cumbersome and virtually unworkable since it requires a shipper to take a disproportionate risk first, that is to conclude a supply contract with a customer with no guarantee that it will actually have the necessary entry capacity to supply that customer[163]. For that reason the fact that this procedure is not used is not an indication that there is no congestion.

240. As regards the transit network, between January 2004 and July 2006, Distrigaz & Co. and Fluxys refused [...]* and [...]* requests respectively for the reservation of capacity in the international transit pipelines which they market[164]. The parties point out that the [...]* refusals by Distrigaz should be compared with the approximately [...]* requests for reservations of transit capacity received by Distrigaz over the same period. Such a comparison reveals that one request in eight is refused, which clearly indicates a state of congestion. The situation as regards transit capacity is therefore even more unsatisfactory than for transmission capacity. Given that the points of entry are the same for the transmission and transit networks, it seems obvious that the Belgian transmission/transit network is permanently congested.

241. The parties claim that the so-called 'matching' rule prevents congestion, at least in the case of requests for transmission capacity. According to this rule, established in the Code of Conduct, a user may not reserve more firm capacity than he needs for the performance of his supply and/or provision contracts[165]. The 'matching' rule states that the network user must reserve the same amount of entry capacity (over all his points of entry) as exit capacity (over all his exit points)[166]. According to the parties, this rule guarantees that every supplier will obtain the entry capacity he needs to supply his customers. Every

---

[161] Cf. the CREG's reply of 9 October 2006 to question 2 of the Commission's questionnaire of 5 October 2006, No 18849.

[162] Point 102 of the reply.

[163] Cf. the CREG's reply of 9 October 2006 to question 2 of the Commission's questionnaire of 5 October 2006, No 18849.

[164] Reply from the parties dated 11 August 2006 to question 5 of the questionnaire of 4 August 2006.

[165] Cf. notification, Form CO, Vol. 1, p. 301.

[166] See idem for more details and relaxing of the rule.

new customer gained will lead to an increase in the reservable capacity in line with the customer's needs, and vice versa. The parties stress that the matching rule also prevents hoarding of entry capacity.

242. Although the matching rule may indeed help to prevent hoarding, it is not sufficient to solve the problems arising from the persistent congestion of the Belgian transmission/transit network. First of all, the matching rule is itself a form of congestion management and therefore evidence that congestion exists, since if there were no congestion there would be no need for the rule. Secondly, the disadvantage of the matching rule as it stands is that it tends to prevent the development of a secondary market.

243. Finally, while it is true that if a customer changes supplier the matching rule allows the transmission capacity to be transferred from the old supplier to the new one, this transfer automatically includes the entry capacity at the entry point used by the previous supplier to bring gas to the customer in question. It seems that it may be possible for the new supplier to choose another entry point ('shift of entry zone'), but this can only be done if firm capacity is available for the entry point requested. Moreover, in accordance with the order of priority established by Fluxys for processing requests, shift of entry zone requests are given the lowest priority and are consequently often refused, and as Fluxys acknowledges in its memo of 21 April 2006[167] the Eynatten and 's-Gravenvoeren entry zones are those where the capacity available for shift of entry is the lowest. These are the very entry points which are of most interest to current competitors such as Wingas, Essent or Nuon.

244. For example, if the previous supplier delivered gas to the customer via the IZT (Zeebrugge Interconnector), the matching rule transfers this entry reservation at the IZT to the new supplier. However, if this new supplier does not have any gas at IZT but has gas elsewhere (e.g. in Germany or the Netherlands), this right of entry is of little use to him. Imports via Eynatten or 's-Gravenvoeren, for example, are only possible if entry capacity is available there. In any case, the matching rule would not 'release' this entry capacity. On the contrary, the matching rule seems in some ways, and in spite of its benefits as regards hoarding, to favour the incumbent, who has gas at almost every entry point and therefore derives full advantage from the effects of matching.

245. In their reply to the statement of objections, the parties accuse the Commission of misinterpreting the matching rule and claim that this rule makes it possible to achieve an optimal reservation of transmission capacity to consumers[168]. In the light of the parties' reply, the Commission consulted the CREG which confirmed the Commission's analysis. In particular, the CREG pointed out that the allocation of capacity in accordance with the matching rule was only 'optimal' for Fluxys and was not at all optimal for the market and certainly not for consumers. Indeed, as a change of suppliers is often accompanied by a change of entry point and Fluxys gives the lowest priority to

[167] Reply from Fluxys dated 19 July 2006 (date of registration) to question 21 of the gas questionnaire of 6 July 2006 [13514], Annex 13.

[168] Point 145 of the reply.

shift of entry zone requests, the customers' choice is limited to alternative suppliers with capacity in the same entry zone as their current supplier[169].

246. Similarly, the 'first committed, first served' rule[170] applied by Fluxys for allocating capacity does not seem to provide a solution to the problems of scarce entry capacity for new entrants since the incumbent has a larger and more diversified client portfolio, often based on longer-term contracts, than the new entrants. This client structure enables the incumbent to plan its capacity needs better, and above all earlier. It can therefore reserve capacity earlier than its competitors and thus take full advantage of the 'first committed, first served' allocation rule. Moreover, Fluxys does not apply this rule strictly, as it gives lower priority to shift of entry zone requests even if they are 'first committed'[171].

247. A forward study suggests that the limits on entry capacity will tend to get worse over the next few years. According to the CREG's Plan indicatif d'approvisionnement de gaz en Belgique 2004-2014 (indicative plan for gas supplies in Belgium)[172] demand for transmission capacity is growing every year. In the same document, the CREG points out that the investments proposed by Fluxys are the minimum necessary to guarantee supply in Belgium during a conventional peak in demand. Any delay in investment in relation to the proposed timetable would lead to a greater risk of physical congestion during such peaks. According to the CREG, Fluxys itself states that growth in demand has exceeded expectations.

248. The question therefore arises as to whether Fluxys has sufficient incentive to carry out all the investment projects needed to expand the capacity of the transmission network or if there could be a conflict of interest between the role of Fluxys and the interests of Suez, its main shareholder and controlling interest, since Distrigaz, a subsidiary of Suez and the incumbent for gas in Belgium, would clearly also benefit from a slow-down or reduction in investment which could reduce barriers to entry.

249. In their reply to the statement of objections, the parties refer to the investment projects planned or approved by Fluxys[173]. In particular, this investment includes the construction of a compressor station at Zelzate. According to the parties, this station would significantly increase import capacity from the Netherlands and Germany. On the question of the capacity and operability of this station, the reply is contradictory: in point 126 it refers to 1 200 000 m3(n)/h from 2008 whereas point 185 refers to 650 000 m3(n)/h from 2010. According to Fluxys's 2005 annual report, it is studying the possibility of a gradual increase in transmission capacity on the Eynatten/Zelzate-Zeebrugge route in the direction of Zeebrugge, from 2009-2010[174]. The

---

169 Cf. the CREG's reply of 9 October 2006 to question 2 of the Commission's questionnaire of 5 October 2006, No 18849.

170 For a description of this rule, see notification, Form CO, Vol. 1, p. 301.

171 Cf. the CREG's reply of 9 October 2006 to question 2 of the Commission's questionnaire of 5 October 2006, No 18849.

172 Available at www.creg.be

173 Points 126 *et seq*; points 182 *et seq*.

174 Pages 5 and 69 of Fluxys's 2005 Annual Report.

table of available capacity on Fluxys's website shows no firm capacity available for Zelzate until March 2008 (the end date of the table). The Commission concludes from this that the Zelzate compressor station will come on-stream only gradually from 2009-2010, that is in the medium to long term. The same time-frame applies to investment in the Eynatten-Zelzate-Zeebrugge (RTR 2) pipeline, which does not yet seem to have been approved by Fluxys's board of directors[175].

250. However, the CREG and the parties agree that these projects are intended more to meet the anticipated increase in demand in Belgium and for transit capacity in the coming years than to solve the existing problems of congestion at points of entry. The parties accordingly state that, with these new infrastructures, Fluxys is looking ahead firstly to the expected increase in overall demand on the Belgian market and secondly to the specific requirements of industry in the Antwerp region and of the new natural gas power stations. The additional capacity can also be made available for the international transit of gas to and from the United Kingdom[176]. Suez's Annual Report is even more specific. It states that the project is driven by the changing supply situation in the United Kingdom, which will soon become an importer of natural gas. An increase in capacity on the rTr route will make it possible to transport very much larger volumes of natural gas to the UK from Eynatten and Zelzate[177]. The Commission concludes from this that this expansion in capacity will be made available primarily for transit and that the expansion available for the Belgian market corresponds largely to increased demand. On the other hand, it is unlikely that this investment will significantly increase the firm capacity available at the points of entry.

251. It is clear from all these facts that (i) the Belgian transmission/transit network is persistently congested, (ii) there is very little, if any, firm capacity available at certain points of entry for several (if not all) months of the year, and (iii) the rules governing allocation of capacity are insufficient to solve the problems of congestion and lack of capacity. The sometimes very acute problems of access to the Belgian transmission network constitute a considerable obstacle to the entry of new competitors and the expansion of competitors already active in the gas markets in Belgium.

A.2.4.3.3 Access to LNG

252. The volume of liquefied natural gas (LNG) imported into Belgium in 2005 was 28 345 GWh (measured volume: 2 365 million Nm3) and thus represented 20.7% of H gas consumption and 14.9% of total natural gas consumption in Belgium. The Zeebrugge terminal is the only LNG terminal in Belgium[178]. The LNG terminal and all its infrastructure is operated and marketed by Fluxys LNG, a subsidiary of the Suez group.

253. The LNG arrives by sea in tankers with a capacity of approximately 125 000 m3 (approximately 75 000 000 Nm3 in a gaseous state). It is unloaded and stored in liquid form in storage tanks. The LNG is then either gasified in vaporisers and sent to the H gas

[175] Cf. also point 126 of the reply.

[176] Point 127 of the reply.

[177] Page 33 of Suez's 2005 Annual Report.

[178] Reply from the CREG dated 14 July 2006 to question 31 of the gas questionnaire of 6 July 2006 [13256].

transmission/transit network in the form of gas or loaded in liquid form into road-tankers supplying the Peak Shaving Facility. Fluxys LNG's liquefied natural gas terminal is made up of:

- a pier and unloading facilities
- three LNG storage tanks (plus one tank under construction)
- six vaporisers and a cogeneration unit
- one point for loading LNG into road tankers.

254. Taking into account all the constraints associated with the loading of ships and the storage and regasification of LNG, the terminal can currently accept 66 shipments of LNG a year[179]. Fluxys decided to double the terminal's capacity and extension work began in October 2004[180]. According to the CREG, Fluxys has stated that it will have a capacity of 110 unloading operations a year once the extension has been completed.

255. At present, and until 31 March 2007, [90-100]*% of the regasification capacity is reserved by Distrigaz. From 2008, [20-30]*% of capacity will be reserved by Distrigaz ([...]* unloading operations a year), [40-50]*% by ExxonMobil/Qatar Petroleum ([...]* unloading operations a year) and [10-20]*% by Suez LNG ([…]* unloading operations a year). These reservation contracts are of [long-term]* duration.

256. Suez currently holds [90-100]*%, and after the extension will still hold [40-50]*%, of reservations of regasification capacity. According to information supplied by the parties, ExxonMobil/Qatar Petroleum's Rasgas joint venture will hold the other [40-50]*% of the capacity. However, Suez has concluded a contract with RasGas for the purchase of [...]* of LNG regasified ex-ship at Zeebrugge. In view of this contract it is unlikely that RasGas will sell the gas unloaded at Zeebrugge on the Belgian market. It is more likely that this gas will be re-exported to other European countries.

257. An analysis of previous years shows that rates of utilisation of capacity are fairly low, however. During 2004 and 2005, Distrigaz carried out only [50-60%] of the firm unloading operations possible. Nominations for regasification by Distrigaz between April 2004 and May 2006 never exceeded [40-50]*% of reservations, and in most months the capacity utilisation rate was substantially lower. It would therefore appear to be very difficult to use all the reserved capacity.

258. According to the CREG there were no formal refusals of capacity, which can be explained by the fact that Fluxys LNG publicly stated that all the capacity had been sold[181]. However, the CREG has noticed that in recent years Fluxys LNG has been reluctant to implement the applicable 'use it or lose it' rules, seeming to wish to prevent third-party access to the terminal before the end of Distrigaz's capacity reservation contract. In fact, the CREG has to approve the system operator's 'catalogue of services'

---

179 Reply from the CREG dated 14 July 2006 to question 30 of the gas questionnaire of 6 July 2006 [13256].

180 Reply from Fluxys dated 19 July 2006 (date of registration) to question 30 of the gas questionnaire of 6 July 2006 [13514].

181 This is confirmed by the Fluxys LNG website: http://www.fluxyslng.net/Slots.asp

and has so far been unable to do so because Fluxys LNG has strongly resisted the CREG's demands[182].

259. Also according to the CREG, third-party access to the terminal and the secondary capacity market is for this reason virtually non-existent, despite a very marked under-utilisation of the capacity of the terminal (35 unloading operations in 2005 out of a possible 66) and despite the interest shown by certain shippers in acquiring short-term capacity. Distrigaz's advertising of unused capacity, via Fluxys LNG's website, is infrequent and inadequate, even though it is a statutory obligation.

260. This reluctance by Fluxys LNG to implement the use-it-or-lose-it rules could be an indication of the underlying conflict of interest which prevents Fluxys taking firm action against an operator belonging to the same group.

261. Despite the extension of the LNG terminal, therefore, there are still considerable barriers to entry which, now and in the future, will continue to prevent LNG from increasing the liquidity of the Belgian market and constituting a source of supply for the new entity's competitors.

A.2.4.3.4 Access to storage for H gas

262. As stated above, there is no L gas storage site in Belgium. The only storage site capable of serving the Belgian market is the GDF site in Picardy. The site at Alkmaar in the Netherlands is unable to do so because of the lack of transmission capacity to Belgium.

263. In the case of H gas, capacity at Loenhout and Dudzele is insufficient to cover Belgian demand. It is [90-100]*% allocated to Suez and GDF, with just a tiny amount going to a third operator. In their reply to the statement of objections, the parties state that the capacity at Loenhout is to be increased by 15%[183]. However, this increase will still fall far short of what is needed to cover all the requirements of the Belgian market[184]. Moreover, the new capacity will very probably be allocated according to the same criteria as at present and will therefore favour the shippers which supply the distribution networks, namely Distrigaz and, to a lesser extent, GDF.

264. The CREG has also confirmed that access to storage offers a significant operational and commercial flexibility for those who have it[185]. This flexibility makes it possible not only to engage in arbitration but also to manage hour-to-hour and day-to-day imbalances, and to be highly responsive to certain customers who need to be supplied at a very short notice.

265. In order to have the necessary flexibility to balance their supply with the fluctuating demand of their customers, the other players have to find other options, such as

---

182 Reply from the CREG dated 14 July 2006 to question 30 of the gas questionnaire of 6 July 2006 [13256].

183 Point 216 of the reply.

184 Cf. point 203 of the reply.

185 Cf. the CREG's reply of 9 October 2006 to question 2 of the Commission's questionnaire of 5 October 2006, No 18849.

interruptible customers or flexibility in their upstream supply contracts. Another possibility is storage abroad, possibly in the United Kingdom, Germany, the Netherlands or France.

266. Storage in the United Kingdom does not seem to be a viable option for several reasons. Firstly, the British sites are a long way from the border. Secondly, the (physical or commercial) transmission of gas to Belgium once it had been removed from storage would have to be via the underwater Interconnector which would entail a significant risk of interruptions of supply. Finally, in view of the current shortage of storage capacity in the UK it would not make commercial sense for an operator to store gas in Britain and transport it to Belgium in winter when the price is regularly higher in the UK.

267. There are two H gas storage sites in the Netherlands, Norg and Grijpskerk. Both these sites are more than 300 km from the 's-Gravenvoeren and Zandvliet entry points (with all the restrictions described above regarding Zandvliet). Such distances are usually considered to be much too great to be financially viable, even for aquifer sites[186]. Because of the shortage of storage capacity in Belgium, however, it seems that operators active in the Belgian market are forced to use storage sites a long way away. The additional cost of transport makes storage abroad less competitive than storage in Belgium. In any case, only a small proportion of Dutch capacity is currently offered to third parties (0.2 bcm out of 5 bcm (4%))[187]. In addition to these financial and access problems, entry capacity is above all limited, particularly at 's-Gravenvoeren.

268. In Germany, the four sites closest to Belgium are Xanten (cavern 140 km from Eynatten), Epe (cavern 210 km from Eynatten), Uelsen (spent operating site 270 km from Eynatten) and Kalle (aquifer 270 km from Eynatten). However, as explained above in relation to the Dutch sites, these long distances can entail additional transport costs and, in the case of several of the German storage sites mentioned by the parties in their reply[188], it is necessary to cross several regional networks, paying the corresponding charges, in order to transport the gas to the Belgian border. Moreover, cavern sites, such as Xanten and Epe, are normally used only for short-term balancing and not for the seasonal balancing which is essential for entry into Belgium. The parties suggested that competitors could use the storage facility at Rehden (spent operating site). Indeed, this site seems to be a storage option for operators in the gas markets in Belgium. It is operated by Wingas, which also manages a pipeline to the Belgian border. However, this option is only available to operators who have reservations at the Eynatten entry point. At the present time, [...]* and [...]* are the only Belgian shippers with transmission reservations at Eynatten. New entrants, on the other hand, are once again faced with the problem of lack of available capacity at Eynatten, particularly in winter when the volumes in storage are required in Belgium.

269. In France there are three aquifer storage sites (Gournay-sur-Aronde, Germigny-sous-Coulombs and Pitgam), located between 150 and 165 km from

---

[186] As a general rule, an economically viable radius is considered to be 200 km for aquifer storage (or storage in old operating sites) and 50 km for storage in caverns: cf. Commission Decisions M.1383, recital 262, M.3086, recital 16, and M.3886, recital 127.

[187] Reply from NMa dated 12 July 2006 to question 5 of the questionnaire of 30 June 2006, No 13120.

[188] Point 306 of the reply.

Blaregnies, and therefore within the radius which is generally considered to be financially viable. Moreover, there is no limit on transmission capacity for GDF either on the French network for transmission to the Belgian border or at the Blaregnies entry point as GDF already has substantial firm reservations of transmission capacity ([...]* out of a total firm capacity of 400 000 m3/h in 2006) at the Blaregnies SEGEO entry point. In addition there is still firm capacity available at Blaregnies SEGEO and conditional capacity at Blaregnies SEGEO and Blaregnies Troll. This conditional capacity (in reverse flow) is virtually firm for GDF, which transports large volumes in the direction of the physical flow.

270. A comparative study of the alternative H gas storage sites abroad therefore shows that France offers considerable advantages over the other neighbouring countries, where storage to meet the requirements of gas supply in Belgium is less financially viable or actually impossible. Also, in contrast to the entry points on the borders with Belgium's other neighbours, there is sufficient entry capacity at Blaregnies, which provides the necessary flexibility to use the gas stored there all year round. GDF, with its access to French storage facilities, would therefore bring a further competitive advantage to the new entity.

A.2.4.3.5 Quality specifications

271. Entry to the Belgian market is further impeded by the quality specifications which apply in the various neighbouring countries and which affect Belgium as a country of transit. Belgian specifications are very close to those recommended by EASEE-gas[189] and allow the import of natural gas from a wide variety of sources (including LNG)[190]. However, more restrictive specifications apply to different points of entry to the Belgian transmission network, in particular at IZT and at Eynatten.

272. At IZT the specifications which apply are those of the Interconnector, which in turn conform to the requirements of the GSMR[191], the technical rules applying to gas in the United Kingdom. The principal restriction imposed by the GSMR is concerned with the Wobbe index, which is the main parameter for describing the combustion of natural gas. The maximum Wobbe index allowed by the GSMR is approximately 15.1 kWh/m3(n), a value which corresponds to the upper limit of the British production fields but is lower than most LNG sources and even than some of the Norwegian fields[192]. From a study recently published by the DTI, it seems that the British authorities have no intention of revising the GSMR in the medium term.

273. At Eynatten there is still a restriction on the gross calorific value (pouvoir calorifique supérieur, or PCS), which is limited to 11.61 kWh/m3(n)[193]. This restriction is purely contractual in origin. EASEE-gas recommendation (CBP) 2005-001/01 calls for the

---

189 EASEE = European Association for the Streamlining of Energy Exchange.

190 Reply from the CREG dated 14 July 2006 to question 8 of the gas questionnaire of 6 July 2006 [13256].

191 GSMR = Gas Safety Management Regulations.

192 The maximum Wobbe index allowed in Belgium is 15.78 kWh/m3(n).

193 The maximum PCS allowed in Belgium is 12.79 kWh/m3(n).

removal by 1 October 2006 at the latest of all restrictions on PCS which are purely contractual, as they create a barrier to free trade in gas. The CREG has therefore contacted the two current co-contractors to put an end to the situation, but at this stage it has no guarantee that the two parties will act on the requests from it and EASEE-gas.

274. These two restrictions limit the amount of gas which can enter Belgium and the development of the Zeebrugge hub, since Eynatten and IZT are at each end of the vTn-rTr pipeline on which the Zeebrugge hub is physically located. Anyone who wishes to sell gas on the Zeebrugge hub must therefore comply with these two restrictions. This means on the one hand that the Norwegian producers must take account of these restrictions when sending their gas to Zeebrugge, and on the other that it is very difficult, if not impossible, to market certain types of LNG on the hub.

A.2.4.3.6 The Zeebrugge hub provides insufficient liquidity to increase competitive pressure on the Belgian markets

275. In view of the persistent congestion at the international points of entry, the Zeebrugge hub could constitute a source of liquidity and hence supply for Suez's competitors active in the Belgian gas markets. However, because of its connection to the transit network, the hub has never played this role in the past and it is very unlikely that this will change.

276. In fact the Zeebrugge hub is on the rTr/vTn (Interconnector-Zelzate-Eynatten) transit axis. It is located in the IZTF terminal (Interconnector Zeebrugge Terminal Fluxys), downstream from the terminal's metering station when the flow is coming from the Interconnector in the direction of Belgium. This transit route is marketed by Distrigaz & Co. To access the hub and transport gas to the Belgian transmission network it is first necessary to have a transit reservation with Distrigaz & Co. However, as described earlier, demand for reservations on this transit route is particularly high, leading to a serious risk of congestion. This led the CREG General Council to observe that access to the hub was causing problems for the moment because of congestion[194]. In their reply to the statement of objections, the parties state that the Fluxys transmission network has been connected to the hub since April 2006, without, however, specifying the capacity[195]. Despite this connection, however, the CREG General Council reached the abovementioned conclusion in July 2006.

277. According to a recent study by the CREG[196], 'Only network users with capacity rights on the rTr/vTn pipelines described above have the right to supply gas to and take gas from the Zeebrugge hub, as this was a sort of stop for their transmission activities. However, this right is not always defined in contractual terms. It would appear that there are old contracts that have never been adapted along these lines and for which this possibility of withdrawal is therefore agreed by mutual consent'.

---

194 Opinion 190706-031 of the General Council dated 19 July 2006 on study F060719-CREG-554 on the measures needed to improve the functioning and the liquidity of the Zeebrugge hub.

195 Point 70 of the reply.

196 CREG Study on the measures needed to improve the functioning and the liquidity of the Zeebrugge hub, (F060719-CREG-554, 19 July 2006).

278. According to the same study 'Other parties wishing to access the hub only and who do not want to go any further than the Zeebrugge region still have to obtain a capacity right by means of an entry/exit agreement with Distrigaz & Co. All negotiations take place on a bilateral basis, without the slightest transparency. Like the primary market, there are no transparent rules for transfers of capacity on the secondary market. Access to the hub is therefore dominated by Distrigaz & Co, for both the primary and the secondary market. As Distrigaz is a competitor (actual or potential) of the other market players at the Zeebrugge hub, its central and monopolistic role on the capacity market in the Zeebrugge region poses a real problem in terms of access to the hub. Amongst other things, legitimate questions may be asked about confidentiality and the non-discriminatory treatment of information'.

279. The study concludes that 'Potential gas suppliers also cite the lack of rapid access to capacity as an access threshold. When they have gas available at one of the Belgian border points, they are not able to obtain the additional capacity needed quickly enough to carry this gas instantly as far as the hub. Only capacity contracted in advance can be used to its maximum limit'.

280. One of the restrictions on the liquidity of the Zeebrugge hub is the result of different quality specifications in force in Belgium and the UK. As explained above, the hub's location on the rTr/vTn pipeline means that all gas accessing the hub must conform to British specifications. However, this constitutes an absolute barrier for the inflow of LNG and to a lesser extent for Norwegian gas. Thus the rTR/vTn pipeline, and therefore the hub, are isolated from the rest of the transmission network in Belgium. For these reasons not even an expansion of the Interconnector's capacity would increase the liquidity of the hub, as the British specifications are not going to change and will therefore continue to limit access for gas.

281. Moreover, Huberator, a subsidiary of Suez[197], which operates the Zeebrugge hub, has announced that automatic back-up services will cease from January 2007. Until now Distrigaz has supplied these services to Huberator. They are essential in order to iron out (temporary) imbalances between the positions of the companies active on the hub. It would also seem that Distrigaz, thanks to the large volume of gas at its disposal, is the only player in Belgium able to provide this service. The prices charged for these back-up services had already been criticised in the past as being too high. Ending such services will diminish the confidence of those involved in the operation of the Zeebrugge hub and could therefore reduce the liquidity of the hub still further.

282. As regards back-up services, until December 2004 Distrigaz had a contractual agreement with Huberator to provide automatic back-up for five hours after any incident. This contract, which was agreed before the integrated Distrigaz was split up, provided effective protection for customers at a reasonable price and helped to create liquidity. This contract has since been replaced by a new back-up services contract between Distrigaz and Huberator which led to a considerable increase in the rates paid for these

[197] Suez controls Huberator via Fluxys, which has a 90% stake in Huberator.

services (a multiplier of 1.5 compared with a multiplier of 1.0 before)[198] by the customers, to whom Huberator passed on the increase[199].

283. These rates, which the CREG considers high, are a way for Distrigaz to increase the costs of its competitors on the hub, while for Distrigaz these costs correspond to equivalent income. Finally, Huberator recently informed hub customers that from 1 January 2007 these services will no longer be provided. Halting or even reducing the back-up services will have a negative effect on the other operators on the hub which, unlike Distrigaz, do not have access to storage or a broad and diversified customer portfolio.

284. Another factor which limits the liquidity of the hub is the time it takes to obtain capacity to and from the hub (considered to be excessive). Thus the CREG finds in its study that potential gas suppliers also cite the lack of rapid access to capacity as an access threshold. When they have gas available at one of the Belgian border points, they are not able to obtain the additional capacity needed quickly enough to carry this gas in the very short term as far as the hub. Only capacity contracted in advance can be used. Lastly, extending the liquidity of the hub is also hampered by the fact that Distrigaz (through Distrigaz & Co.) gets to know the positions of all the other parties because it controls the pipelines leading to the hub and according to the CREG legitimate questions may therefore be asked about confidentiality and the non-discriminatory treatment of information[200].

A.2.4.3.7 The hourly balancing system discriminates against new entrants

285. In Belgium, Fluxys applies an hourly balancing system with daily and hourly thresholds, in contrast to certain other countries which apply a purely daily system. This means that a shipper is required to keep his injections and withdrawals in balance (within certain tolerances) over the course of the day but must also comply with hourly limits. The hourly balancing system allows the shipper less flexibility than the daily balancing system (which permits an imbalance which occurs in one hour to be compensated for over the hours that follow) and any imbalance incurs 'balancing costs' which the shipper must pay to Fluxys.

286. Any balancing system has a prohibitive effect (and this effect is more marked in the case of hourly balancing than in the case of daily balancing) because it discriminates between new entrants on the one hand and the incumbent on the other. On the one hand there are the new entrants, which have only a limited volume of gas at their disposal and a small customer portfolio, and which as a result can easily find themselves with an imbalance. On the other there is the incumbent, with large quantities of gas available and a diversified client structure, which can more easily balance its positions because the size of its portfolio offers considerable room for manoeuvre.

---

198 In their reply the parties stated that the multiplier was 1.25 (point 52 of the reply).

199 Paragraph 55 of the study.

200 Paragraph 61 of the study.

A.2.4.3.8 Conclusion on barriers to entry

287. In view of the above, the Commission finds that there are very substantial barriers to entry which make it extremely difficult to enter the Belgian gas markets. Some of these barriers, namely those relating to control of SEGEO, reservations of capacity and access to storage where the parties' positions are stronger, would be exacerbated by the merger. It is therefore unlikely that other actual or potential competitors could take over the role of GDF and thus compensate for the competitive pressure which would be eliminated as a result of the proposed merger. In this context, the removal of GDF as Suez's major competitor in Belgium would have an adverse impact on effective competition which would go beyond simple addition effects on market shares.

A.2.4.4 Conclusion

288. The Commission finds that the notified transaction significantly impedes effective competition in Belgium in the following gas markets:

- National market for the supply of gas to electricity producers
- National markets for the supply of H gas and L gas to dealers
- National markets for the supply of H gas and L gas to large industrial customers
- National markets for the supply of H and L gas to small industrial and commercial customers
- Markets for the supply of H and L gas to household customers, whether the relevant geographic market is national or regional.

A.3 FRANCE

A.3.1 National context

289. According to the 2006 Activity Report of the Energy Regulatory Commission (CRE), gas consumption in France increased by 3.3% in 2005 compared with 2004. French gas consumption stems almost entirely from imports. These grew by 4.2% in 2005, increasing from 516.0 TWh in 2004 to 537.9 TWh in 2005[201]. France's main suppliers of natural gas are Norway (27%), Russia (21%), the Netherlands (20%) and Algeria (12%). French import capacities are expanding, in particular because of the current increase in the Obergailbach entry point capacity and the future siting of a new methane terminal at Fos Cavaou.

National liberalisation and rules: general points

290. France transposed the Gas Directive by means of the Law of 9 August 2004. The Law of 3 January 2003 and Decree No 2003-302 of 1 April 2003, as amended by Decree No 2004-420 of 18 May 2004, provided for the eligibility of all gas purchasers, with the exception of final consumers purchasing natural gas for household use, irrespective of their gas consumption threshold.

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

292. At 1 January 2006, the gas market's legal rate of opening-up stood at 73%, with 640 000 eligible sites, representing an annual consumption of some 380 TWh of natural gas. At the same date, 68 400 sites had exercised their eligibility. They accounted for 52% of the gas consumption of the eligible sites and a little under 11% of the number of eligible sites. The sites that chose an alternative supplier (other than the historical supplier on which they depended) represented 32% of the gas consumption of the sites that had exercised their eligibility[202].

The Energy Regulatory Commission (CRE)

293. In France, the gas and electricity markets are governed by an independent administrative authority, the CRE, set up by the legislature in 2000. It has two main tasks: 1) guaranteeing third parties access to public electricity networks and natural gas facilities; 2) market regulation. However, it has less extensive powers in respect of gas than electricity, as described below.

294. As part of its first task, the CRE (i) guarantees right of access to public electricity grids and natural gas networks and facilities, (ii) ensures the smooth running and development of electricity and natural gas networks and infrastructures, and (iii) it also guarantees the independence of system operators.

---

201 Energy observatory - April 2006 (Directorate for Energy and Raw Materials – Ministry of Economic Affairs, Finance and Industry).

202 Electricity and gas market observatory (4th quarter 2005), CRE.

295. As regards infrastructure, the CRE proposes tariffs for the use of electricity transmission and distribution systems and for natural gas networks and LNG facilities. However, as access to gas storage facilities is negotiated, the CRE has no power over the prices charged for this by the operators.

296. The CRE also settles disputes between users and operators of electricity and natural gas transmission systems, natural gas storage or LNG facilities. It can decide on protective measures, penalties or other sanctions.

297. The CRE approves the public electricity transmission system operator's annual investment programme but does not enjoy this power in the natural gas sector, either as regards the transmission or the storage system.

298. The CRE ensures that electricity and natural gas system operators comply with the codes of good conduct and assesses system operators' independence. The CRE produced a first report in November 2005. Similarly, the CRE approves the accounting rules separating the activities of integrated electricity and natural gas operators

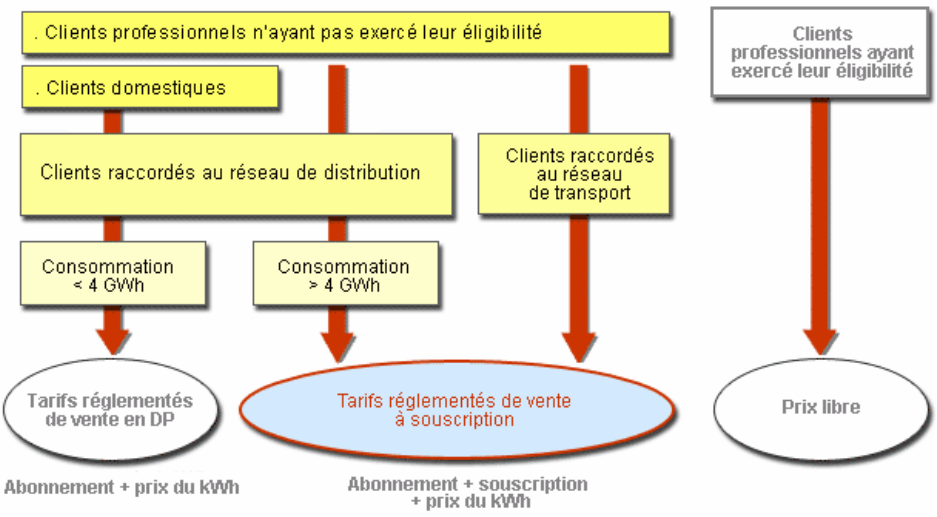
299. As part of its second task, the CRE has prerogatives in the field of market regulation and regulated tariffs applied to non-eligible consumers.

300. Firstly, it is responsible for surveillance of organised electricity and natural gas markets and cross-border trade in these two energies. This prerogative has not yet been exercised as it depends on a decree which has yet to be published.

301. Secondly, the CRE issues an opinion on the electricity or gas sales tariffs charged to non-eligible consumers decided by the Government. The purpose of this opinion is to ensure that the tariffs cover costs and do not create cross-subsidies in favour of eligible customers. This opinion is, however, only advisory.

Regulated gas supply tariffs

302. As shown in the diagram below, there are currently two categories of regulated tariffs in France: (i) subscription tariffs and (ii) public distribution tariffs



Source: CRE's Internet site

Professional customers that have not exercised their eligibility			Professional customers that have exercised their eligibility
Domestic customers			
Customers connected to the distribution system		Customers connected to the transmission system	
Consumption	Consumption		
≤ 4GWh	≥ 4GWh		
Public distribution regulated tariffs		Regulated subscription tariffs	Free price
Pre-payment + price of kWh		Pre-payment + subscription + price of kWh	

303. Public distribution tariffs cover all customers connected to a distribution network, consuming less than 4 GWh per year. They therefore concern both non eligible customers (household customers) and eligible customers (professionals). Changes in public distribution tariffs are decided by Order of the Ministers for Energy and Economic Affairs, following the CRE's advisory opinion. Public distribution tariffs are applied by GDF and the 22 local distribution companies (LDCs) in France. Some 96% of GDF's sales are made under these tariffs.

304. Subscription tariffs apply to gas consumers directly connected to the gas transmission system and customers connected to a distribution network that consume more than 4 GWh per year. The consumers in question are all eligible. Changes in subscription tariffs are proposed by the operators and are directly applicable provided that the Government, having received the CRE's advisory opinion, does not object. Besides GDF and Total, about ten LDCs have subscription tariffs.

305. For professional customers (i.e. eligible customers), regulated tariffs are therefore the benchmark against which they can decide whether or not to exercise eligibility. As described in more detail in section A 3.4.3.3, it should be noted that current regulated prices are significantly lower than the market price.

306. Under the regulations in force the regulated tariffs for sales of natural gas must also reflect suppliers' costs in order to avoid any cross subsidy between captive consumers and the market open to competition. This is mainly in order to allow the development of competition on the open market[203].

[203] Article 7 of the Law of 3 January 2003 stipulates that 'tariffs for sales of natural gas to non eligible customers are defined according to the inherent characteristics of the supplies and the costs related to these supplies. They cover all these costs with the exception of any subsidy in favour of eligible customers'. Article 4 of the same Law states that 'if an eligible customer does not exercise the right to obtain supplies for a site from a supplier of his choice under Article 3, he shall keep for that site the contract in force on the date at which he becomes eligible. Without prejudice to the provisions concerning the end of this contract, where appropriate, its tariff clauses shall be subject to the same changes as those applicable to gas sales tariffs to non-eligible customers'.

A.3.2 Infrastructure

A.3.2.1 Transmission

307. France has five gas entry points on its territory: Taisnières (on the border with Belgium), Dunkirk (connected to the gas pipeline from Norway), Obergailbach (on the border with Germany), Montoir (methane terminal in the west) and Fos-sur-Mer (methane terminal in the south). There are also two exit points on French territory: Larrau (on the border with Spain) and Oltingue (on the border with Switzerland). Entry capacities are also available on the Spanish border at Larrau and at Biriatou but they are currently very low.

308. There are two natural gas transmission system operators in France: GDF transmission network (GRTgaz) operates most of the gas network, and Total Gas Infrastructure France (TIGF) operates the network in the south west of France. GRTgaz and TIGF are 100% subsidiaries of GDF and Total respectively.

309. The French transmission network comprises a main network and a regional network. The main network is made up of all the transmission facilities that link up entry and exit points in France and underground storage facilities. The regional network covers regional supply downstream from the main network.

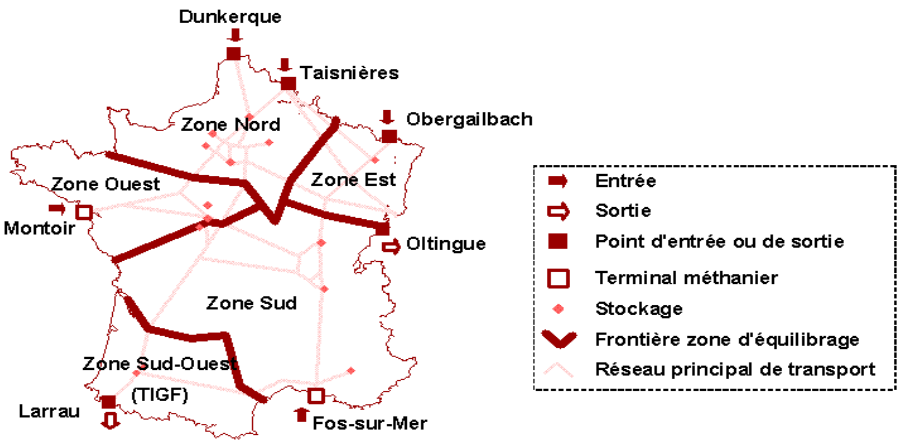
310. The main transmission network currently comprises five balancing zones,[204] within which the users must, with certain tolerances, put in as much gas as they take off. The network used by GRTgaz has four balancing zones (North, West, East, South) while TIGF's network constitutes a single balancing zone. The balancing zones are made up of exit zones defined by the delivery points attached to them. There are plans to cut back the number of GRTgaz zones to two (North and South) in 2009, with the current North, West and East zones being merged into a single North zone.

7 entry/exit points and 5 balancing zones

Dunkirk

Entry
Exit
Entry or exit point
Methane terminal
Balancing zone border
Main transmission network

[204] Order of 25 May 2005 defining the balancing zones for natural gas transmission networks.



311. The transmission network carries high calorific value gas (H gas) into each of the five zones. In the North zone there is also a specific network for low calorific value gas (L gas). In view of the gas entry points into France, the transmission network has been designed on the basis of a reigning north-south flow.

312. Decisions on transmission tariffs are taken jointly by the Ministers for Energy and Economic Affairs, on a proposal from the CRE[205]. The transmission tariff for the main network is of the type entry/exit per balancing zone, which means that it depends only on the gas entry and exit points and not on the distance covered. On the regional network, however, the pricing system is linked to distance. Each tariff for use of the gas transmission networks includes rates for entry onto the main network, rates for exit from the main network, where appropriate, rates for linkage between balancing zones, rates for transmission on the regional network and delivery rates[206]. Some eligible final customers are directly connected to the transmission system[207].

313. In 2004, in the Total/Gaz de France decision[208], the Commission had found that transmission tariffs in France were not homogenous because they implied zone entry and exit costs as well as the payment of a rate for links between zones. The Commission had also pointed out that transmission costs within each zone were not identical and that getting into the GSO zone (now TIGF zone) required concluding a specific contract with

[205] Article 7 of Law No 2003-8 of 3 January 2003 on the gas and electricity markets and energy public service.

[206] Decree No 2005-607 of 27 May 2005 on tariff fixing rules applicable to the use of natural gas transmission systems.

[207] Under the regulations applicable, a final customer consuming less than 5 GWh must be connected to the distribution network (Article 16 of Decree No 2004-251 of 19 March 2004). Consequently, only final customers consuming at least 5 GWh can be connected to the transmission system.

[208] COMP/ M. 3410, decision of 8 October 2004.

the operator of that zone. Lastly, the Commission had stated that physical congestion in France in practice made transmission over the whole country difficult.

314. In the context of Form CO, the parties do not share this analysis for the following reasons[209]. First of all, they state that in the last few years there has been no disruption of supply to customers due to network shortcomings. Secondly, the effect of distance on gas transmission has been significantly reduced by the introduction of an entry/exit pricing system and by the considerable drop in link costs in recent years. In addition, the drop in the number of tariff zones from seven to five in 2005 and in the number of network system operators following the unbundling of Total's and GDF's cross shareholdings, further contributed to relieving tension in the market. By 1 January 2009 the number of zones should be cut even further, from three to five. Lastly, the doubling of the Guyenne pipeline, which links the GRTgaz and TIGF systems, should in the near future increase the interconnection capacities between those systems.

315. Despite the arguments presented by the parties, transmission costs between zones are still very heterogeneous, as explained below.

316. First, the parties themselves admit that there is congestion on the transmission system when they say that 'the scale of link tariffs simply reflects the different degrees of physical congestion for getting from one zone to another'[210].

317. GRTgaz itself stresses in its investment plan that 'the existence of several balancing zones in GRTgaz's tariff scheme limits arbitrage opportunities between several sources of supply, both because of the congestion that can exist on the inter-zone links and the tariff surcharge linked to each zone'[211].

318. The CRE also stresses in its reply to the Commission's questionnaire that existing interconnection capacities, both within each network and between the two GRTgaz and TIGF networks, are not, as they are, sufficient to guarantee the transmission of natural gas efficiently throughout France. The CRE emphasises that 'the existence of potential congestion has led to the creation of balancing zones'[212].

319. Secondly, transmission tariffs are based on the costs of each operator, which implies that the transmission costs of GRTgaz and TIGF are not homogeneous. In this connection, entry and exit tariffs are not the same in summer and winter on TIGF's main network, whereas this distinction does not exist for GRTgaz's main network. In addition, a specific link tariff is charged to go from the GRTgaz to the TIGF network, which accounts for a large share of the total transmission cost. According to the calculations provided by the parties, the costs of this change-over accounts for over 50% of the cost of transmitting one MWh of gas between Dunkirk (North zone of GRTgaz) and

---

209 Form CO, p. 142.

210 Form CO, p. 142.

211 The parties' e-mail reply dated 1 August 2006 (No 14319) – Ten year investment plan –indicative scenario for the period 2006-15, presented at the meeting of the Board of Directors on 16 June 2006.

212 The CRE's reply to the Phase I questionnaire. E-mail dated 7 August 2006 (No 14565), question 32.

Toulouse (TIGF zone)[213]. The share of this link tariff is even higher in the case of transmitting gas from another zone of GRTgaz to the TIGF zone.

320. Thirdly, within the actual GRTgaz zone, link tariffs between zones differ widely, with the highest tariff almost nine times higher than the lowest[214]. Link tariffs between two zones also differ widely depending on the direction of the link[215].

321. These differences in transmission tariffs (between TIGF and GRTgaz zones and also between GRTgaz zones) mean that transmission costs account for a very different share of the price of gas depending on the origin of the gas point of entry. For example, the CRE calculated the share of the average transport cost in the price of one MWh of gas transmitted to the South zone (GRTgaz) and the South-West zone (TIGF), which border one another, according to the entry point of the gas into France[216]. As can be seen from the table below, for the same zone of origin, the transport cost/gas price ratio is significantly higher for transmitting the gas into the South-West zone than into the South zone: the ratio given is from 45% (gas from the North zone) to 86% (gas from the West zone) higher than for the South-West destination zone. Similarly, for the same destination zone, the ratio in question differs considerably according to the zone of origin.

Share (as % of gas price) of the average cost of transmitting one MWh[217]

Transmission zone	Gas entry point on the transmission system				
	Dunkirk (North)	Taisnières (North)	Obergailbach (East)	Montoir (West)	Fos (South)
South	6.2	6.2	5.3	5.1	3.5
South-West	9	9	8.1	9.5	6.3

Source: CRE

322. Fourthly, even if there are plans to increase certain interconnection capacities between the TIGF and GRTgaz systems, these new capacities will not come on stream before

213 Form CO, p. 143. On the basis of a total transmission cost of €661.98/MWh/day per year from Dunkerque to Toulouse, the cost of the switch from the GRTgaz system to the TIGF system is €354.96/MWh/day per year.

214 See the opinion of the Ministry of Economic Affairs, Finance and Industry of 27 May 2005 on the tariffs for use of natural gas transmission systems resulting from the CRE proposal. The tariff for the link between the East and West zones to the South zone is €146.88/MWh/day per year, whereas it is €29.40/MWh/day for the East and West zones to the North zone.

215 For example, the liaison tariff from the East zone to the South zone is €146.88€/MWh/day per year, whereas it is €29.40 €/MWh/day per year from the South zone to the East zone.

216 The CRE's reply to the Phase II questionnaire, e-mail dated 7 August 2006 (N° 14565), question 11.

217 Transmission costs represent an average and include the cost of regional transmission to the final customer. The price of gas used by the CRE is €25/MWh. It is a delivery at site price, which therefore includes the cost of transmission.

2008 2009. Furthermore, even after this date, maintaining three tariff zones (two GRTgaz zones and one TIGF zone) will continue to have an impact on the price of gas transmission.

323. It should be noted that the parties did not discuss the above arguments put forward by the Commission both in the Article 6(1)(c) decision and in the statement of objections, and limited themselves to referring the Commission to their position set out in Form CO.

A.3.2.2 Distribution

324. Gas distribution involves moving gas over short distances using smaller diameter pipes than for transmission and operating at low pressure.

325. According to the CRE, some 11 million consumers are connected to distribution systems. These customers are supplied by 23 distribution system operators. At national level, GDF's system supplies over 96% of gas consumption, while the Gaz de Bordeaux and Gaz de Strasbourg systems each supply some 1.5% of gas consumption. The 20 other distribution system operators share less than 1% of this consumption. Each of the operators has a monopoly over the zone served by its distribution system.

326. Decisions on tariffs are taken jointly by the Ministers for Economic Affairs and Energy on a proposal from the CRE[218]. Tariffs are identical for a single distribution system operator's whole network. The tariff structure is common to all the distribution system operators, each tariff option depending on the final customer's consumption profile. Each option includes an annual subscription, a rate proportional to the amount consumed and, where appropriate, a rate proportional to the daily capacity subscribed.

A.3.2.3 Storage

327. Underground storage facilities are used to adjust supplies, which are regular over the year, to consumption by final customers, which is irregular and generally focused on the winter period. Storage facilities are therefore mainly used to stock the gas in summer and release it in winter. They make it possible to meet demand in very cold weather. They therefore play a key role in the security of supply and flexibility that all suppliers must offer. They are therefore essential infrastructure for the smooth running of the natural gas market.

328. There are two categories of gas storage in France: storage in aquifers and storage in salt caverns. Large volumes of gas can be stored in aquifers and these facilities are used to cover base loads throughout the winter. Gas stored in salt caverns is used for demand surges; their storage capacity is smaller and they are therefore more suited to meeting needs caused by cold peaks in winter.

329. The Department of Large Infrastructures (DGI) of GDF, and TOTAL Infrastructures Gaz France (TIGF), a subsidiary of TOTAL, are the only two storage operators in France. GDF operates 13 sites all over France, with the exception of the South-West. TIGF operates two sites in the South-West. Only GDF operates sites in salt caverns, of which there are three. GDF also manages France's only L gas storage site (aquifer). According

[218] Article 7 of Law No 2003-8 of 3 January 2003, cited above.

to the parties, the storage capacities marketed by GDF represent almost 79% of total storage capacities marketed in France**.**

330. The tariffs and general conditions of use of storage facilities are not regulated but fixed by the operators. The CRE therefore has no regulatory power in this field.

331. GDF storage services are marketed in the form of physical access to six storage groups: Centre (3 sites), Ile de France North (3 sites), Ile de France South (3 sites), Lorraine (1 site), Salins South (3 sites in salt caverns) and Picardy (1 site for L gas).

332. For the [...]* site, which is also owned and managed by the DGI, there is a specific security and flexibility contract with GRTgaz. Storage contracts last for one year (from 1 April year n to 31 March year n+1, with reservations made in February of year n). Since 1 April 2006, it is also possible to have access to capacities over a shorter period (one day). Each of these groups is connected (via one or more storage transmission interface points) to only one balancing zone, except for the Centre group which serves both the West and South zones.

333. Access to TIGF's storage infrastructure is possible from the South-West balancing zone.

334. Each balancing zone is not connected to the same storage groups, except for the West and South zones, which both depend on the Centre group.

335. However, under the GDF's provisional rules of access to storage, it is possible to reserve, within certain limits, storage capacities in a balancing zone other than where the customers are located[219]. Similarly, under TIGF's provisional storage allocation rules, it is possible to reserve storage capacities for needs outside the South-West zone, but priority is none the less given to requests corresponding to that zone's needs[220].

336. The provisional rules drawn up by GDF and TIGF have been replaced by those laid down in Decree No 2006-1034 of 21 August 2006 and should therefore be implemented as of storage year 2007/2008.

A.3.2.4 Methane terminals

337. Methane terminals are gas infrastructures that receive LNG and regasify it for injection into the natural gas transmission system. There are currently two methane terminals in France, the Fos Tonkin terminal at Fos-sur-Mer, near Marseille, and the Montoir terminal, near Saint-Nazaire. According to the CRE, these terminals receive about a quarter of the natural gas consumed in France. These infrastructures are owned and managed by GDF (via the DGI). In addition, GDF has begun building a third methane terminal at Fos-Cavaou, which should come on stream at the end of 2007. There is provision for Total to have an option to purchase some 30% of the capital of the

219 Provisional principles for allocating storage capacities (24 December 2004).

220 Rules for allocating storage capacities (9 May 2005). TIGF has, however, indicated that 'having had, until 31 March 2006, available capacity, all the requests by shippers prior to March 2006 have been honoured according to the 'first come, first served' rule, without recourse to the priorities system described in the capacity allocation rules' (see reply dated 18 July 2006 to the Commission's questionnaire No 13583)

company that will run this terminal, but according to the parties, GDF will have sole control of this company.

338. Decisions on tariffs are taken jointly by the Ministers for Economic Affairs and Energy on a proposal from the CRE[221]. The tariff for use of the terminals includes a fixed rate per vessel, a rate proportional to the quantities discharged and a rate proportional to the length of use of LNG storage facilities.

339. The Fos terminal is located in the South balancing zone, while the Montoir terminal is in the West zone. There are limits to the substitutability of the two terminals because the maximum size of gas carriers that can access Montoir is 200 000 m³, whereas it is only 75 000 m³ for gas carriers that can access Fos.

A.3.3 Relevant markets

340. In keeping with the Commission's decision-making practice, the different activities associated with the gas sector can be separated into different relevant markets, ranging from exploration to supply to the final consumer.

341. According to the Commission's decision-making practice[222] the following activities constitute separate product markets: (i) exploration/production of natural gas; (ii) gas wholesale supplies, (iii) gas transmission (via high pressure systems), (iv) gas distribution (via low pressure systems), (v) gas storage (vi) gas trading, (vi) gas supply, comprising several separate markets.

342. In so far as the notified transaction does not have any effects on the gas infrastructures markets, a precise definition of markets is not necessary for the purposes of this decision. However, the situation concerning ownership, management and rights of use of the different infrastructures described above will be taken into account in the analysis of the effects of the merger on the downstream markets.

343. On the basis of the Commission's decision-making practice referred to above and the market survey, and in accordance with what is stated above with regard to Belgium, the Commission therefore considers that the product markets to be analysed for the purposes of this transaction are the following gas supply markets: (i) gas supply to large industrial customers; (ii) gas supply to small industrial and commercial customers; (iii) gas supply to gas-fired power plants; (iv) gas supply to dealers (local distribution companies); (v) gas supply to household customers.

H gas /L gas distinction

344. As regards France, the parties do not propose to distinguish separate markets for the supply of L gas[223] and H gas and do not discuss the relevance of such a distinction. In

---

221 Article 7 of Law No 2003-8 of 3 January 2003, cited above.

222 See: COMP/M.3440 *EDP/GDP/ENI*, of 9 December 2004, COMP/M.3696 *E.ON/MOL*, of 12 December 2005 and COMP/M3886 *Dong/Elsam/Energi E2*, of 15 March 2006.

223 In France, L gas is called 'B gas'. However, the term 'L gas' will hereafter be systematically used instead of 'B gas'.

their observations on the Article 6(1)(c) decision and on the statement of objections, the parties did not discuss the relevance of this distinction.

345. For Belgium[224], the Commission did distinguish separate markets for L gas and H gas. For the same reasons as set out above for Belgium, this distinction is also relevant for France[225].

Distinction of eligible customers who have exercised eligibility

346. In France, eligible customers can choose whether or not to exercise their eligibility. Exercising eligibility transfers them from regulated tariffs to free tariffs, with no possibility of going back to regulated tariffs. As a result, substitutability between the supply of gas at regulated tariffs and supply of gas at free tariffs only works in one direction.

347. The parties consider in Form CO, however, that a segmentation distinguishing eligible customers that have exercised their eligibility is not necessarily relevant since the rate of exercising eligibility is rising very quickly with the advent of the full opening-up of the market.

348. It should be noted, however, that, on 1 January 2006, almost half the gas supplied to eligible customers was still at regulated tariffs and that eligible sites supplied at regulated tariffs at that time represented almost 90% of the total number of eligible sites[226].

349. According to current information, it is also seems likely that regulated tariffs will continue to exist in France after 1 July 2007, the date when the gas and electricity markets will be completely opened up. Indeed, in June this year, the Government presented a bill to the National Assembly concerning the energy sector which, after the complete opening-up of the markets, provides for the maintenance of regulated tariffs where a customer has not exercised its eligibility[227].

350. It should be noted also, that, in the case of electricity, to which the same principle of exercise of eligibility applies, the French Competition Council recently estimated that

---

224 In particular, Decision COMP/M. 3318 *ESC/Sibelga* of 19 December 2003.

225 The relevance of such a distinction was confirmed by the CRE in its reply to the Commission's questionnaire (the CRE's reply to the Phase I questionnaire, cited above – question 22).

226 Electricity and gas market observatory of the 4th quarter 2005, published by the CRE.

227 Draft law on the energy sector, registered with the Presidency of the National Assembly on 28 June 2006. Article 2 of this draft law supplements Article 3 of Law No 2003 8 of 3 January 2003 on the gas and electricity markets and energy public service with the following indent: 'If a customer has not exercised the right to obtain natural gas from a supplier of his choice, he shall continue to benefit from the regulated sales tariffs for natural gas mentioned in Article 7 of this Law'. By 3 October 2006, the National Assembly had adopted a draft law containing provisions on these lines, for both household and non-household final consumers (see the document 'Draft law adopted by the National Assembly on first reading, after a declaration of urgency, on the energy sector, Article 4).

the supply of electricity to eligible customers that had exercised their eligibility could constitute a relevant market[228].

351. The CRE also considers that a market of eligible customers that have exercised their eligibility in respect of gas supply should also be differentiated: '*Basically, eligible consumers that have exercised their eligibility and eligible consumers that have not done so have the same consumption profile (at a given voltage). It might therefore seem logical to group them together in the same market. However if the SSNIP test (Small Significant Non-transitory Increase in Price) is applied, it is clear that the two markets are different, since the exercise of eligibility is not reversible. If there is a 'small, significant, non-transitory' increase (5% or 10%) in the price paid by the eligible consumers who have left the tariff, these customers could not therefore return to the tariff.* ***It is therefore relevant to differentiate, among eligible consumers, the market of those that have exercised their eligibility'***[229].

352. It should be noted that in their observations on the Article 6(1)(c) decision and on the statement of objections, the parties did not discuss the above arguments put forward by the Commission and limited themselves to referring the Commission to their position set out in Form CO.

353. Hence, in the light of the above, the Commission considers that the relevant markets to be analysed in respect of gas supply are the markets for the supply of gas to eligible customers that have exercised their eligibility.

354. For the purposes of this Decision, it is not necessary to define a market of eligible customers that have not exercised their eligibility since, by definition, these customers are served by the incumbent supplier (GDF, Total or one of the LDCs), which is therefore de facto a monopoly. Were a customer to decide to exercise its eligibility, it would leave this hypothetical market to join the market of customers that have exercised their eligibility. In any case, for the purposes of this Decision, this question can be left open since in a hypothetical market of eligible customers that have not exercised their eligibility, competition would not exist between incumbent suppliers.

A.3.3.1 Relevant product markets

A.3.3.1.1 Markets for the supply of gas to large industrial customers (that have exercised their eligibility) and for the supply of gas to small industrial and commercial customers (who have exercised their eligibility)

355. In line with the Commission's decision-making practice, the parties consider that a distinction should be drawn between the supply of gas to large industrial customers and the supply of gas to small industrial and commercial customers.

356. The parties have taken a threshold of 50 GWh in terms of annual consumption of gas as the criterion for distinguishing between large and small industrial customers. In their view, with this threshold it is possible to draw a distinction between two categories of

---

228 Opinion No 05-A-23 of 5 December 2005 on a system designed to enable electricity-intensive industries to benefit from special conditions for the purchase price of electricity.

229 The CRE's reply to the Phase I questionnaire, cited above – question 18.

homogeneous customers. Large customers are 'top drawer' customers that have specific characteristics and needs, which call for a complex offer. Very often they are multi-site customers that require great flexibility and their own dedicated contact person. Often the gas offer proposed to them also includes specialist energy advice. Small customers get a more standardised offer. Lastly, the parties stress that from a purely operational point of view, customers consuming more than 50 GWh are generally connected to the transmission system and those consuming less are in most cases connected to the distribution system. According to the parties, this threshold therefore corresponds to the effective demarcation between customers connected to the transmission system and customers connected to the distribution system[230].

357. Although several third parties have confirmed this threshold, including gas suppliers[231], others have proposed different thresholds, or even segmentation based on more than two thresholds. The Commission has not, however, found any convergence among the proposals for alternative thresholds, except for the threshold of 5 GWh[232]. The CRE, for its part, has proposed a similar threshold, namely 4 GWh, which in its view makes it possible 'to distinguish, on the one hand, industrial uses and high-power boilers and, on the other, uses directed more at small professional customers or boilers used in collective accommodation'[233].

358. The parties have told the Commission that they were not in a position to provide estimates of the volumes of gas sold individually by their competitors on the basis of a consumption threshold of 5 GWh. They stressed that this threshold does not reflect any commercial reality and that consequently the sections of GDF and Distrigaz responsible for marketing gas do not conduct any studies and so do not have any public data on the basis of which a breakdown could be made of estimated volumes of sales by their competitors[234].

359. The Commission has, however, received from the parties and their competitors figures for volumes of gas sold to eligible customers (distinguishing between sales to customers that have exercised their eligibility) on the basis of thresholds of 50 GWh and 5 GWh. These data show that, in the markets for the supply of gas to large customers, GDF's market shares are less high with a threshold at 50 GWh than with a threshold at 5 GWh. By the same token, the opposite effect is found in markets for the supply of gas to small customers. In addition, in so far as Distrigaz does not supply gas to small customers

---

230 This threshold of 50 GWh is different from that adopted for Belgium, namely 12 GWh. The parties justify the 12 GWh threshold by the fact that it is to be found in the Belgian legislation on the organisation of the gas market, notably as regards the timetable for liberalising the gas supply market in Belgium. That is not the case with France.

231 See in particular the replies to question 19 of the Phase I questionnaire cited above: from BP (e-mail of 5 June 2006 – No 10867), E.ON (fax of 6 June 2006 – No 10810) and Altergaz (e-mail of 31 May 2006 – No 10617).

232 The threshold of 5 GWh is mentioned by Total (fax of 4 August 2006 – No 14549), EDF (e-mail of 2 June 2006 – No 10702), Gas Natural (fax of 6 June 2006 – No 10776), and Dalkia (letter of 31 May 2006 - N° 10444) in their reply to question 19 of the Phase I questionnaire, cited above.

233 The CRE's reply to the Phase I questionnaire, cited above – question 20.

234 Parties' e-mail reply of 25 July 2006 (No 13931).

consuming less than 5 GWh, and where the bulk of its sales are to large customers consuming more than 50 GWh, its market shares are a little higher on the basis of a segmentation with a threshold of 50 GWh. Finally, the combined shares of GDF and Distrigaz show little difference from one segmentation to the other and the Commission has found that the conclusions of the analysis are identical whatever segmentation is used for these markets.

360. In the light of the above, the precise definition of the threshold differentiating between the markets for the supply of large customers and that for the supply of small customers can be left open since the competition analysis does not vary according to the threshold chosen.

361. However, for the purposes of the analysis below, since both parties were able to provide more accurate data for markets segmented with a threshold of 50 GWh, the markets for the supply of gas to (i) large industrial customers and (ii) small industrial and commercial customers have been examined on the basis of a consumption threshold set at 50 GWh per year.

A.3.3.1.2 Market for the supply of gas to electricity producers

362. For the same reasons as given in section A.2.3.1.4 concerning the Belgian market, the market for the supply of gas to electricity producers also differs in France from the other gas supply markets, because of different competitive conditions.

363. In France electricity is generated from gas in two types of plant: CCGTs and cogenerators.

364. However, as highlighted by the CRE[235], in terms of competitive conditions, the supply of gas to cogenerators is close to the supply of gas to other industrial customers. As regards uses, cogeneration responds to an industrial need to produce heat. In addition, as for industrial customers, natural gas is, for cogeneration, in competition with heavy fuel oil. Lastly, supply contracts are similar to industrial contracts in terms of duration.

365. The CRE points out that, by contrast, the supply of gas to CCGTs does not generally respond to an industrial need and that the development of the CCGTs goes together with medium and long-term purchase contracts.

366. Consequently, only the supply of gas to CCGTs belongs to the market for the supply of gas to electricity producers.

367. In previous decisions, the Commission raised the question whether a distinction should be drawn between the supply of gas to CCGTs, according to the different types of CCGT. However, for the purposes of this Decision, the question can be left open since the competition analysis is the same, namely the elimination of the potential best-placed competitor.

368. Currently in France there is only one CCGT, the DK6 power plant owned and operated in Dunkirk by GDF. GDF supplies all the gas that this power plant needs. At present there is therefore no market for the supply of gas to CCGT, in France.

[235] The CRE's reply to the Phase I questionnaire, cited above – question 21.

369. Several operators have, however, publicly announced the commissioning of CCGTs in the next few years, between 2008 and 2010. Apart from GDF and Suez (via Electrabel) which plan to do this, the CRE has publicly announced that Poweo, SNET, and EDF plan to put one or more CCGTs into service between 2008 and 2010.

370. For the purposes of this analysis, the market for the supply of gas to electricity producers will therefore be examined.

A.3.3.1.3 Market for the supply of gas to household customers

371. In its previous decisions, the Commission examined whether there was a separate product market for the supply of gas to household customers but left the question open[236].

372. As indicated above, household customers are not currently eligible in France, their sole supplier of gas being either GDF, or one of the 22 LDCs. However, they will become eligible on 1 July 2007, which will give them the possibility of choosing their supplier by exercising their eligibility.

373. Although the markets for the supply of gas to household customers in France are not yet open to competition, a prospective analysis must take into consideration the likely effects of the notified transaction in these markets whose liberalisation is sure to happen in less than eight months from the date of this Decision.

374. Therefore, for the purposes of this analysis, the market for the supply of gas to household customers will be examined.

A.3.3.1.4 Market for the supply of gas to dealers

375. The local distribution companies (LDCs) mentioned above are dealers that buy their gas either from GDF or from Total.

376. These customers buy large volumes of gas that they re-sell either to eligible customers or to (non-eligible) household customers connected to the distribution networks.

377. A distinction should be drawn between this market and the other markets that supply gas to eligible customers, since the dealers referred to above supply, in particular, non-eligible customers and therefore have a public service mission which implies obligations as regards continuity of supply. In addition, the adjustment needs of dealers are also different from those of eligible customers, especially industrial ones, as the consumption of gas by non-eligible final consumers is seasonal, heavily affected by weather conditions, which is much less the case for industrial customers whose gas needs are more constant throughout the year.

378. Although Distrigaz is absent from this market, the information made available to the Commission (see below) shows that it intends to enter it.

379. Therefore, for the purposes of this analysis, the market for the supply of gas to dealers will be examined.

[236] See decision of 15 March 2006, COMP/M.3886 (*DONG/Elsam/Energi E2*).

A.3.3.2 Relevant geographic markets

380. In the abovementioned Total/GDF case, the Commission had envisaged the supply of gas to eligible customers in the GSO zone (now TIGF zone) as constituting a separate geographic market, mainly because of heterogeneous conditions of competition between the different balancing zones.

381. In this case, as stated above, the Commission has found that at present, conditions of competition are heterogeneous between the different balancing zones, mainly reflected by the transmission tariffs for natural gas. In this connection, the share (in terms of quantity of gas consumed) of eligible customers that have exercised their eligibility is heterogeneous between the balancing zones: on 1 January 2006, this share was 60% in the North zone, 67% in the East zone, 34% in the West zone, 47% in the South zone and 33% in the South-West zone[237]. As a result, the market shares of alternative suppliers, including Distrigaz, vary widely from one zone to the other (see below), which is the indicator that the conditions of competition differ widely between zones.

382. The CRE has also stated that: '*the conditions of competition are not homogeneous in France. Suppliers have two possibilities for getting their gas into the country: by pipeline at the entry points in the north and east of France (Dunkirk, Taisnières, Obergailbach, Oltingue), or by methane carrier at the south and west entry points (Fos and Montoir).*

The pricing system for transmission set up on the French market is of the 'entry-exit' type with link costs between the five balancing zones that exist at present.

In a developing market, the use of methane terminals is not an appropriate solution for new small-scale entrants, since a shipment is equivalent to about 1 TWh, to be disposed of in a month, which is considerably higher than the consumption of customers of new entrants and the storage capacities they have.

Alternative suppliers are therefore faced with a high transmission costs to make an offer to customers located in the South, West and South-West zones, from their entry points located in the north and the east.

The level of competition in the south, west and south-west of France is therefore much lower than in the east and the north.

Zones that do not have entry points by pipeline have different competitive structures:

- *In the South zone, there is a gas release programme*
- *In the South-West zone, there is a gas release programme and the cost of transmission is higher (two zones have to be crossed from the entry points)*
- *In the West zone, there is no gas release*

At first sight, each balancing zone therefore constitutes a relevant market'[238]**.**

---

[237] Electricity and gas market observatory (4th quarter 2005) published by the CRE.

[238] The CRE's reply to the Phase I questionnaire, cited above – question 42.

383. The existence of heterogeneous competitive conditions between the different balancing zones has also been confirmed by the Commission's market survey[239].

384. It should be noted that in their observations on the Article 6(1)(c) decision and on the statement of objections, the parties did not discuss the above arguments put forward by the Commission and limited themselves to referring the Commission to their position set out in Form CO in which they contested the existence of significantly different conditions of competition between the balancing zones.

385. The Commission considers that, in view of the current heterogeneous competitive conditions between the different balancing zones, mainly reflected by the transmission tariffs for natural gas, each balancing zone constitutes a separate geographic market in terms of gas supply to (i) large industrial customers, (ii) small industrial customers, (iii) household customers, (iv) dealers and (v) electricity producers.

A.3.4 Competition analysis

Introduction

386. The Commission considers that the notified merger would significantly impede effective competition in the various French markets for the supply of gas, particularly because of the strengthening of GDF's dominant position.

387. All the operators active in the different supply markets must obtain gas supplies. The consequences of the transaction on the possible supply sources in France would therefore have an impact on the supply markets downstream.

388. France imports almost 97% of its gas supplies. The remaining 3% comes from French production in Aquitaine, run by Total, but this has been declining since the beginning of the 1980s.

389. According to data provided by the parties, GDF was responsible for nearly [80-90]*% of H gas imports and [90-100]*% of L gas imports into France in 2005. Suez accounted for almost [0-5]*% of H gas imports and [0-5]*% of L gas imports.

390. The notified merger would reinforce GDF's privileged position as regards access to gas. The parties would then have access to:

- [90-100]*% of the H gas and [90-100]*% of the L gas imported into France;

- [90-100]*% of the long-term import contracts for H gas and [90-100]*% for L gas.

391. In this context, the notified merger would strengthen GDF's dominant position: firstly, GDF would incorporate Suez's French activities (in particular elimination of current competition) and, secondly, the transaction would eliminate the strong competitive pressure exerted thus far by Suez (via Distrigaz), including potential competition by it in respect of certain markets which are to liberalise or to develop in the near future. Suez is one of the main alternative operators to have come onto the French gas supply markets and has played a key role in their liberalisation in the face of the two French incumbent

[239] See in particular the replies to question 31 of the Phase I questionnaire from the following operators: Altergaz, BP, EDF, E.ON, Gas Natural, Total cited above, as well as Poweo (fax of 7 June 2006, No 10883).

operators, GDF and Total (incumbent operator in the south-west of France). Moreover, Suez has a combination of major advantages that gives it strong growth potential.

392. As explained in detail in sections A.3.4.1 and A.3.4.2, because of the existence of high barriers that already make entry into the French gas market difficult, it is likely that very few competitors would be able to take over the role of Suez and thus compensate for the competitive pressure that would be eliminated as a result of the notified merger.

A.3.4.1 Horizontal effects

A.3.4.1.1 Markets for the supply of gas to large industrial customers (that have exercised their eligibility) and for the supply of gas to small industrial and commercial customers (that have exercised their eligibility)

393. The parties estimated the volumes and corresponding market shares for the various operators for the four GRTgaz zones. They communicated this information during Phase I of the procedure and had to revise some of it during Phase II. However, as regards the markets for the supply of gas to small industrial customers who have exercised their eligibility (consumption of less than 50 GWh), they consider that the market shares communicated greatly underestimate the strength of their competitors, in that they were evaluated on the basis of estimates of volumes lost by GDF in each zone. The parties therefore stress that these estimates do not include the volumes for Total or local distribution company (LDC) customers who have exercised their eligibility.

394. The Commission has obtained from the competitors of the parties the volumes of gas they supplied to large and small customers who have exercised their eligibility for each zone. It was then able to compare actual data with the parties' estimates. In general terms, the Commission found that the parties had overestimated the size of the markets, which in some cases led to a significant overestimation of the strength of the parties' competitors.

395. The parties did not contest this observation. They cannot, therefore, as they did in their observations on the statement of objections, be able to rely on some of their estimates of volumes and market shares to describe the positions of the competitors of GDF and Distrigaz[240]. In particular, as regards the markets for the supply of H gas to small industrial customers, they cannot use their estimates to claim that the positions of Distrigaz are still much more modest that those of EDF[241] or to deduce from them differences in position between Total and Distrigaz[242].

396. It is clear from the actual data gathered from competitors that, with the exception of supplying gas to large customers in the South-West zone, GDF is in a dominant position in all the markets with a market share of at least 60% and up to more than [90-100]*%, depending on the zone and the market. In the above markets, the notified merger would strengthen GDF's dominant position – something which the parties do not dispute in their observations on the statement of objections.

---

[240] Points 343 to 348 and 363 to 367 of the reply to the statement of objections.

[241] Point 365 of the reply to the statement of objections.

[242] Point 367 of the reply to the statement of objections, as regards the East zone.

397. The tables below show the estimates of the volumes and market shares communicated by the parties ('Parties' column) and, in some cases, a market share threshold for the parties or their competitors ('Survey' column), where there was a difference of more than 5 points with the market share estimated by the parties.

1) North zone

L gas

398. The market survey showed that the sales volumes and market shares of alternative suppliers other than Distrigaz, ENI and EDF were much lower than those estimated by the parties. Thus, in the market for supplying L gas to large industrial clients, the combined market share of EDF and ENI is less than 5% (the combined market share of GDF and Distrigaz being more than [90-100]*%), while the parties estimated it to be [10-15]*%. Consequently, the parties' claim that EDF and particularly ENI could, separately, play a much greater role in driving competition than Distrigaz[243] is untenable.

	Large customers			Small customers		
North L	Parties		Survey	Parties		Survey
GDF	[...]*	[80-90]*%	>[90-100]*%	[...]*	[80-90]*%	>[90-100]*%
SUEZ (DISTRIGAZ)	[...]*	[0-5]*%		[...]*	[0-5]*%	
GDF + SUEZ	*[...]**	*[80-90]*%*	*>[90-100]*%*	*[...]**	*[80-90]*%*	*>[90-100]*%*
TOTAL	[...]*	[0-5]*%		[...]*	[0-5]*%	
ENI	[...]*	[5-10]*%		nd	nd	
E.ON	[...]*	[0-5]*%		nd	nd	
BP	[...]*	[0-5]*%		nd	nd	
HYDRO ENERGY	[...]*	[0-5]*%		nd	nd	
WINGAS	[...]*	[0-5]*%		nd	nd	
EDF	[...]*	[0-5]*%		[...]*	[0-5]*%	
POWEO	[...]*	[0-5]*%		nd	nd	
ALTERGAZ	[...]*	[0-5]*%		nd	nd	
GAS NATURAL	[...]*	[0-5]*%		nd	nd	
IBERDROLA	[...]*	[0-5]*%		nd	nd	
ELECTRICITE DE STRASBOURG	[...]*	[0-5]*%		nd	nd	
Others (to be defined)	[...]*	[0-5]*%		[...]*	[5-10]*%	[0-5]*%
Total market	**14.73**	**100.0%**	**100.0%**	**7.93**	**100.0%**	**100.0%**

[243] Point 343 to 345 of the reply to the statement of objections.

399. In both markets, GDF has a virtual monopoly and is therefore in a dominant position, as the number of alternative operators is very small.

400. The transaction would strengthen GDF's dominant position by eliminating:

- one of the three alternative suppliers of L gas;

- the only competitor of GDF which imports L gas into France, since GDF and Suez (via Rhodigaz) reserved [90-100]*% and [0-5]*% of gas capacity at the Taisnières point of entry in 2005. In this regard, the notified transaction would result in the elimination of the operator best placed to enter the French L gas market. L Gas can only be brought into France from the Netherlands via Belgium. As mentioned above in the analysis of the Belgian markets, Suez is the only gas operator other than GDF which imports L gas into Belgium.

- one of only two buyers (the other is ENI) of L gas on the relevant gas exchange point[244], on which GDF is the sole seller.

401. Therefore, once the transaction is completed, the competitors of the new entity would depend on it entirely for their supply of L gas.

402. Consequently, the Commission considers that the notified transaction would have the effect of significantly impeding competition by strengthening GDF's dominant position in the markets for supplying L gas to (i) large industrial customers and (ii) small industrial customers.

H gas

403. The market survey showed that GDF's market share was significantly higher than that estimated by the parties, as the volumes declared by several competing suppliers were much lower than those estimated by the parties.

[244] Since 2004, each balancing zone includes a gas exchange point where users can trade their excess gas. Gas exchange points are in the early stages of activity and their solvency is very weak. In its response to the Phase I and II questionnaires mentioned above, the CRE emphasised that gas exchange point operation was not fully satisfactory because of the low volumes being exchanged and the lack of a resulting price signal.

North H	Large customers			Small customers		
	Parties		Survey	Parties		Survey
GDF	[...]*	[50-60]*%	> [60-70]*%	[...]*	[40-50]*%	> [90-100]*%
SUEZ (DISTRIGAZ)	[...]*	[10-15]*%		[...]*	[0-5]*%	
GDF + SUEZ	*[...]**	*[60-70]*%*	*> [70-80]*%*	*[...]**	*[40-50]*%*	*> [90-100]*%*
TOTAL	[...]*	[20-30]*%	< [10-20]*%	[...]*	[0-5]*%	
ENI	[...]*	[0-5]*%		n/a	n/a	
E.ON	[...]*	[0-5]*%		n/a	n/a	
BP	[...]*	[0-5]*%		n/a	n/a	
HYDRO ENERGY	[...]*	[0-5]*%		n/a	n/a	
WINGAS	[...]*	[0-5]*%		n/a	n/a	
EDF	[...]*	[0-5]*%		[...]*	[0-5]*%	
POWEO	[...]*	[0-5]*%		n/a	n/a	
ALTERGAZ	[...]*	[0-5]*%		n/a	n/a	
GAS NATURAL	[...]*	[0-5]*%		n/a	n/a	
IBERDROLA	[...]*	[0-5]*%		n/a	n/a	
ELECTRICITE DE STRASBOURG	[...]*	[0-5]*%		n/a	n/a	
Others (to be defined)	[...]*	[0-5]*%		[...]*	[50-60]*%	> [0-5]*%
Total market	**55.4**	**100.0%**	**100.0 %**	**19.3**	**100.0%**	**100.0%**

404. The North zone, together with the East zone (see below), is one of the zones least closed to competition in terms of the supply of H gas to large customers. The explanation for this is the proximity of the Dunkirk and Taisnières entry points.

405. GDF is in a dominant position in both markets. The transaction would strengthen that position:

- in the market for supplying gas to large customers, by eliminating the first alternative supplier after Total. Although the parties emphasise that Total has a higher market share than Distrigaz[245], they do not dispute that the notified transaction would strengthen GDF's dominant position in this market.

- in the market for supplying gas to small customers, where GDF already has a virtual monopoly, by eliminating one of the very few alternative suppliers in that market.

[245] The parties claim that Total has a market share twice as high as that of Distrigaz (reply to the statement of objections, point 347). This is untrue, as Total's market share is less than 20% and that of Distrigaz is more than 10%.

2) East zone

406. The market survey showed that in the market for supplying gas to small customers, GDF's market share was significantly higher than that estimated by the parties, as the volumes declared by several competing suppliers were much lower than those estimated by the parties.

East	Large customers			Small customers		
	Parties		Survey	Parties		Survey
GDF	[...]*	[50-60]*%		[...]*	[40-50]*%	> [90-100]*%
SUEZ (DISTRIGAZ)	[...]*	[30-40]*%		[...]*	[0-5]*%	
GDF + SUEZ	*[...]**	*[80-90]*%*		*[...]**	*[40-50]*%*	*> [90-100]*%*
TOTAL	[...]*	[0-5]*%		[...]*	[0-5]*%	
ENI	[...]*	[0-5]*%		n/a	n/a	
E.ON	[...]*	[0-5]*%		[...]*	[0-5]*%	
BP	[...]*	[0-5]*%		n/a	n/a	
HYDRO ENERGY	[...]*	[0-5]*%		n/a	n/a	
WINGAS	[...]*	[0-5]*%		n/a	n/a	
EDF	[...]*	[0-5]*%		[...]*	[0-5]*%	
POWEO	[...]*	[0-5]*%		n/a	n/a	
ALTERGAZ	[...]*	[0-5]*%		n/a	n/a	
GAS NATURAL	[...]*	[0-5]*%		n/a	n/a	
IBERDROLA	[...]*	[0-5]*%		n/a	n/a	
ELECTRICITE DE STRASBOURG	[...]*	[0-5]*%		n/a	n/a	
OTHERS (to be defined)	[...]*	[0-5]*%		[...]*	[40-50]*%	[0-5]*%
Total market	**25.3**	**100.0%**	**100.0%**	**9**	**100.0%**	**100.0%**

407. The East zone, where the eligibility rate is 67% (in volume), is the least closed to competition in the market for supplying gas to large customers. The reason for this is the proximity of the entry points at Dunkirk, Taisnières and Obergailbach.

408. In this market, Suez is the first alternative supplier, with a market share of 30%, behind GDF, which remains by far the dominant operator.

409. GDF is in a dominant position in both markets. The transaction would strengthen GDF's dominant position:

- in the market for supplying gas to large customers, by eliminating the first alternative supplier to gain significant market shares in this zone, and the one best placed to compete with GDF. After the merger, GDF would retain its virtual monopoly in this market.

- in the market for supplying gas to small customers, where GDF has a virtual monopoly, by eliminating one of the very few alternative suppliers.

3) West zone

410. It emerged from the market survey that Total's market shares were grossly overestimated by the parties, both for the market for supplying gas to large customers and for the market for supplying gas to small customers.

West	Large customers			Small customers		
	Parties		Survey	Parties		Survey
GDF	[...]*	[40-50]*%	> [60-70]*%	[...]*	[70-80]*%	> [90-100]*%
SUEZ (DISTRIGAZ)	[...]*	[5-10]*%		[...]*	[0-5]*%	[0-5]*%
GDF + SUEZ	*[...]**	*[50-60]*%*	*> [60-70]*%*	*[...]**	*[70-80]*%*	*> [90-100]*%*
TOTAL	[...]*	[40-50]*%	< [30-40]*%	[...]*	[15-20]*%	< [0-5]*%
ENI	[...]*	[0-5]*%		n/a	n/a	
E.ON	[...]*	[0-5]*%		n/a	n/a	
BP	[...]*	[0-5]*%		n/a	n/a	
HYDRO ENERGY	[...]*	[0-5]*%		n/a	n/a	
WINGAS	[...]*	[0-5]*%		n/a	n/a	
EDF	[...]*	[0-5]*%		[...]*	[0-5]*%	
POWEO	[...]*	[0-10]*%		n/a	n/a	
ALTERGAZ	[...]*	[0-5]*%		[...]*	[0-5]*%	
GAS NATURAL	[...]*	[0-5]*%		n/a	n/a	
IBERDROLA	[...]*	[0-5]*%		n/a	n/a	
ELECTRICITE DE STRASBOURG	[...]*	[0-5]*%		n/a	n/a	
OTHERS (to be defined)	[...]*	[0-5]*%		[...]*	[0-5]*%	[0-5]*%
Total market	**6.85**	**100.0%**	**100.0%**	**6.2**	**100.0%**	**100.0%**

411. The West zone is very closed to competition: there are few competitors and a very low eligibility rate (34% of volumes of gas consumed by all eligible customers).

412. In their observations on the Article 6(1)(c) decision, the parties contested the fact that GDF was in a dominant position in the market for supplying gas to large customers, affirming that GDF had a market share of about [50-60]*%, while Total had a market share of more than 40%[246]. The market survey showed that the parties' claim was unfounded: in reality, GDF has a market share of more than 60% and Total has a market

[246] Point 197 of the observations on the Article 6(1)(c) decision.

share of less than 30%. The parties did not dispute this fact in their observations on the statement of objections.

413. In both markets, GDF is in a dominant position in an area which is practically closed to competition. The merger would strengthen GDF's dominant position:

- in the market for supplying gas to large customers, by eliminating the first alternative supplier other than Total. It is noteworthy that Total's significant strength in this market is related to its acquisition from GDF of part of its customer base in this zone as a result of agreements on decreasing GDF and Total holdings in joint ventures in 2004 (LEGO agreements). In return for transferring part of its customer base, GDF supplies Total each year with volumes of gas. So, unlike Distrigaz, Total's position is in part due not to winning over a section of the customer base, but to an organised transfer of customers.

- in the market for supplying gas to small customers, where GDF has a virtual monopoly, by eliminating one of the very few alternative suppliers in that market.

4) North zone in 2009

414. As already indicated above, it is planned to merge the North, East and West balancing zones into a single North zone in 2009. The table below shows the combined data on H gas for the current North, East and West zones (the data for L gas remains unchanged as this gas is only available in the current North zone). It emerges from the market survey that Distrigaz is, after GDF, the first alternative supplier of gas to large industrial customers, in front of Total.

North zone in 2009	Large customers			Small customers		
	Parties		Survey	Parties		Survey
GDF	[...]*	[50-60]*%	> [60-70]*%	[...]*	[70-80]*%	> [90-100]*%
SUEZ (DISTRIGAZ)	[...]*	[15-20]*%		[...]*	[0-5]*%	
GDF + SUEZ	*[...]**	*[60-70]*%*	*> [70-80]*%*	*[...]**	*[70-80]*%*	*> [90-100]*%*
TOTAL	[...]*	[15-20]*%	< [15-20]*%	[...]*	[5-10]*%	
ENI	[...]*	[0-5]*%		n/a	n/a	
E.ON	[...]*	[0-5]*%		n/a	n/a	
BP	[...]*	[0-5]*%		n/a	n/a	
HYDRO ENERGY	[...]*	[0-5]*%		n/a	n/a	
WINGAS	[...]*	[0-5]*%		n/a	n/a	
EDF	[...]*	[0-5]*%		[...]*	[0-5]*%	
POWEO	[...]*	[0-5]*%		n/a	n/a	
ALTERGAZ	[...]*	[0-5]*%		n/a	n/a	
GAS NATURAL	[...]*	[0-5]*%		n/a	n/a	
IBERDROLA	[...]*	[0-5]*%		n/a	n/a	
ELECTRICITE DE STRASBOURG	[...]*	[0-5]*%		n/a	n/a	
OTHERS (to be defined)	[...]*	[0-5]*%		[...]*	[10-15]*%	[0-5]*%
Total market	**87.55**	**100.0%**		**22.01**	**100.0%**	**100.0%**

415. In the whole of the future North zone, GDF is in a dominant position in both markets. The transaction would strengthen GDF's dominant position:

- in the market for supplying gas to large customers, by eliminating the first alternative supplier in this zone. Moreover, it should be pointed out that the purpose of creating the new North zone in 2009 and planning an increase in the capacity of certain infrastructure in the transport network is to reduce congestion and the excessive costs associated with interzonal liaison. Creation of the new zone is therefore likely to contribute to the growth of competition. In view of its current position as first alternative supplier in the East (in front of Total) and second alternative supplier in the North (behind Total) and its other major strengths, Suez is one of the best placed competitors of GDF to encourage competition in this new zone, especially in the West, where competition and eligibility rates are weak. The merger between GDF and Suez would therefore also impede the expected growth of competition following creation of the new North zone in 2009;

- in the market for supplying gas to small customers, by eliminating one of the very few alternative suppliers in a market where GDF has a virtual monopoly

416. It is worthy of note that in their observations on the statement of objections, the parties did not dispute the Commission's analysis of the consequences of the notified transaction on the future North Zone.

5) South zone

417. The market survey showed that in the market for supplying gas to small customers, GDF's market share was significantly higher than that estimated by the parties, as the volumes declared by several competing suppliers were much lower than those estimated by the parties. Thus in this market GDF's market share is more than 90%, while Total's is less than 5%.

	Large customers			Small customers		
South	Parties		Survey	Parties		Survey
GDF	[...]*	[70-80]*%		[...]*	[50-60]*%	> [90-100]*%
SUEZ (DISTRIGAZ)	[...]*	[0-5]*%		[...]*	[0-5]*%	
GDF + SUEZ	*[...]**	*[70-80]*%*		*[...]**	*[50-60]*%*	*> [90-100]*%*
TOTAL	[...]*	[20-30]*%		[...]*	[10-15]*%	< [0-5]*%
ENI	[...]*	[0-5]*%		n/a	n/a	
E.ON	[...]*	[0-5]*%		n/a	n/a	
BP	[...]*	[0-5]*%		n/a	n/a	
HYDRO ENERGY	[...]*	[0-5]*%		n/a	n/a	
WINGAS	[...]*	[0-5]*%		n/a	n/a	
EDF	[...]*	[0-5]*%		[...]*	[0-5]*%	
POWEO	[...]*	[0-5]*%		n/a	n/a	
ALTERGAZ	[...]*	[0-5]*%		n/a	n/a	
GAS NATURAL	[...]*	[0-5]*%		[...]*	[0-5]*%	
IBERDROLA	[...]*	[0-5]*%		n/a	n/a	
ELECTRICITE DE STRASBOURG	[...]*	[0-5]*%		n/a	n/a	
OTHERS (to be defined)	[...]*	[0-5]*%		[...]*	[20-30]*%	[0-5]*%
Total market	**34.3**	**100.0%**	**100.0%**	**12.8**	**100.0%**	**100.0%**

418. The South zone is hardly open to competition at all: the eligibility rate is only 47% (in terms of volume of gas consumed) and the number of alternative suppliers is low. Suez managed to enter the market in this zone by buying more than 40% of the volumes of gas sold by GDF under the gas release programme for the period 2005-07. Despite the

introduction of the gas release programme, the CRE stressed in its last annual report that 'competition was still too restricted' in the South of France[247].

419. GDF is in a dominant position in both markets. Besides GDF and Total, only three alternative suppliers, one of which is Suez, share less than 5% of the market (via Distrigaz).

420. In a zone which is hardly open to competition at all, the merger would lead to:

- the elimination of more than 40% of the volumes of gas sold by GDF to Distrigaz under the gas release programme, despite the fact that the introduction of this programme is intended to initiate the entry of alternative suppliers into this zone. The merger of GDF and Suez would make it even more difficult for competitors to obtain supplies from the new entity and would therefore impede their growth in the gas supply markets;

- elimination of a competitor who, outside the gas release programme, intended to enter the gas supply markets in the South of France, as indicated in Distrigaz's 2004 business plan[248].

- the strengthening of GDF's dominant position in the market for supplying gas to large customers, by eliminating the main alternative supplier other than Total, which is moreover the strongest of them.

The parties emphasised in their observations on the Article 6(1)(c) decision that Gas Natural, a Spanish operator which is active in this zone, had much greater proximity with the South zone: its participation in the gas release programme in this zone and extension of the interconnection capacities with Spain would put it in a much better position than Distrigaz to increase its holdings in France and compete with GDF.

The Commission notes first of all that Distrigaz also participated heavily in the gas release programme in this zone. Consequently, from this viewpoint, Gas Natural is not better placed than Distrigaz to enter the markets in this zone. Furthermore, the increase in interconnection possibilities with Spain would not give Gas Natural a short to medium-term advantage. The current interconnection capacities from Spain to France are very weak and increasing them, even if such a step were to be envisaged, would require work to be done in the TIGF zone, coordinated between TIGF and the Spanish transmission operator, which is currently only at the planning stage (see below). Finally, the market survey shows that the parties significantly overestimated Gas Natural's market share, which places Gas Natural quite far behind Distrigaz. Consequently, Gas Natural cannot be considered as being better placed than Distrigaz to establish itself in this zone and compete with GDF. In their observations on the statement of objections, the parties did not dispute this reply from the Commission.

- the strengthening of GDF's dominant position in the market for supplying gas to small customers, by eliminating one of the very few alternative suppliers in that market.

---

[247] Page 34 of the 2006 CRE activity report mentioned above. The CRE analysis covers the South and South-West zones, in each of which a gas release programme was introduced.

[248] Reply from the parties in response to the request for information issued on 27 July (e-mail of 2 August 2006 – No 14346). The business plan states: '[…]*'.'

6) South-West zone

421. The parties could not supply an assessment of the market shares of the various suppliers active in this zone. Consequently, the Commission reconstituted the market shares of the various suppliers on the basis of the information gathered during the market survey.

422. The South-West zone, where the transmission and storage infrastructure is owned and managed by TIGF, has the lowest eligibility rate of all the balancing zones (33% of gas consumed). In 2005, GDF was active in this zone but Suez was not. The latter, like EDF, only started to become active there (via Distrigaz) in 2006, thanks to the volumes of gas release proposed by Total for 2005-07[249]. However, as the table below shows, competition is still very limited in the South-West zone, just as it is in the South zone.

South West	First half of 2006	
	Large customers	Small customers
GDF	> [10-15]*%	> [80-90]*%
SUEZ	> [0-5]*%	< [0-5]*%
GDF + SUEZ	> [15-20]*%	> [80-90]*%
TOTAL	> [80-90]*%	> [0-5]*%
ENI	[0-5]*%	[0-5]*%
E.ON	[0-5]*%	[0-5]*%
BP	[0-5]*%	[0-5]*%
HYDRO ENERGY	[0-5]*%	[0-5]*%
WINGAS	[0-5]*%	[0-5]*%
EDF	[0-5]*%	> [0-5]*%
POWEO	[0-5]*%	[0-5]*%
ALTERGAZ	[0-5]*%	[0-5]*%
GAS NATURAL	[0-5]*%	[0-5]*%
IBERDROLA	[0-5]*%	[0-5]*%
ELECTRICITE DE STRASBOURG	[0-5]*%	[0-5]*%
OTHERS (to be defined)	[0-5]*%	[0-5]*%
Total market	**100.0%**	**100.0%**

423. In the market for supplying gas to large customers, Total is in a dominant position with a market share of more than 80%. GDF and Suez are the only two other suppliers in competition with Total, with a combined market share of more than 15%.

[249] Page 34 of the 2006 CRE activity report mentioned above.

424. In the market for supplying gas to small customers, GDF is in a dominant position with a market share of more than 80%. Besides GDF and Total, only three alternative suppliers share less than 15% of the market.

425. In a zone which is hardly open to competition at all, the merger would lead to:

- the elimination of 50% of the volumes of gas sold under the gas release programme and bought by Distrigaz, even though the introduction of the gas release programme was intended to initiate the entry of alternative suppliers into this zone. The merger between GDF and Suez would therefore go against the objective of the gas release programme introduced in 2005, that is the growth of competition to counter the situation in which GDF and Total alone shared the markets for the supply of gas in this zone.

- elimination of a competitor who, outside the gas release programme, intended to enter the gas supply markets in the South of France, as indicated above in relation to the South zone.

- the strengthening of GDF's dominant position in the market for supplying gas to small customers, by eliminating one of the few alternative suppliers, who have entered the market only since 2006.

7) Conclusion

426. In the markets for the supply of gas to large customers in the GRTgaz zones (L gas and H gas), the notified transaction would strengthen GDF's dominant position and would lead to the disappearance, depending on the zone, of the first (East) or the second (North, West, South) alternative supplier to GDF. Moreover, the notified transaction would lead to the disappearance of the first alternative supplier of H gas in the future North zone in 2009.

427. In the markets for the supply of gas to small customers (both L gas and H gas) in the GRTgaz and TIGF zones, the notified transaction would lead to the strengthening of the dominant position enjoyed by GDF, which already has a virtual monopoly, through the disappearance of one of the few alternative suppliers in the market.

428. Moreover, as described below, the merger between GDF and Suez comes at a time when there are substantial barriers to entering French gas supply markets.

429. In view of the major role played by Distrigaz in driving competition in the gas markets due to the strengths outlined below, the transaction would lead to the elimination of one of the competitors best placed to compete with GDF in the French markets for the supply of gas to industrial customers.

430. On the basis of the above, the Commission considers that the notified transaction would significantly hinder effective competition in the markets for the supply of L Gas and H gas (i) to large industrial and customers in each GRTgaz balancing zone and (ii) to small industrial and commercial customers in each GRTgaz balancing zone and in the TIGF balancing zone.

A.3.4.1.2 Markets for the supply of gas to dealers (local distribution companies (LDCs))

431. It is noteworthy that in their observations on the statement of objections, the parties did not discuss the objections raised by the Commission in respect of these markets.

432. According to the information supplied by the parties, only GDF and Total are active in these markets. GDF is the only supplier active in the East, North (H and L gas) and South zones, while Total is the only supplier active in the South-West zone (TIGF)[250].

Volumes of gas (in TWh) sold to the LDCs in 2005

Zone	GDF	Total
North B	[0-5]*	[0-5]*
North H	[0-5]*	[0-5]*
East	[5-10]*	[0-5]*
South	[0-5]*	[0-5]*
South-West	[0-5]*	[5-10]*

Source: E-mail from the parties dated 8 August 2006 (No 14675)

433. The fact that Total and GDF are the only operators to supply the LDCs, in the TIGF zone and in the other tariff zones respectively, is not the result of a legislative or regulatory act. It is a de facto situation which may change at any moment, depending on the policies adopted by the LDCs to satisfy their gas requirements, as the latter are at liberty to approach any gas supplier (Article 3(3) of the Law of 3 January 2003).

434. Although the notified transaction would not cause any overlap in these markets, it is noteworthy that Distrigaz is, in the East and North zones where GDF has a monopoly, a competitor which is in a particularly good position in the neighbouring markets for the supply of gas to large industrial customers.

435. In fact, as regards the provision of H gas to large industrial customers, Distrigaz is respectively the first alternative supplier in the East (market share of more than 30%) and the second alternative supplier in the North (market share of more than 10%). Distrigaz is also the first alternative supplier in the future North zone in 2009.

436. As regards the supply of L gas to large industrial customers, Distrigaz is one of only three alternative suppliers to GDF, as Total is moreover absent from this market.

437. As explained below, Distrigaz intends to build on obtaining a critical mass in these markets in order to improve its growth in other markets. It is worthy of note that when applying for its authorisation to supply gas from the Minister for Economic Affairs,

[250] There is no LDC in the West zone.

Distrigaz submitted a business plan which clearly indicated that it planned to supply gas to the LDCs[251].

438. It follows from the above that Distrigaz can be considered as one of the potential competitors of GDF best placed to supply gas to dealers in the North (H and L) and East zones.

439. Hence, although the notified transaction would not bring about any overlap in these markets, it would however cause the disappearance of one of GDF's best-placed potential competitors, a competitor with major strengths that has the intention of entering the markets.

440. Moreover, as mentioned below, the merger between GDF and Suez comes at a time when there are substantial barriers to entering French gas supply markets.

441. On the basis of the above, the Commission considers that the notified transaction would significantly hinder effective competition in the markets for the supply of gas to dealers in the North (H and L gas) and East zones.

A.3.4.1.3 Markets for the supply of gas to household customers from 1 July 2007 onwards

442. Nearly [90-100]*% of the gas provided to household customers is supplied by GDF. The rest is supplied by the LDCs, each LDC having a monopoly in the distribution zone allocated to it.

443. Since household customers are not yet eligible, suppliers other than GDF and the LDCs cannot be active in this market. However, household customers will be eligible from 1 July 2007. According to the draft law submitted to the National Assembly in June 2006, referred to above, they may choose not to exercise their eligibility and thus continue to buy gas at regulated prices.

444. The Court of First Instance has ruled that the absence of competition in the gas markets in accordance with the Gas Directive made it impossible to conclude that the conditions laid down in Article 2(3) of the Merger Regulation had been satisfied[252]. In particular, it observed that the Commission was not in a position to assess whether the concentration prevented the introduction of effective competition within the binding timetable laid down in the Gas Directive[253].

445. However, the competitive situation existing on the date of adoption of the contested decision or on the date of the opening of the markets in question to competition is an objective fact which is not affected by the non-fulfilment of a legal criterion[254]. Moreover, the Court of First Instance indicated in the EDP decision that the

---

[251] Parties' reply of 3 August 2006 (No 14463), mentioned above.

[252] Case T-87/05 *EDP* v *Commission*, paragraphs 116 et seq.

[253] Case T-87/05 *EDP* v *Commission*, paragraph 127.

[254] Case T-87/05 *EDP* v *Commission*, paragraph 131.

Commission may analyse the immediate effects of a transaction if they exist and take them into them into account in its overall assessment of the transaction[255]. In this case, such an immediate effect of the merger, modified by the commitments, would have been to bring forward the opening of certain markets by comparison with the timeframe envisaged in the Gas Directive[256].

446. Moreover, when the Commission examines a merger, it must ensure that it will have a direct and immediate effect on the basis of the significant impediment to effective competition test. By doing this, it can if necessary take into consideration the effects of a merger in the near future[257].

447. In this case, the notified merger would have no effect on the timeframe for opening the French gas supply markets to household customers. Therefore there would be no immediate positive effect on competitive conditions in this market. On the contrary, although these markets will not be open to competition until 1 July 2007, the merger is likely to have an immediate effect on potential competitors' preparations for their opening. In particular, the merger would immediately eliminate Distrigaz (Suez) as a potential competitor of GDF in France and create obstacles to the entry of other potential competitors. These obstacles would be likely to have the immediate effect of discouraging investment by the latter in anticipation of their entry into these markets from 1 July 2007. The merger would also be likely to remove or reduce the incentive for GDF to anticipate the effects of the opening of the market by offering more competitive prices or other favourable conditions now to build customer loyalty.

448. This Decision comes only a few months before the liberalisation of the markets for supplying gas to household customers. The immediate effects of the merger on the commercial decisions both of the parties to the merger and third parties will thus have consequences for competitive conditions in the near future.

449. The Commission therefore considers it necessary to analyse the impact of the transaction on the forthcoming opening of the market for supplying gas to household customers.

450. As explained in greater detail in section A.3.4.2, Distrigaz intends to build on obtaining a critical mass in the markets for the supply of gas to large industrial customers in order to improve its growth in the other supply markets. The market positions obtained by Distrigaz are likely to assist its entry into the markets for supplying gas to household customers.

451. However, in their reply to the statement of objections, the parties assert that Distrigaz is not the best-placed company to enter these markets. They claim (i) that Distrigaz has not applied for authorisation to supply gas to household customers and (ii) that EDF, which

---

255 Case T-87/05 *EDP* v *Commission*, paragraph 124.

256 Case T-87/05 *EDP* v *Commission*, paragraph 125.

257 Case T-5/02 *Tetra Laval* v *Commission* [2002] ECR II-4381, paragraph 153.

has an unrivalled domestic customer base, is better placed than Distrigaz to penetrate these markets from 1 July 2007 onward[258].

452. The Commission considers however that Distrigaz is, together with EDF, the best-placed operator to penetrate the markets for the supply of gas to household customers from 1 July 2007.

453. Firstly, the Commission notes that when Distrigaz applied for authorisation to supply gas it referred to Article 7 of Decree No 2004-250[259] to explain why it was not asking for authorisation to supply gas to household customers in 2004. The second paragraph of this article provides that 'where the holder of an authorisation to supply gas cannot demonstrate the conclusion of any contract with eligible or non-eligible customers for a period of one year, this authorisation shall lapse'. Hence, since only GDF and the LDCs can supply gas to household customers, who will only become eligible from 1 July 2007, any authorisation granted to Distrigaz in 2004 to supply gas to household customers would have lapsed before it could even be used. Consequently, the fact that Distrigaz did not apply for an authorisation to supply gas to household customers cannot be interpreted as a lack of willingness to supply gas to such customers from 1 July 2007.

454. Secondly, while it is true that EDF is well placed to penetrate the markets for gas supply to household customers[260], the Commission notes that the Suez Group, to which Distrigaz belongs, has strengths which no competitor other than EDF possesses.

455. In the first place, Suez already has experience of supplying energy to household customers (specifically in Belgium), which is not the case of the other main competitor in France, Total. So the fact that Total is, as the parties emphasise[261], the third-largest gas producer in the world and the fourth-largest in Europe, does not seem to have given the company any significant competitive advantage in penetrating the markets for the supply of gas to household customers abroad, particularly in the United Kingdom where the market has been completely open for several years now.

456. Secondly, the Suez group is already well established in France through its management of several services (in the energy services and waste and water management sectors), which puts it into direct contact with several million household customers. None of the incumbent gas operators other than GDF is so well established in France or is already in contact with household customers. Lyonnaise des Eaux, a French subsidiary of the Suez group, distributes water and bills more than 3.9 million French customers for it in 5 000

---

258 Reply to the statement of objections, points 370-374.

259 Decree No 2004-250 of 19 March 2004, on the authorisation to supply gas.

260 In its *EDP/ENI/GDP* decision (COMP M.3440), the Commission considered that EDP, as an incumbent retailer of electricity in Portugal 'would have had strong advantages in entering the Portuguese gas retail market for small customers, and incentives to do so' due to (i) its customer base in the electricity market (ii) its capacity to provide dual fuel offers (electricity and gas) and (iii) the strength of its brand (paragraphs 570-575)

261 E-mail from the parties dated 19 September 2006 (No 17565).

local authorities and has a network of 120 agencies throughout France[262]. Thus, in its final reference document, Suez stresses that it intends to develop its activities in the French energy market '*on the basis of positions acquired in the electricity and gas markets through building on established roles (…) in the environment and services sector'*[263].

457. Thirdly, if it is to be considered that supplying gas to small industrial customers could facilitate entry on to the market for the supply of gas to household customers, then it is worthy of note that Distrigaz's positions in the market for supplying gas to small industrial customers are very similar to those of EDF in each of the balancing zones.

458. On the basis of the above, the Commission considers that the notified transaction would lead to the disappearance of a potential competitor whose strengths make it best-placed, alongside EDF, to enter the markets for the supply of gas to household customers from 1 July 2007.

459. Moreover, as described below, the merger between GDF and Suez comes at a time when there are substantial barriers to entering French gas supply markets.

460. On the basis of the above, the Commission considers that the notified transaction would significantly hinder effective competition in the markets for the supply of gas to household customers in the North (H and L gas), East, South and South-West zones from 1 July 2007.

A.3.4.1.4 Markets for the supply of gas to electricity producers

461. Currently, GDF owns and runs the only CCGT plant in France (plant DK6 in Dunkirk). GDF supplies this plant with all the gas it needs to operate. The market for supplying gas to electricity producers therefore does not exist at the moment. However, it will exist in the near future since several operators have already planned the construction of CCGT plants. In this connection, the Commission considers that the merger would have a negative short-term impact on the decisions on investment and gas supply being taken by operators who wish to construct CCGT plants.

462. On the basis of public declarations, the CRE has identified several proposals to launch CCGT plants in France between 2008 and 2010. Assuming that all the proposed projects are carried through, and including the Gaz de France utilities already in operation, CCGT capacity in France would have the following structure in 2010[264]:

---

[262] 2005 activity report, p. 49. In the light of this, the parties' claim that Suez's customers are industrial customers or local authorities and not (or to a very limited extent) household customers (e-mail of 19 September 2006 from the parties – No 17565) does not stand up.

[263] 2005 reference document, p. 31.

[264] The CRE's reply to Phase II questionnaire, mentioned above – question 27.

Producer	Installed power in 2010 (MW)
Endesa - La Snet	2 800
Gaz de France	1 700 – 1 900
Suez	800
EDF (*decision to be confirmed in 2007*)	800
Poweo	400
Total power	**6 500 – 6 700**

Source: CRE, based on public declarations

463. The three operators other than GDF and Suez planning to put CCGT plants into operation (Poweo, SNET and EDF) have expressed their concern about the consequences of the merger in the market for supplying gas to CCGT plants. Poweo and EFF are both active in the markets for the supply of electricity and gas in France.

464. SNET considers that the new entity would have (i) a power of negotiation which would allow it to impose its own tariff conditions on the supply of gas, and (ii) knowledge of all the conditions under which all its competitors are supplied with gas in the market for producing electricity from gas (main gas outlet for the next ten years)[265].

465. EDF considers 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 a virtual monopoly in essential segments of the corresponding value chain'*[266].

466. Finally, Poweo explained[267] that it had launched an invitation to tender in April 2006 for a long term (15-year) contract for the supply of gas to its future CCGT plant at Pont sur Sambre, in the north of France, some twenty kilometres from the Taisnières gas entry point. Following publication of this invitation to tender, Poweo stated that it had received a tender from GDF for only three years, at a exorbitant price, and had received no tender at all from Suez[268]. Poweo stressed the extensive access which the new entity would have to the Taisnières entry point and considered that the behaviour of GDF and Suez after a merger *'would be even more discriminatory, particularly as regards access to gas through Taisnières'*.

467. Distrigaz already holds strong positions in the markets for supplying gas to large industrial customers who have exercised their eligibility in the East zone (where it is the

265 Answer to Phase II questionnaire, e-mail of 18 July 2006 (No 13530) – question 18.

266 Answer to Phase II questionnaire, e-mail of 17 July 2006 (No 13426) – question 18.

267 E-mail of 1 August 2006 (No 14265).

268 The parties dispute that the offer made by GDF to Poweo was exorbitant.

first alternative supplier with a market share of [30-40]*%) and in the North zone (where it is the second alternative supplier with a market share of more than 10%).

468. Admittedly, Total, the first alternative supplier in the market for supplying gas to large industrial customers in the North zone, was also approached by Poweo and did not submit a bid either.

469. However, Poweo made another approach to Distrigaz, after it failed to make an initial bid, as Poweo's CCGT was to be situated in the North, near the Taisnières entry point close to the Belgian border. Distrigaz's definitive refusal prompted Poweo to consider that its proposed construction of a CCGT plant was endangered by *'two dominant groups on the market in the North of France and Belgium'*. So, with regard to its position in that zone and in Belgium, Distrigaz was perceived by Poweo as the best alternative to GDF in the North.

470. Distrigaz's very strong position in the market for supplying gas to large industrial customers in the East zone, near the Taisnières entry point, is also an argument for considering this operator to be the best alternative to GDF in terms of supplying gas to CCGT plants in this zone.

471. The notified transaction would therefore lead to the elimination of the potential competitor best placed to supply gas to CCGT plants in the North and East zones.

472. The parties did not respond, in their reply to the statement of objections, to the Commission's objection that the notified merger would lead to the disappearance of the best placed competitor for supplying gas to electricity producers.

473. Moreover, the Commission notes that GDF considers as essential the possibility of offering both gas and electricity […]*[269]. The development of CCGTs by GDF is therefore an important way for the company to offer both gas and electricity, as the new group post merger would account for about 40% of production capacity of CCGT plants in France in 2010.

474. The question then is whether the new entity could be inclined to refuse to sell gas to CCGT plants at a competitive price, to prevent its competitors from offering both gas and electricity.

475. The Commission considers this scenario to be unlikely. In fact, for such behaviour to be advantageous, the new entity would have to have a very strong position in the markets for producing or supplying electricity. However, this is not the case, as EDF is the dominant operator in these markets in France, and will continue to be so even after the CCGT plants mentioned above are built[270].

---

[269] Reply from the parties of 1 August 2006 (No 14319), Gaz de France – Business plan 2003-2017 (October 2003 summary).

[270] See pp. 598, 602 and 603 of Form CO. In 2005, EDF had a share of [80-90]*% of the market for producing electricity in France, while the parties had a combined share of [0-5]*%. Taking the new CCGT plants to be built by 2010 into account (a total of 6700MW, 2700 MW for the parties) would bring the combined market share of the parties to [5-10]*%. The parties, who do not supply electricity to household clients (this market will not be opened until 1 July 2007), supply almost no electricity to small industrial customers

476. On the basis of the above, the Commission considers that the notified transaction would, in the near future, significantly impede effective competition in the markets for supplying gas to electricity producers in the North (H and L gas) and East zones, by eliminating a potential competitor who would act as an important stimulant to competition.

477. *A.3.4.2 Suez's combination of advantages makes it one of the alternative suppliers best placed to drive competition in France*

478. Though not an incumbent operator in France – it launched itself on the French gas supply markets only in 2002 - Suez is one of the main alternative competitors, having played an active role in the liberalisation of the gas markets in France via its subsidiary, Distrigaz. Suez has a number of major advantages which it can thank for this active role.

479. First, Suez is the dominant incumbent operator in Belgium, a country through which a part of France's H gas supplies and all of its L gas supplies are routed. This gives Suez a major advantage over most of its competitors as regards penetrating France and developing there. In its application for authorisation to supply gas in France, submitted in 2004[271], Distrigaz states that *'since Distrigaz currently operates chiefly from Belgium and is already active in the North and East zones, Taisnières H and Taisnières B were the first entry points used to penetrate the French market*. […]*'.

480. The parties object that '*E.ON Ruhrgas is in an even better position than Distrigaz, because it dominates the German market, which is larger in volume than the Belgian market, and which is likewise a transit route for a very large portion of French supplies*'[272].

481. The Commission does not agree with this argument, for the following three reasons.

482. E.ON Ruhrgas ('E.ON') has currently very little scope for importing H gas from Germany. For 2005-07 GDF has reserved over [90-100]*% of the capacity from the German exit point at Medelsheim to the French entry point at Obergailbach, and of this more than [90-100]*% is reserved on a firm basis[273]. In 2005 the parties together accounted for almost [90-100]*% of imports of H gas from Germany (GDF [90-100]*% and Distrigaz [0-5]*%). The scope for GDF's competitors to import gas from Germany is further reduced by the fact that the Obergailbach entry point is congested (see below)[274]. Despite its position in Germany, therefore, and despite the fact that it entered the French market at the same time as Distrigaz (in 2002), E.ON's share of the market for the supply of gas to large industrial customers in the East zone is no more than 5%, whereas Distrigaz's share is over 30%. In the North and South zones E.ON's market

---

(consumption of less than 250 kW). Their combined market share is about [10-15]*% of the market for the supply of electricity to large industrial customers (consumption of more than 250 kW).

271 Parties' reply of 3 August 2006 (No 14463), file on S.A. Distrigaz's application for authorisation to supply natural gas.

272 Parties' reply to the statement of objections, paragraph 387.

273 Parties' reply of 12 June 2006, No 11272.

274 E.ON Ruhrgas itself draws attention to the congestion at this point in its reply to the Phase II questionnaire, paragraph 15 (e-mail dated 11 July 2006, No 13018).

shares are even smaller than in the East zone. In the West and South-West zones E.ON does not supply gas, unlike Distrigaz, which covers the entire country.

483. It is true that E.ON has subscribed for transmission capacity which is to become available with the expansion of the capacity of the Obergailbach entry point. But the new capacity will not be available before December 2008. In the long term the additional capacity is already fully booked, by means of long-notice reservations[275]; and from [...]* until [...]*, [80-90]*% - [90-100]*% of the firm long-term capacity has been reserved by GDF, while E.ON has reserved [10-20]*-[10-20]*%.

484. L gas cannot be imported from Germany at all: the only importation point is Taisnières.

485. Distrigaz's second major asset is its possession of large and diversified gas resources. As Distrigaz stresses in the aforesaid document, *'it has large quantities of LNG in its purchase portfolio and has large-scale methane carriers at its disposal which can easily be rerouted to French or other terminals*'. Not only does it have numerous long-term supply contracts with flexibility clauses, but it can quickly obtain large quantities of gas from the Zeebrugge hub, in which it is *'one of the leading players'*. In the same document, Distrigaz points out that it *'it has built up a flexible and diversified supply portfolio, which is one of its major assets'*.

486. The parties object that possessing large and diversified resources is a characteristic common to all of the big gas operators in Europe, such as ENI, E.ON or Centrica. The parties further assert that all of the incumbent operators are in an identical position with respect to access to methane terminals, with the same degree of flexibility.

487. The Commission accepts this objection only to a very limited extent. Its reasons are three.

488. While other gas operators in Europe may have large and diversified gas resources, that is not true of new entrants to the market for gas supply such as Altergaz, Poweo and EDF. And while possession of such resources is an advantage, it comes into its own only in combination with other advantages. E.ON's and ENI's gas resources have not enabled them to enter the French markets for gas supply to a significant extent, and Centrica continues to be wholly absent.

489. As regards access to LNG, the parties have not been able to say what proportion of regasification capacity at European methane terminals is reserved by the various operators[276]. But given the way the gas transmission networks are configured at present, the only foreign methane terminal that allows access to the French markets is the one in Zeebrugge in Belgium. Suez currently holds [90-100]*% of regasification reservations at this terminal; from 2008, when the capacity of the terminal is expanded, Suez will hold [40-50]*%, ExxonMobil having reserved the remaining [40-50]*%. At the French

---

[275] There are two categories of reservation of annual transmission capacity: there are short-notice reservations, covering one year only, which require notice of less than six months (and more than one month), and long-notice reservations, which can cover several years, and which require notice of more than six months. At the Obergailbach entry point, long-notice capacity amounts to 80% of annual capacity.

[276] Parties' reply of 19 September 2006, No 175502.

terminals the bulk of capacity is reserved by GDF, so that Distrigaz has a clear advantage over competitors other than GDF.

490. Distrigaz stresses that *'more than 30 years' experience in the supply and purchasing of natural gas has enabled it to become operational on other western European markets without having to make any large additional investments in human resources*'. Other incumbent gas operators may have similar experience, but the new entrants to the gas supply markets, such as Altergaz, Poweo and EDF, have not.

491. The parties further object that the scope for reverse flows at the gas exit points at Oltingue on the Swiss border, or Larrau on the Spanish border, gives ENI and Gas Natural a special advantage on the French market.

492. The Commission does not accept this objection.

493. The scope for reverse flows is very limited at both Oltingue and Larrau. Reverse flow capacity amounts to 81 GWh per day at Oltingue, and 40 GWh per day at Larrau, which on an annual basis comes to less than 4.5% of the total capacity of the French entry points. In addition, the reverse flow capacity at Larrau is interruptible, so that it cannot be used on a regular basis.

494. In the third place, as has been explained in the analysis of markets for the supply of gas to households, Suez has specific advantages over the incumbent gas operators other than GDF.

495. For one thing, Suez already has experience of supplying energy to household customers (especially in Belgium), which is not the case for Total, the other incumbent operator in the South-West zone in France. The parties point out that Total is the third producer of gas in the world and the fourth in Europe[277], but this does not seem to have given it a significant competitive advantage that would enable it to penetrate foreign markets for the supply of gas to household customers, most notably in the United Kingdom, where the market has been fully open for several years.

496. For another thing, while it is true that EDF is particularly well placed to penetrate the markets for the supply of gas to household customers, given its base of electricity supply customers, Suez is already well established in France as manager of a number of services, such as energy services or waste and water management, which puts it in direct contact with several million households. Its subsidiary Lyonnaise des Eaux distributes and invoices drinking water to over 3.9 million customers in more than 5 000 municipalities in France, and has a countrywide network of 120 local offices. In its reference document of 2005 Suez states that it intends to develop its energy business in France 'starting *out from its established positions in electricity and gas, and making use of the historic base (…) in the environmental and services businesses*'[278]. No other gas operator has such a base.

497. The major role played by Suez in the liberalisation of the French gas markets has been underlined by the CRE: '*the Suez group has played a major role in the liberalisation of*

[277] Parties' reply of 19 September 2006, No 17565.

[278] Reference Document 2005, p. 31.

the French market for natural gas. Between 2002 and July 2004, Suez developed a commercial policy of acquiring high gas-consuming industrial customers. When the gas market was opened up to all commercial users on 1 July 2004, Suez began to acquire smaller-scale customers'[279].

498. In its application for authorisation to supply, Distrigaz says that *'as the third largest supplier it is already an alternative to the incumbent operator' and that it 'intends to reach out to […]* of […]* customers […]*. It is focusing initially on […]* in order to secure the critical mass indispensable for any further development'.*

499. Distrigaz is the leading alternative to the two incumbent suppliers, GDF and Total. Thanks to the combination of advantages described here, the Commission takes the view that Distrigaz is one of the suppliers best placed to compete with GDF in all gas supply markets. Distrigaz has the resources to be (i) the best placed, along with Total, in the markets for the supply of gas to industrial customers, and (ii) the best placed, along with EDF, to enter the markets for the supply of gas to households.

A.3.4.3 High barriers to market penetration exacerbate horizontal effects

500. The ability to supply gas is dependent on access to gas and to infrastructures such as transmission systems, methane terminals and storage sites. Access is assured by means of capacity reservations. Such reservations are crucially important to competition. Except in the South-West zone, all these infrastructures are held by GDF, either directly (storage and methane terminals) or via GRTgaz, a wholly owned subsidiary. The preponderance of GDF, and even more so of the new entity, in access to gas and gas infrastructures raises major barriers to the entry of competitors wanting to penetrate markets downstream.

501. These barriers are made all the more difficult to remove by the fact that the entities within GDF which operate the gas infrastructures do not yet afford all the guarantees of independence required by the Gas Directive.

502. Lastly, the trend in the regulated tariffs for the public distribution of GDF gas does not reflect the pattern of GDF's supply costs, a fact which hampers the opening up of the markets to competition.

A.3.4.3.1 Access to gas

503. As already pointed out, France relies on imports for 97% of its gas supplies.

504. According to the figures supplied by the parties, GDF accounted for nearly [80-90]*% of France's H gas imports and [90-100]*% of its L gas imports in 2005. Suez accounted for about [0-5]*% of H gas imports and [0-5]*% of L gas imports[280].

505. GDF and Suez import gas into France chiefly on the basis of long-term contracts (contracts' lifespan more than 10 years). In 2005, [80-90]*% of GDF's H gas imports and [90-100%]* of its L gas imports were based on long-term contracts. As for Suez, in

[279] The CRE's reply to the Phase I questionnaire, question 66.

[280] Parties' e-mailed reply of 15 June 2006 (No 11541).

2005 [70-80]*% of its H gas imports and [90-100%]* of its L gas imports were based on long-term contracts.

506. All in all, in 2005, GDF and Suez accounted for respectively [90-100]*% and [0-5]*% of imports under long-term contracts for H gas. In the case of L gas, they accounted for respectively [90-100]*% and [0-5]*% of imports under long-term contracts.

507. Admittedly, GDF and Suez are not the only gas operators to have concluded long-term gas-purchasing contracts. The other European incumbent operators in particular have similar access to such contracts. But other operators with aspirations to entering the gas markets cannot gain access to these contracts so easily[281]. In this type of situation, possession of long-term contracts therefore would confer a real advantage on the new entity compared with those operators which have only recently made their entrance to the gas-supply markets (e.g. EDF, Poweo or Altergaz) or which are still planning to do so.

508. The notified merger would strengthen GDF's privileged position as regards access to gas. More precisely, the parties would henceforth have access to:

- [90-100]*% of H gas and [90-100]*% of L gas imported into France;

- [90-100]*% of the long-term import contracts for H gas and [90-100]*% of the long-term import contracts for L gas, thus enabling the new entity to make long-term reservations of annual capacity on the transmission system and methane terminals.

509. Furthermore, the gas exchange points set up in each balancing zone since 2004 do not allow the new entrants to acquire sufficient volumes of gas to be able to develop. As the CRE states, the gas exchange points 'are not operating entirely satisfactorily because of the low volumes exchanged and the resultant absence of any price signal'[282].

510. The parties contend that their very strong position in access to gas is not a barrier to entry[283]. The proportion of gas they import is merely a reflection of their positions in the markets downstream, and according to a study they have had carried out[284], from 2008 onward suppliers other than Suez and Gaz de France, including ENI, E.ON, Gazprom and Gas Natural could be supplying more than 50% of winter demand. The parties further argue that the Commission is contradicting itself when it asserts on the one hand that Distrigaz has developed thanks to the North gas exchange point, and on the other that the gas exchange points do not allow alternative gas operators to develop.

511. The Commission does not accept this objection, for the following reasons.

512. On the question of access to gas via imports, the conclusions of the above-mentioned study carried out for the parties are clearly contradicted by the market and by the

---

281 Page 32 of 2006 CRE activity report.

282 The CRE's reply to Phase I questionnaire, question 63.

283 Reply to the statement of objections, paragraphs 402 to 411.

284 'Prospective analysis of the wholesale gas markets in Belgium and in France in connection with the proposed merger of Suez and Gaz de France', [a consulting company]*, September 2006.

regulators questioned, as is explained above in the part devoted to gas supply markets in Belgium (introduction to section A.2.4).

513. The parties' objection regarding gas exchange points will not stand up.

514. The objection does not reflect Distrigaz's own description of its access to gas. In its application for authorisation to supply, Distrigaz says that it established itself in France thanks to the Taisnières entry point, and that it then completed its supplies by using the entry points at [...]*[285].

515. The CRE's analysis, referred to above, has been confirmed by the immense majority of competitors, who take the view that the volumes of gas exchanged through the gas exchange points are not sufficient to allow the development of alternative suppliers in each balancing zone[286]. The fact that gas operators draw supplies over gas exchange points does not mean that the gas exchange points are by themselves enough to allow new entrants to develop. It may be noted that although EDF takes supplies from the North gas exchange point, it does not consider the volumes sold there to be sufficient[287].

A.3.4.3.2 Access to infrastructures

516. The ability to supply gas is dependent on access to infrastructures such as transmission systems, methane terminals and storage sites. Access is assured by means of capacity reservations. Such reservations are crucially important to competition. Except in the South-West zone, all these infrastructures are held by GDF, either directly (storage and methane terminals) or via GRTgaz, a wholly owned subsidiary. The preponderance of GDF, and even more so of the new entity, in access to gas and gas infrastructures raises major barriers to the entry of competitors wanting to penetrate markets downstream.

1) Access to the transmission system

517. Regarding the transmission system, given that almost all the gas consumed in France is imported, it is essential to be able to reserve capacity at the points where the gas enters French territory. The capacity for use at the entry and exit points may be contracted for on a firm or an interruptible basis. Where capacity is available on a firm basis, the transmission operator can, in normal operating circumstances, guarantee the use of capacity at any time throughout the whole duration of the contract. By contrast, where capacity is available on an interruptible basis, the transmission operator cannot guarantee the use of capacity at any time throughout the whole duration of the contract. Capacity reservations can be made on a daily, monthly or yearly basis.

---

[285] Parties' reply of 3 August 2006, No 14463, file for application for authorisation to supply natural gas by SA Distrigaz: 'since Distrigaz currently operates chiefly from Belgium and is already active in the North and East zones, Taisnières H and Taisnières B were the first entry points used to penetrate the French market. Today other entry points along the French borders are also being used ([…]*)'.

[286] See the replies to the Phase II questionnaire, question 7, from: Altergaz, for all gas exchange points except the North H gas exchange point, No 13124; BP, No 13890; Centrica, No 13105; EDF, No 13749; Electricité de Strasbourg, No 13140; ENI, No 13511; E.ON, No 13654; Gas Natural, for the North B, West and East gas exchange points, No 15173; Hydro, No 13496; Iberdrola, No 14002; Poweo, No 13090; RWE, No 13337; and Wingas, No 13107.

[287] Reply to Phase II questionnaire, question 7, already referred to.

518. On the GRTgaz transmission network there are two categories of yearly reservation, namely short-notice reservation and long-notice reservation. For short-notice reservation the notice given must be shorter than six months and longer than one month; the period covered is one year only[288]. For long-notice reservation the notice given must be six months or more, and the period covered may be several years[289]. Long-notice yearly reservation is available only for (i) network entry capacity, (ii) connectors between balancing zones, and (iii) exit to a neighbouring transmission network.

a) Preponderance of the new entity in access to transmission system entry points

519. On the GRTgaz network, three entry points are linked by gas pipeline: Taisnières (H gas and L gas) and Dunkirk in the north, and Obergailbach in the east. The Dunkirk entry point is directly linked to Norway whereas Taisnières is linked to Belgium and Obergailbach to Germany. The pipeline leading to the latter is owned on the German side by a company (MEGAL GmbH) jointly controlled by GDF and E.ON[290].

520. On the TIGF network, the two entry points to French territory (Larrau and Biriatou) have low entry capacity. Larrau is essentially an exit point to Spain, [...]* by GDF for conveying gas to Spain. The annual capacity of this point of entry to France is 40 GWh/d and is available only on an interruptible basis. Biriatou has a very low annual firm entry capacity not exceeding 5GWh/d, and has no annual interruptible capacity. In total, the annual capacity for entry to the French territory of the TIGF zone accounts for only 1.5% of total annual capacity for entry to French territory.

521. The ability to supply gas in France is therefore dependent on access to the entry capacity of the GRTgaz network. The position as regards reservations of GRTgaz capacity at the entry points is shown in the following table:

[288] For example, in October of year n, a user may reserve capacity for a year beginning no earlier than 1 December of year n (in which case it will end on 30 November of year n+1), and no later than 1 April of year n+1 (in which case it will end on 31 March of year n+2).

[289] For example, in October of year n, a user may reserve yearly capacity beginning no earlier than 1 May of year n+1.

[290] GDF, via its subsidiary Deutschland GmbH, and E.ON Ruhrgas AG hold respectively 44% and 51% of capital of MEGAL GmbH. OMV holds the remaining 5%.

Capacity in GWh/d (at 25/07/2006)	**Firm cap. in 2006**	**% alr. res. for 2006**	**% GDF 2006**	**% Suez 2006**	**% GDF 2007-10**	**Interruptible Cap. 2006**	**% alr. res. for 2006**	**% GDF 2006**	**% Suez 2006**	**% GDF 2007-10**
GRTgaz										
Taisnières H gas	590	[70-80]*%	[50-60]*%	[5-10]*%	[30-40]*%	0				
Dunkirk	555	[90-100]*%	[80-90]*%	[0-5]*%	[80-90]*%	35	[90-100]*%	[90-100]*%	[0-5]*%	[80-90]*%
Obergailbach	430	[90-100]*%	[70-80]*%	[0-5]*%	[70-80]*%	0				
Taisnières L gas	230	[90-100]*%	[90-100]* %	[0-5]*%	[80-90]*%	50	[40-50]*%	[40-50]*%	[0-5]*%	[80-90]*%
Fos	200	[70-80]*%	[70-80]*%	[0-5]*%	[60-80]*%	230	[40-50]*%	[40-50]*%	[0-5]*%	[50-80]*%
Montoir	340	[90-100]*%	[90-100]* %	[0-5]*%	[70-80]*%	250	[30-40]*%	[30-40]*%	[0-5]*%	[0-60]*%
Total	*2345*	*[90-100]*%*	*[70-80]*%*	*[0-5]*%*	*[0-5]*%*	*565*	*[40-50]*%*	*[40-50]*%*	*[0-5]*%*	*[0-5]*%*

Source: E-mail from parties dated 27 July 2006 (No 14011)

522. The merger would therefore produce a relatively slight addition of reservations, and the capacity added together would not be long-term. But this cannot hide the fact that for 2006 GDF and Suez together will account for nearly [70-80]*% of total annual firm capacity. The new entity's access to the entry points of the transmission system would be all the more preponderant in that it would control almost all the capacity for the transmission of gas to France from Belgium and Germany. As already pointed out in the foregoing analysis concerning Belgium, GDF and Suez predominate as regards access to the Belgian H and L gas exit points (Blaregnies) to France (Taisnières). Thus the fact that capacity is available at Taisnières does not necessarily mean that it can in practice be reserved by the competitors of GDF and Suez, who may have no access to the capacity on the Belgian side. Furthermore, GDF, which exercises joint control over the German MEGAL pipeline, which is linked to the Obergailbach entry point, has, for 2006 and 2007, reserved [90-100]*% of the firm capacity and [90-100]*% of the interruptible capacity of the Medelsheim exit point to Obergailbach[291].

523. GDF also is also preponderant in access to the Fos and Montoir entry points, which are linked to the methane terminals. GDF's preponderance in access to these entry points is closely linked to its preponderance in access to the capacity of the methane terminals as analysed below.

524. Furthermore, the preponderance of the new entity as regards access to the entry points by gas pipeline is made all the greater by the fact that the Dunkirk and Obergailbach

[291] E-mail from parties dated 13 June 2006, No 11278.

entry points are prone to congestion, according to GRTgaz itself[292]. For 2006 the entire capacity of these entry points is reserved.

525. The parties contest most of this analysis[293]; they argue that:

(i) the GRTgaz network is not congested overall, and consequently the new entity's preponderance in access to the transmission network is not a barrier to entry;

(ii) an unbiased analysis has to take as its point of departure the situation facing a new entrant, that is to say not the situation in the past (2006) but the situation in the future; for the year 2007 and thereafter there is capacity available at each of the entry points, which proves that there are no barriers to entry.

526. The Commission does not accept the parties' objections, for the following reasons.

527. First, to say that a network is not congested overall is to say that for all competitors the different entry points are substitutable. Such a situation is conceivable to some extent in the case of GDF, which is easily preponderant in access at all entry points. In one of its replies to the Commission GDF explains that its reservations of transmission capacity '*are not made for an identified delivery from an entry point to an area of consumption. In reality they correspond to an overall analysis of transmission needs intended to balance gas supply properly over the whole year, on the basis of the resource and consumption scenarios adopted by Gaz de France, which in particular include the scenarios arising out of public service obligations*'[294]. But this is not the case with GDF's competitors. Moreover, the fact that GRTgaz has decided to expand capacity at Obergailbach shows that the other entry points are not enough to compensate for the congestion there. Thus the concept of a network 'not congested overall' that the parties invoke is of no relevance.

528. Second, contrary to the parties' contention, an analysis of capacity reservations for 2006 is indeed relevant, because it reflects the barriers that already exist. In addition, the parties' assertion that there is capacity available for 2007 and thereafter is in fact inaccurate or biased.

529. In the first place, the long-term (long-notice) firm yearly capacity is almost entirely reserved until at least 2010: at Dunkirk, 100% (GDF accounts for [90-100]*%), at Obergailbach 100% (GDF accounts for [90-100]*% until the end of [...]*, and [80-90]*% from [...]*), at Taisnières 100% for L gas (GDF accounts for [90-100]*%), at Montoir 92-100% (GDF accounts for [90-100]*%), and at Fos 100% (GDF accounts for [90-100]*%). The exception is H gas at Taisnières, where the portion reserved is only 44-57% (GDF accounts for [40-60]*%). Thus the fact that other competitors cannot secure long-term reservations, which have been blocked by GDF, is indeed a barrier to entry to the gas supply markets.

530. In the second place, turning to short-notice yearly reservations, it was perfectly natural that at the time the parties' reply was being drafted there should be substantial capacity

[292] See GRTgaz reply submitted by parties by e-mail dated 18 July 2006, No 13574.

[293] Parties' reply to the statement of objections, paragraphs 413 to 425.

[294] E-mail from the parties dated 25 July 2006, No 13931.

available for 2007 and 2008. The rules for short-notice reservation allow reservation only for one year, and only at notice of less than six months. In a reply to the Commission[295], Distrigaz, which had not yet made any short-notice yearly reservations, explained that it 'makes short-notice applications that have, in accordance with the allocation rules applied by GRTgaz, to made less than six months in advance. This explains why Distrigaz makes its reservations in the second half of the year preceding the year of reservation'. The parties have been unable to provide a statement of short-notice yearly reservations for each competitor updated to September 2006. But an overall statement of short-notice yearly reservations was available in September 2006 on the Internet site of GRTgaz, and it shows that there is no capacity remaining for such reservations until September 2007 at any entry points with the exception of Taisnières.

b) Preponderance of the new entity in access to interzone connectors, most of the remaining connectors being reserved by the other incumbent operator (Total)

531. Owing to where the gas entry points are located, the dominant flow of the gas is from north to south. It is therefore of capital importance to be able to reserve capacity on the following connectors: North to East, East to South, North to West, West to South, South to South-West, and from the GRTgaz network to TIGF (Hérault and Dordogne exit points). The following table shows the state of reservations of annual capacity on these connectors:

	GRTgaz				to TIGF	
	North to East	East to South	North to West	West to South	Hérault exit	Dordogne exit
Capacity 2006 in GWh/d	530	260	260	180	225	56.5
Reservation rate	100.0%	99.8%	96.9%	83.3%	100.0%	99.1%
of which GDF	[80-90]*%	[60-70]*%	[70-80]*%	[60-70]*%	[70-80]*%	[10-20]*%
of which Suez	[0-5]*%	[0-5]*%	[0-5]*%	[0-5]*%	[0-5]*%	[0-5]*%
of which Total	[5-10]*%	[20-30]*%	[15-20]*%	[15-20]*%	[20-30]*%	[70-80]*%

Source: E-mail from parties dated 27 July 2006 (No 14011)

532. These data clearly show that GDF has substantially preponderant access on five of these connectors and that the other incumbent operator, Total, reserves virtually all of the remaining capacity available. Only the West to South connector still has capacity available. However, access to this connector presupposes that a gas shipper first has gas at its disposal in this zone: (i) via the Montoir methane terminal, (ii) from the North, or (iii) by purchasing from the Western gas exchange point. It is difficult for a new entrant to obtain gas via these different points: firstly, as explained below, use of a methane terminal is inappropriate for a new entrant; secondly, there is very little capacity still available on the North to West connector (about 3%); thirdly, as shown above, the activity of the gas exchange points, and more especially of the Western one, where virtually all the volumes are traded between GDF and [...]*, does not offer sufficient volumes of gas to allow new entrants to develop.

[295] Parties' reply of 19 September 2006, No 17325.

533. All in all, the new entrants can gain only marginal access to the capacity of the interzone connectors.

534. The parties contest the Commission's analysis, and argue, as they did on the question of reservations, that the analysis should not focus on the year 2006, and that there is substantial capacity available for 2007.

535. The Commission does not accept the parties' objections. The list of both long-notice and short-notice reservations for 2007, as it stood in September 2006[296], rebuts the objection, and confirms the structure of the table for 2006 that the Commission had put forward.

c) Corrective arrangements have limited effects

Returnable capacity

536. In 2005 GRTgaz set up a system of returnable capacity hinging on the entry points, the GRTgaz interzone connectors and the two connectors of the GRTgaz network to the TIGF network. At these points or connectors, 15% of that part of the annual firm capacity allocated to a shipper which exceeds 20% of the total annual firm capacity is converted into returnable capacity. This has to be returned at the request of GRTgaz, month by month, in whole or in part, only if there is no longer any firm capacity or no longer sufficient firm capacity available. In such an event GRTgaz allows the capacity to be used by a shipper making a reservation of annual capacity at short notice.

537. An examination of the capacity nominations made by GDF in 2005 and the first half of 2006, i.e. after application of the returnable capacity arrangement, show that GDF enjoys preponderant access to the entry capacity of the transmission network. The nominations made by GDF account for between *[80-90]*%* and *[90-100]*%* of all nominations. This suggests that the returnable capacity arrangement is not affecting GDF's preponderant access to the transmission network.

	Taisnières L		Taisnières H		Dunkirk		Obergailbach		Montoir		Fos	
	2005	S1 2006	2005	S1 2006	2005	S1 2006	2005	S1 2006	2005	S1 2006	2005	S1 2006
GDF	[90-100]*%	[90-100]*%	[80-90]*%	[80-90]*%	[80-90]*%	[80-90]*%	[90-100]*%	[80-90]*%	[90-100]*%	[90-100]*%	[90-100]*%	[90-100]*%
Suez	[0-5]*%	[0-5]*%	[5-10]*%	[5-10]*%	[0-5]*%	[0-5]*%	[0-5]*%	[0-5]*%	[0-5]*%	[0-5]*%	[0-5]*%	[0-5]*%
Total	[0-5]*%	[0-5]*%	[10-15]*%	[10-15]*%	[10-15]*%	[10-15]*%	[0-5]*%	[0-5]*%	[0-5]*%	[0-5]*%	[0-5]*%	[0-5]*%

Source: E-mail from parties dated 18 July 2006 (No 13574)

538. The CRE draws attention to certain limits to the existing returnable capacity system, by pointing out that *'In the period from April 2005 to April 2006, 12 capacity requests, involving small quantities, remained unsatisfied on the GRTgaz network. Although these requests did not generate any requests for settlement of disputes, they serve to highlight the limits of the returnable capacity system. Nearly half of the requests that failed to be*

[296] E-mail from the parties, 25 September 2006, No 17845, and statement of reservations published by GRTgaz on its Internet site in September 2006.

satisfied owing to lack of available capacity concerned annual subscriptions for firm capacity, all the returnable capacity having been returned. The other half concerned monthly subscriptions for firm capacity, to which the returnable capacity system does not apply'[297].

539. The parties take the view that nominations are not a good guide to the impact of the returnable capacity system, because they do not take account of whether any request for the grant of capacity under those arrangements was in fact made. To say that GDF accounted for the bulk of nominations in 2005 and the first half of 2006, they argue, '*is merely to say that overall demand for yearly reservations on the part of entrants was not sufficient to trigger the mechanism*'. They point out that the mechanism allows competitors with GDF to hold as much as 20% of the firm yearly capacity at an entry point.

540. The Commission does not deny that the returnable capacity mechanism might in theory enable operators other than GDF to reserve up to 20% of the firm yearly capacity at an entry point. But even then GDF could reserve 80% of the capacity at the entry point for itself. Furthermore, the mechanism has not been anything like fully used at the congested entry points, Dunkirk and Obergailbach; indeed between January and September 2006 returnable capacity reservations at those entry points were almost non-existent. According to the statement of past capacity reservations published by GRTgaz on its Internet site in September 2006, returnable capacity subscribed between January 2005 and September 2006 averaged less than 1% of total firm yearly marketable capacity at Dunkirk, or 3% at Obergailbach. Lastly, the returnable capacity mechanism cannot be used to assign long-term (long-notice) yearly capacity to the applicants.

541. The Commission accordingly takes the view that while the returnable capacity mechanism is undoubtedly useful, its effect is only limited, partly because it is under-utilised.

The UIOLI system

542. Since December 2005, GRTgaz has been applying a 'Use it or Lose it' system (UIOLI). The purpose of this mechanism is to prevent a shipper from blocking reserved capacity which it is not using. The GRTgaz rules on the allocation of capacity and subscriptions to transport capacity (RAS) lay down two arrangements: on the one hand a short-term UIOLI scheme (point 6.1 of the rules) and, on the other, a mechanism designed to prevent a shipper from under-using capacity on a saturated infrastructure (point 6.2 of the rules)[298].

543. According to the short-term UIOLI mechanism, where there is no longer any firm daily capacity available, outside periods of capacity restriction, the capacity reserved by a shipper for annual and monthly subscriptions not nominated the previous day may be allocated by GRTgaz to other shippers who are active at that entry point and have requested UIOLI capacity. This mechanism applies to all the entry and exit points on the network but not to the capacity of connectors between balancing zones.

---

[297] Page 40, 2006 CRE activity report.

[298] GRTgaz rules on allocations and subscription of transmission capacity at 1 July 2006.

544. As stated by GRTgaz[299], this system is still at an experimental stage. It is worth noting however that between December 2005 and June 2006 almost all requests for UIOLI concerned only one of the two congested entry points, namely Obergailbach, and that nearly [20-30]*% of the requests could not be satisfied over the period as a whole, this non-satisfaction rate reaching [30-40]*% in March 2006. Moreover, this system responds only to a need for short-term capacity (daily capacity), and does not meet the development needs of new entrants.

545. The purpose of the other mechanism (point 6.2 of the rules) is to prevent a shipper from under-using capacity on a saturated infrastructure. According to GRTgaz, this mechanism *'is designed to respond to a need for long-term capacity in order to allow a clientele and gas sales to develop in the long term'*[300].

546. According to point 6.2 of the rules '*where:*

- *a shipper is found to be under-using capacity on a saturated infrastructure,*
- *and the shipper concerned refuses to sell on the secondary market at a price above or equal to the regulated price,*
- *and where it is impossible to show that the shipper is acting in good faith, taking account of a variable potential need justifying the necessity for keeping this capacity available,*

any recurrence of this behaviour will result in the temporary or permanent loss of the capacity reserved, on terms to be decided'.

547. GRTgaz has told the Commission that at certain periods of the year GDF had under-used its capacity at Dunkirk, Obergailbach and Oltingue (exit point to Switzerland), all points prone to congestion.

548. GRTgaz told the Commission that it *'had already made it clear to those shippers whose reservations did not appear adequately borne out by their actual results that they should improve their forecasts or make use of the secondary market for the resale of capacity. This approach has had some impact and GRTgaz has not seen any need to take further specific action'.*

549. Furthermore, according to GRTgaz, any under-utilisation of capacity is not necessarily abnormal in character. According to GRTgaz, (i) gas consumption is highly seasonal, (ii) shippers are, by virtue of their public-service obligations, required to take account of climatic variables, which oblige them to make provision for exceptional meteorological conditions when reserving capacity, and (iii) the long-term gas purchasing contracts include an annual modulation which results in reservations equivalent to the maximum forecast delivery.

550. Against this background, GRTgaz takes the view that there cannot be any *'express under-utilisation threshold which, once exceeded, indicates abnormal under-utilisation by a given shipper of his capacity such as to justify the intervention of GRTgaz. The method used by GRTgaz is therefore based on (i) the detection of a relative recurrence of under-utilisation phenomena and (ii) search for its causes'.*

---

[299] GRTgaz reply via parties (letter of 27 July 2006, No 14065).

[300] GRTgaz reply via parties (letter of 27 July 2006, No 14065).

551. For these reasons, GRTgaz states that point 6.2 of the rules has not had to be applied, given that the combination of the short-term UIOLI and returnable capacity mechanisms has in any event worked satisfactorily.

552. The Commission feels prompted to make the following two observations.

553. Firstly, the Commission has not been able to consult the warnings from GRTgaz to GDF. According to GRTgaz, they '*were conveyed orally as is normal practice in professional relations with the shippers. They did not give rise to any record*'[301].

554. Secondly, it emerges from the explanations given by GRTgaz that, since in order to decide whether the under-utilisation of reserved capacity is normal or abnormal consideration has to be given to qualitative criteria (which are not otherwise specified in the rules), it is particularly difficult to identify any abnormal under-utilisation of capacity.

555. In this respect, the CRE considers that a shipper can block storage capacity without using it and that the effectiveness of the long-term UIOLI mechanisms remains uncertain '*since it is difficult to verify the medium and long-term availability of capacity held by a shipper on the basis of its past use*'[302].

556. On the basis of the foregoing, the Commission considers that while a UIOLI mechanism is undoubtedly useful, its usefulness is nevertheless limited.

d) Expanding planned capacity will permit only limited development of the new entrants in the short-medium term

557. GRTgaz has scheduled work on expanding the capacity of its network, focusing mainly on the Obergailbach entry point and on the Guyenne pipeline. However the increase in this capacity will permit only limited development of competition in the short-medium term.

558. In 2005, before work started at Obergailbach, GRTgaz issued a call for expressions of interest designed to identify shippers wishing to commit themselves to the reservation of capacity covering a period of 10 years.

559. Only GDF, E.ON Ruhrgas and ENOI were allocated shares, GDF and E.ON Ruhrgas obtaining respectively [60-70]*% and [30-40]*% for the period 2008-18. In this respect, the CRE's last activity report states that '*with the exception of ENOI, the other candidates withdrew, not having been able to contract capacity upstream in Germany*'[303]. Furthermore, the new capacity will not be available before late 2008.

560. The work planned on the Guyenne pipeline involves an increase, in coordination with TIGF, of the capacity of the connector between TIGF and GRTgaz. The purpose of this increase in capacity is to be able, at the end of the initial phase (end 2008), to convey

---

[301] GRTgaz reply via parties (letter of 27 July 2006, No 14065).

[302] The CRE's reply to Phase I questionnaire, question 53; the CRE's reply to Phase II questionnaire, question 12.

[303] Aforementioned 2006 CRE activity report June 2006, p. 40.

the gas northwards from the Fos terminals. The purpose of the subsequent phases will be to increase the capacity of the pipeline so as to be able to convey gas from Spain to France.

561. However, when the work on the initial phase is completed (end 2008), GDF's competitors other than Total may find it difficult to gain access to the new capacity on the Guyenne pipeline. GDF has reserved most of the capacity of the Fos terminals for the long term (see below). The other main operator having reserved long-term capacity is Total. Furthermore, as already pointed out above, the use of methane terminals is inappropriate for new entrants.

562. The other phases of the work will increase the capacity of the pipeline further, in particular with the long-term aim of conveying gas from Spain. However, conveying gas from Spain will require work coordinated between TIGF and the Spanish transmission operator, which as yet is only in the study stage[304].

563. The parties assert, however, that the CRE does not share the Commission's assessment of the impact of the planned investments. They cite three resolutions of the CRE granting GRTgaz and TIGF, at least in part, a rate of return increased by 3% (i.e. 12% as opposed to the usual rate of 9%) for certain categories of investment likely to make a significant contribution to improving the market[305].

564. The Commission does not accept the parties' objection: it takes the view that in essentials the CRE resolutions referred to confirm its own analysis.

565. The CRE has decided that '*for certain investments, limited in number, which are likely to make a significant contribution to improving the operation of the market, to the creation of new points of entry to the French network (connectors), or to the decongestion of the network (the reduction of the number of balancing zones), the rate of return should be 12% in real terms before tax for a limited period of 5 to 10 years*'[306]. The CRE has therefore passed three resolutions[307] providing for an increased rate of return on projects aimed at (i) connection to the Fos Cavaou methane terminal, (ii) the upgrading of the Guyenne pipeline, and (iii) the new compression station at Cuvilly. The CRE considers that the first two projects, accounting for a total of almost 90% of the whole cost of the three projects, will benefit mainly GDF and Total.

566. For the connection to the Fos Cavaou terminal, the CRE granted an increase in the rate of return for only a small part of the project. It noted that '*only 10% of the capacity of this terminal will be open to new entrants, and then only for short-term reservations.*

---

304 See TIGF reply to Commission (letter of 18 July 2006, No 13583), in which TIGF states that 'together with the operator Enagas it has studied the opportunities for short, medium and long-term development of transmission capacity at the interconnection points with Spain'.

305 Parties' reply to the statement of objections, paragraph 462.

306 Resolution on tariffs for the use of gas transmission networks, 24 July 2003.

307 Resolution on the allocation of an increased rate of return to the planned new compression station at Cuvilly, submitted by GDF, dated 10 June 2004; resolution on the allocation of an increased rate of return to the upgrading of the Guyenne pipeline, 8 December 2005; and resolution on the allocation of an increased rate of return to the planned connection with the Fos Cavaou methane terminal, 8 December 2005.

The capacity created by the connection with the Fos entry point will consequently benefit mainly Gaz de France and Total, who hold 90% of the capacity at the Fos Cavaou terminal*. The increase in capital charges due to the application of an increased rate of return to the whole of the project would be borne by all the players in the market, via the tariff for the use of the transmission networks, but they would not benefit from the capacity created.* ***The CRE considers, therefore, that the connection to the Fos Cavaou terminal will not by itself make any significant contribution to improving the operation of the market'.***

567. It should be noted, too, that the CRE allowed an increased rate of return because it found that '*GRTgaz has designed the connection to be able to handle a probable increase in the capacity of the Fos Cavaou methane terminal and the commissioning of a third methane terminal'*. At the date of this Decision it is not certain that the capacity of the Fos Cavaou terminal will be increased, or that a third methane terminal will be brought into service.

568. As regards the planned upgrading of the Guyenne pipeline, the CRE allowed an increased rate of return only on a small part of the project. It noted that the project would essentially benefit only GDF and Total: '*only 10% of the capacity of the Fos Cavaou terminal will be open to new entrants, and then only for short-term reservations.* ***A large part of the capacity created in the initial phase of the development of the Guyenne pipeline will benefit mainly Gaz de France and Total, who hold 90% of the capacity of the Fos Cavaou terminal****. The increase in capital charges due to the application of an increased rate of return to the whole of the project would thus be borne by all of the market players, via the tariff for the use of the transport networks, although they would not benefit from the capacity created.* ***The CRE considers, therefore, that the part of the project corresponding strictly to the need to convey gas from the Fos Cavaou terminal will not contribute significantly to the improvement of the operation of the market'.***

569. Moreover, the part of the infrastructure for which the CRE allowed an increased rate of return cannot be used during the initial phase, which begins at the end of 2008.

Access to methane terminals

570. Access to methane terminals acts as a barrier to entry to the gas supply markets for two reasons.

571. Firstly, as pointed out by CRE in its last activity report, use of methane terminals is inappropriate for new entrants whose monthly withdrawals are substantially less than the volume of a spot cargo[308]. This was confirmed by many of the competitors questioned[309].

572. Secondly, GDF is preponderant in access to the methane terminals, having reserved [90-100%]* of the capacity of the Fos Tonkin terminal and nearly [80-90]*% of the

[308] Aforementioned 2006 CRE activity report June 2006.

[309] See replies to Phase II questionnaire from : Altergaz (fax of 12 August 2007, No 13124), BP (e-mail of 25 July 2006, No 13890), Centrica (e-mail of 18 July 2006, No 13520), E.ON (e-mail of 11 July 2006, No 13018), Hydro (fax of 24 July 2006, No 13775), Iberdrola (e-mail of 26 July 2006, No 14002), Poweo (fax of 12 July 2006, No 13090), and RWE (fax of 14 July 2006, No 13337).

capacity of the Montoir terminal pending the entry into service of the Fos Cavaou terminal at the end of 2007. From 2008, GDF has already reserved [60-70]*% of the entire capacity of the three terminals for the long term. Of the alternative suppliers, Total alone has reserved nearly [20-30]*% of the capacity of the future Fos Cavaou terminal.

573. The parties argue, however, that three parties other than GDF have recently reserved capacity at the Montoir terminal, and that methane terminals are not unsuited to new entrants, who can always sell part of a cargo through the LNG exchange point or the gas exchange point, or join with others to charter a ship.

574. The Commission takes the view that the parties' objections do not cast any doubt on its analysis.

575. The parties do not deny the fact that GDF has very preponderant access to the methane terminals. And the data furnished by the parties show that so far GDF has been almost the only user of the methane terminals[310].

2) Access to storage

a) New entity preponderant in access to storage

576. GDF has reserved for 2006/07 nearly [80-90]*% of the capacity marketed by the storage facilities of the GRTgaz zones. Fourteen other suppliers share the remaining capacity between them. With some storage facilities (Ile de France Sud, Lorraine, Picardie) GDF has reserved more than [90-100]*% of the capacity marketed, GDF's lowest rate of reservation being [70-80]*% with the Centre and Ile de France Nord facilities.

577. The capacity reserved by Distrigaz accounts for [0-5]*% of the capacity marketed by the storage facilities, the bulk of its reservations being made with the Salins Sud facility, with [0-5]*% of this facility's capacity.

578. It should be noted that the new entity will be preponderant in access ([80-90]*%) to the Salins Sud facility with nearly [80-90]*% of the capacity reserved (GDF: [80-90]*%; Suez: [0-5]*%). This is a strategic facility: the only one in France to use salt caverns. Thanks to its technical characteristics, Salins Sud is able to ensure that customers are kept supplied in peak cold periods.

579. Where the TIGF is concerned, GDF and Suez have, according to the parties' estimates, subscribed for respectively [40-50]*% and [0-5]*% of the storage capacity for storage year 2006/07.

---

310 Parties' replies of 1 August 2006 (No 14339) and 15 September 2006 (N0 17352). GDF is the only operator to have reserved capacity at the currently operational Fos terminal. Up to the end of 2005, moreover, GDF was to only operator to have reserved capacity at the Montoir terminal. For 2006, only Total and EDF have reserved [0-5]*% and [0-5]*% respectively of the Montoir terminal's capacity (compared with more than [80-90]*% for GDF). For 2007, besides GDF, only EDF has reserved capacity ([5-10]*%) at Montoir. For 2008, besides GDF, only Statoil has reserved capacity ([0-5]*%) at Montoir. Beyond 2008, no operator other than GDF has reserved capacity at Montoir.

580. The parties object that GDF's preponderant access to storage capacity is no more than an accurate reflection of its share of final customers in the market.

581. The Commission would point out that storage capacity was allocated to GDF taking account of at least a proportion of its customers abroad[311], and without calculating its rights in each balancing zone, something that the rules in force would require, as will be explained in more detail below.

b) Allocation of storage capacity to GDF untransparent under the provisional storage rules

582. According to the provisional rules on access to storage introduced by the Directorate for Large Infrastructure (DGI), storage capacity can, subject to certain limits, be reserved in a balancing zone other than that in which the customers served are situated[312]. A supplier requesting a capacity reservation must give by balancing zone: (i) the storage capacity and the nominal take-off rate it wishes to reserve; these values may not be higher than the storage rights opened for the zone (calculated on the basis of the clientele served by the supplier in the zone in question), as regards either the storage capacity or the take-off rate; and (ii) the facilities in which they wish to make reservations, respecting the relative maxima established. The DGI has therefore defined a matrix of reservation potential for each facility as a function of the balancing zone in which the customers served are situated.

583. Once the shipper has made its request, the DGI performs consistency checks in order to ensure that the capacity requested complies with the rules referred to above.

584. The Commission observes that the DGI has not performed these consistency checks for [...]* and GDF. According to the DGI, *'In the absence of any precise modelling of domestic customers' needs and of an order concerning capacity allocations, the storage contracts of GDF and [...]* permit a distribution of storage capacity in relation to storage needs to be agreed which in overall terms corresponds to their portfolios of existing customers'*[313].

585. The DGI explains moreover that *'the storage rights of Gaz de France Négoce spring mainly from the rights relating to those domestic customers of which it is the only possible supplier until 1 July 2007. (…) The tools needed for a precise calculation of the storage rights for domestic customers are being developed by the transmission system operators. Thus, in the absence of such tools, the storage capacity rights of Gaz de France Négoce have been calculated on the basis of the overall storage rights minus those relating to customers served by other suppliers, which has made it possible to satisfy all the requests of these suppliers'*[314].

---

311 GDF's storage rights were calculated taking account of its historic contracts with [...]*. The parties' replies dated 15 September 2006, No 17325, and 19 September 2006, No 17582.

312 Provisional principles for allocation of storage capacity (24 December 2004).

313 DGI reply via the parties (letter of 27 July 2006, No 14065).

314 DGI reply via the parties (e-mail of 1 August 2006, No 14319).

586. This method of assigning storage capacity to GDF, i.e. assigning to it what remains after serving the other requesters, cannot be used to check whether surplus capacity in storage facilities have been unduly assigned to GDF.

587. The fact that GDF holds storage capacity beyond the needs of its French clientele is borne out in its reply to the question whether it uses French storage sites to feed customers in other countries: *'Gaz de France uses the storage capacity it holds in France over and above those needed to supply its customers in France to feed [...]* and provide them with storage services. The working gas storage volume concerned is about 2 TWh in all. To achieve this, Gaz de France mainly uses the storage capacity of the Salins Sud facility. Gaz de France may also make sporadic use of its storage capacity in France to provide additional supplies for its portfolio of customers in other neighbouring countries (Belgium, Netherlands, Germany, Italy). Since the approach is one of overall management of a capacity portfolio and a customer portfolio, it is impossible to determine the customers, volumes or groups concerned'*[315].

588. For its part, the ERC considers that the existing system for third-party access to storage infrastructures has discriminatory aspects in that *'storage users are not treated in the same way. The storage operators have not published any rules on access to capacity surplus in relation to the strict needs of the final consumers as governed by the Law of 9 August 2004. The unallocated capacity may have remained in the hands of the incumbent operator'*[316].

589. The rules on access to storage have now been clarified by Decree (*décret*) No 2006-1034 of 21 August 2006, which has to be supplemented by an order (*arrêté*) that has not yet been issued. Capacity is to be allocated in order of priority, with customers based abroad having the lowest priority. The Minister for Energy must grant storage rights per zone for each requester. The capacity is to be assigned by the storage operators according to rules which they have still to define.

590. As it stands, however, the decree does not reveal what arrangement will be introduced to ensure respect for the rules on the allocation of capacity. One can therefore assume that the DGI will continue to be in charge of the checks normally required.

591. The parties submit that for the year 2006/07 storage capacity was allocated in a perfectly transparent and non-discriminatory fashion, and that excess capacity was sold by auction in 2006[317].

592. However, the parties have not produced any fresh evidence that might alter the Commission's assessment of the untransparent character of the allocation of storage capacity to GDF. The calculation of GDF's entitlement to storage rights included part of its portfolio of customers abroad, which was not provided for in the provisional allocation rules; and GDF's capacity entitlement was calculated on a countrywide basis, and not by balancing zone, which was also contrary to the allocation rules[318].

---

315 Parties' reply by letter of 27 July 2006, No 14065.

316 The CRE's reply to the Phase I questionnaire, question 57.

317 Parties' reply to the statement of objections, paragraphs 473 to 491.

318 Parties' reply of 19 September 2006, No 17852.

3) Independence of GDF group infrastructure operators

593. Much like incumbent gas operators in other European countries, GDF is a vertically integrated group which both supplies gas and operates gas infrastructures. Thus, alongside its activities as supplier (GDF Négoce), GDF comprises three gas infrastructure operators: GRTgaz (transport), DGI (storage and methane terminals), and Gaz de France Réseau Distribution (GRD, distribution).

594. Various provisions of the Gas Directive , particularly Articles 9 and 13, are designed to ensure efficient and non-discriminatory access to gas transmission and distribution networks. These articles stipulate that where an operator of a transmission or distribution system forms part of a vertically integrated undertaking, it must be independent, *'at least in terms of its legal form, organisation and decision making from other activities not relating to transmission. These rules shall not create an obligation to separate the ownership of assets of the transmission system from the vertically integrated undertakings'*. These same articles moreover set out a number of minimal criteria which have to be applied in order to guarantee the independence of these infrastructure operators.

595. By contrast, the Gas Directive does not impose the same level of guaranteed independence on storage operators.

596. Law No 2004-803 of 9 August 2004 transposes this Directive into French law. In this connection, in November 2005 the CRE published its first report on compliance with the code of conduct and on the independence of the network operators. The report raised a number of problems and set out proposals for guaranteeing the independence of the network operators.

The network operators

597. First, in its reply to the Commission the CRE takes the view that the independence of GRTgaz from GDF is secure.

598. In the same reply, however, the CRE notes that some of its proposals have not yet been put into effect, and that it has not checked whether all of them have been implemented[319].

599. It says that *'the proposals relating to information for administrators (proposal 3), the appointment of independent figures to represent network users on the board of directors (proposal 6) and the separation of the communication policy from the policy of the group (proposal 7) have not yet been put into effect*'. Furthermore it states that it has not verified that the professional interests of those responsible for managing the network operator are guaranteed (proposal 5).

600. Second, the CRE considers that the independence of GRD from GDF is not guaranteed. It says that *'GRD has not yet adopted a name and visual identity different from the supplier (proposal 2), GRD's principal argument being that for economic reasons and reasons of internal communication it is better to wait until 1 July 2007, the date on which the distributor will have to become a subsidiary. Moreover, the proposal*

[319] The CRE's reply to the Phase I questionnaire, question 48.

concerning communication policy distinct from that of the group has not been taken up (proposal 7)'. It also states that it has not verified that the professional interests of those responsible for managing the network operator are guaranteed (proposal 5).

601. Third, in the aforesaid report, the CRE stresses that *'consideration for the professional interests of those responsible for managing the network operator for management, required under the directives, has not been fully transposed. The concept of 'persons responsible for the management' as it appears in the directive has been narrowly interpreted in the Law by 'managers'. Moreover, it has been approached only from the angle of the removal of the members of the management board or of the general manager. It will therefore at the very least have to be the subject of group procedures to remedy this shortcoming'*[320].

602. In the same report, the CRE remarks that *'the independence of the electricity or gas transmission system operators cannot be reliably guaranteed solely by the content of the articles of association adopted. How the parties concerned behave in implementing them will therefore be crucial for achieving the result dictated by the directives of 26 June 2003. Owing to the very nature of the link between a parent company and its subsidiary, and regardless of the kind of energy concerned, the independence of the public transmission system operators cannot be ensured simply by converting them into subsidiaries'.*

603. Fourth, on 4 April 2006 the Commission addressed a letter of formal notice to France in which it expressed the view that France had infringed the Gas Directive. According to this letter, the independence of the distribution structure common to EDF-GDF (EDF Gaz de France Distribution) is limited from the point of view of investment.

Storage operator

604. In its reply to the Commission the CRE takes the view that the independence of the DGI in relation to GDF is not guaranteed. The lack of clarity in the allocation of storage capacity to GDF, described above, is one factor that suggests that its independence is not guaranteed under the provisional rules for the allocation of storage capacity.

605. In the light of the foregoing, the Commission concludes that, in varying degrees, the distribution, storage and methane terminal infrastructure operators of the GDF group do not yet afford sufficient guarantees as to independence.

A.3.4.3.3 Regulated tariffs for sales by public distributors impede entry of competitors

606. Article 7 of the Law of 3 January 2003 stipulates that *'The tariffs for sales of natural gas to non-eligible customers shall be defined by reference to the intrinsic characteristics of the supplies and the cost linked to such supplies. They shall cover all these costs, but shall not comprise any subsidy to eligible customers'.*

320 Report, p. 20.

607. Since October 2005, the CRE has issued three negative opinions[321] concerning changes in GDF regulated public distribution tariffs which failed to comply with the principle established by the Law.

608. In its last activity report[322] the CRE states that, despite the emergence in 2005 of suppliers targeting the commercial clientele linked to the distribution networks, *'the recent trend in regulated tariffs, which do not pass on the entire costs of supplies, makes it difficult for these new entrants to compete'.*

609. Consequently, on 1 December 2005, the Gas and Electricity Syndicate for the Ile de France (Sigeif), which has 145 members (including local authorities, subsidised housing agencies and other administrative bodies) issued a call for tenders for 800 GWh of gas a year. By means of this call for tenders, Sigeif, which had not exercised its eligibility, wanted to subject GDF to competition with other suppliers. The call for tenders produced no result, Sigeif stating that since the Government *'had decided to limit the rise in controlled tariffs for gas on 1 April 2006 and freeze them until 1 July 2007, the exercise of eligibility by public bodies appears inappropriate'*[323].

610. Furthermore, Electrabel France, a subsidiary of the Suez group which supplies electricity in France, recently studied the possibility of offering gas supplies to domestic customers when the market opens up fully on 1 July 2007. It concluded that it is *'currently impossible to compete with the regulated tariffs without (on average) giving rise to a negative gross margin'*[324].

611. For its part, on 4 April 2006, the Commission addressed a letter of formal notice to France in which it expressed the view that France had infringed the Gas Directive .

612. The parties argue that regulated prices cannot be a barrier to entry to the markets for the supply of gas to eligible customers who have exercised their eligibility, because the regulated prices do not apply to those markets. Quite the reverse, GDF is penalised by the financial burden imposed by the regulated tariffs.

613. The Commission cannot accept this argument. The existence of regulated prices discourages customers from exercising their eligibility, and thus restricts the growth of the markets for the supply of gas to customers who have exercised their eligibility. The entry and development of competitors in these markets is consequently slowed or prevented. The examples of Sigeif and Electrabel given above provide a perfect illustration. That GDF may suffer a financial constraint as a result of the regulated prices[325] does not in any way show that the prices do not constitute a barrier to entry.

---

321 Opinion of 27 October 2005 on the state of Gaz de France public distribution tariffs at 1 November 2005; opinion of 23 December 2005 on the draft order amending the order of 16 June 2005 on the selling prices of gas sold from public distribution networks; opinion on the draft order amending the order of 16 June 2005 on the selling prices of gas sold from public distribution networks.

322 2006 ERC activity report (June 2006), p. 34.

323 See Sigeif communication on its Internet site: http://www.sigeif.fr/somart.php3?rub=actualite&sousrub=&idsous=23&id=97&position=5

324 E-mail from parties of 7 August 2006, reply to supplement to questionnaire of 27 July (No 14054).

325 The possible constraint on GDF is difficult to evaluate, because, as the French Competition Council recently pointed out, 'the separate accounts for eligible customers do not distinguish between sales of gas on the

614. In the light of the foregoing, the Commission considers that the regulated prices in force are considerably lower than the market price and that they therefore prevent competitors from entering the market.

A.3.4.3.4 Conclusion on barriers to entry

615. In the light of the foregoing, the Commission finds that there are high barriers making it difficult to enter the French gas markets. It is therefore likely that very few other existing or potential competitors would be able to take over the role of Suez and compensate for the competitive pressure which would be lost as a result of the proposed merger. In this context, the elimination of Suez as one of GDF's principal competitors in France has adverse effects on effective competition going beyond the mere effects of adding market shares.

A.3.5 Conclusion

616. In the light of the foregoing, the Commission finds that the notified transaction significantly impedes effective competition in France in the following markets:

- supply of H gas to large customers who have exercised their eligibility, in the North, East, West and South zones
- supply of H gas to small customers who have exercised their eligibility, in the North, East, West, South and South-West zones
- supply of L gas to large customers who have exercised their eligibility in the North zone
- supply of L gas to small customers who have exercised their eligibility in the North zone
- supply of H gas to dealers in the North and East zones
- supply of L gas to dealers in the North zone
- supply of H gas to household customers from 1 July 2007 in the North, East, West, South and South-West zones
- supply of L gas to household customers from 1 July 2007 in the North zone
- supply of H gas to electricity producers in the North and East zones
- supply of L gas to electricity producers in the North zone.

---

open market and sales at the regulated tariff, which means that these accounts are of no real use for checking that there is no distortion of competition between the two types of customer' (opinion No 06-A-12 of 30 June 2006 on the introduction by GDF of separate accounting for eligible and non-eligible customers).

B. Electricity in Belgium

B.1 LEGAL FRAMEWORK OF THE ELECTRICITY SECTOR

B.1.1 European legal framework

617. The internal market in electricity is regulated by Directive 2003/55/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in natural gas and repealing Directive 98/30/EC[326]. The Directive lays down common rules concerning electricity generation, transmission and distribution, and sets out arrangements for the organisation and operation of the electricity sector, market access, applicable criteria and procedures for calls for tender and authorisations, and the use of the grids. It fixes a deadline for the total opening of the electricity markets of 1 July 2004 for the non-household sector and 1 July 2007 for the household sector. It provides that transmission and distribution network operators who are part of a vertically integrated undertaking must be independent, at least in terms of their legal form, organisation and decision making. This legal separation has to be effective by 2004 at the latest for transmission and by 2007 at the latest for distribution. The independence of network operators is intended to ensure non-discriminatory access to essential electricity infrastructure. In addition, each Member State must designate one or more independent regulatory authorities in the electricity sector.

618. Regulation (EC) No 1228/2003 of the European Parliament and of the Council of 26 June 2003 on conditions for access to the network for cross-border exchanges in electricity[327] aims at setting fair rules for cross-border exchanges in electricity. It establishes a compensation mechanism for cross-border electricity flows and lays down harmonised principles on cross-border transmission charges and the allocation of available interconnection capacities between national transmission systems.

B.1.2 THE NATIONAL REGULATORY FRAMEWORK

619. The federal and regional authorities have transposed the two European directives (96/92/EC and 2003/54/EC) in four sets of rules: the Law of 29 April 1999 on the organisation of the electricity market, as amended by the Law of 1 June 2005[328] (for the federal level) and referred to hereunder as 'the Electricity Law', the Decree (decreet) of 17 July 2000 on the organisation of the electricity market[329] (for Flanders), the Decree (décret) of 12 April 2001 on the organisation of the regional electricity market[330] (for

326 OJ L 176, 15.7.2003, p. 37.

327 OJ L 176, 15.7.2003, p. 1.

328 Law of 29 April 1999 on the organisation of the electricity market, *Moniteur belge/Belgisch Staatsblad* of 11 May 1999, as amended by the Law of 1 June 2005, *Moniteur belge/Belgisch Staatsblad* of 14 June 2005. Of the implementing royal decrees, the most important are those governing transmission networks, transmission and distribution tariffs, public service obligations and electricity supply authorisations.

329 Decree of 17 July 2000 on the organisation of the electricity market, *Moniteur belge/Belgisch Staatsblad* of 22 September 2000.

330 Decree of 12 April 2001 on the organisation of the regional electricity market, *Moniteur belge/Belgisch Staatsblad* of 1 May 2001.

Wallonia) and the Order (ordonnance/ordonnantie) of 19 July 2001 on the organisation of the electricity market[331] (for the Brussels Region).

620. At the federal level, customers connected to electricity transmission and supply networks at voltages between 30kV and 70 kV (i.e. non-household customers) have been eligible since 1 July 2004. In Flanders, all final customers have been eligible since 1 July 2003. In Wallonia, customers connected to the national transmission network and all commercial customers have been eligible since 1 July 2004. All final customers will be declared eligible as of 1 January 2007. In the Brussels Region, commercial customers have been eligible since 1 July 2004. Households will be eligible as of 1 January 2007. All Belgian customers will therefore be eligible as of 1 January 2007.

621. The Belgian electricity market is regulated at federal level by the CREG (the Electricity and Gas Regulatory Commission), whose dual mission is to advise the official authorities and to monitor the application of laws and regulations in the gas and electricity sectors. At a regional level, three regulatory bodies, the VREG (the Flemish regulatory body), the IBGE-BIM (the Brussels Region regulatory body) and the CWaPE (the Walloon body), monitor the application of market regulations at the regional level.

B.2. **Infrastructure**

B.2.1 Physical infrastructure

622. Electricity is transmitted from producers to final consumers through cables that are either suspended or buried underground. Other equipment, such as transformers, forms an integral part of the network.

623. A distinction needs to be made between transmission through the high voltage network (greater than 70 kV - the 'transmission network') and transmission through the low voltage network (less than 70kV - the 'distribution network').

624. From the technical point of view, however, the transmission network and the section of the distribution network that operates on relatively high voltages (between 30 kV and 70 kV) form a single unit, and constitute an integrated meshed network for electricity transmission.

625. The interconnectors referred to above, which connect Belgium's transmission systems with those of neighbouring countries, are an integral part of the transmission system. The Belgian transmission system is interconnected only with the transmission systems in the Netherlands and France and one of the networks in Luxembourg. There is no interconnection between the Belgian transmission system and the systems in Germany or the United Kingdom.

626. Since 1 January 2006, all available interconnection capacity at the Franco-Belgian border has been sold at auction to market operators, with transmission in each direction sold separately. Calendar year, calendar month, and single day capacities are sold. Unused monthly and annual capacity is resold when daily capacities are put up for sale. The interconnection capacity at the border between Belgium and the Netherlands is

[331] Order of 19 July 2001 on the organisation of the electricity market, *Moniteur belge/Belgisch Staatsblad* of 17 November 2001.

essentially allocated in the same way. There is no congestion at the border between Belgium and Luxembourg and, consequently, no particular arrangement has been set up to allocate capacities.

B.2.2 Network operators

627. Electricity transmission in Belgium is a federal responsibility, while distribution is a matter for the three regions, Flanders, Wallonia and Brussels.

628. Elia is the transmission system operator (for voltages above 70 kV). But the distribution network operating at voltages of between 30 and 70 kV is used to transmit electricity, and this has led the three regions to choose Elia as the distribution network operator as well as transmission system operator for their respective areas where their distribution networks operate on voltages between 30 and 70 kV.

629. Distribution of electricity at voltages below 30 kV is in the hands of a number of different distribution network operators which take the form of associations of local authorities known as 'intercommunales'. There is no geographical overlap between the areas covered by these distribution network operators. They are responsible for the use, maintenance and development of the distribution system, including connections with other electricity networks, in particular the transmission system operated by Elia.

B.2.3 Ownership and control of the networks

630. There is no legal requirement for separation of ownership between transmission and distribution networks, and private actors can hold shares in these operators.

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

632. Private holdings in distribution system operators are nevertheless subject to certain restrictions, which vary according to the region. In Flanders, since 5 September 2006, Electrabel's holdings in the mixed public- and private-sector utilities may no longer exceed 30%, and under the terms of a Flemish decree Electrabel must withdraw completely from such companies by 31 December 2018 at the latest. In Wallonia, private actors can hold a maximum 49% share in distribution system operators. The complete withdrawal of Electrabel from the distribution network operator in Brussels is envisaged in two stages, the first in 2007 and the second in 2012.

633. On the evidence available the Commission believes that Suez exercises de jure joint control over Elia, and that Suez has de facto control of the mixed public- and private-sector utilities in the Walloon Region, or is at the very least in a position to bring considerable pressure to bear on them.

B.2.4 Suez control of Elia

634. Elia shareholders can be broken down into three groups. One block of shares is a free float on the Stock Exchange (accounting for 40%, the B shares). The two other groups are local authorities (via Publi-T, a cooperative company with limited liability), which hold 30% of the shares (the C shares), and the former owners of the CPTE transmission

network, who own the remaining 30% of the shares (the A shares), divided between Electrabel SA (27.45%) and the SPE public shareholders, via Publipart SA (2.55%). Elia's board and senior management are the same as for Elia System Operator.

635. A shareholder agreement concerning Elia System Operator SA was signed on 31 May 2002 by Publi-T SCRL, Electrabel SA, CPTE SCRL, SPE SA, Elia System Operator SA, Elia Asset SA and the Belgian State[332]. This agreement still applies[333]. It is doubly relevant to the question of the Suez group's (joint) control of Elia, firstly because it contributes to the applicability of the concept of de facto (joint) control described below, and secondly because it reflects the will of the largest groups of shareholders – the Suez group and the public shareholders – to maintain their joint control through a right of reciprocal pre-emption between the shareholders.

636. In reply to a question from the Commission, the CREG[334] explained why on the basis of Article 5 of the Belgian Company Code the Suez group would be consider to exercise joint control over Elia together with representatives from the local authorities (Publi-T). The blocking minority preserved by Suez in Elia covers the control that Suez can exercise within the board of directors via Electrabel.

637. The CREG based its arguments on Article 5 of the Belgian Company Code. Article 5 describes the closest links covered by company law, which, as might be expected, are subject to the strictest conditions. It defines 'control' of companies as 'the de jure or de facto ability to bring a decisive influence to bear on the appointment of the majority of administrators or directors, or on the management decisions they make'.

638. Control may be de facto or de jure. Paragraphs 2 and 3 of Article 5 in the Company Code give concrete examples of such kinds of control. De jure control is an irrebuttable presumption, while de facto control has to be demonstrated using tangible examples (such as how voting rights were used at a general assembly).

639. Under Article 5.2.5 of the Company Code, control may be exclusive or joint. The concept of 'joint control' is defined in Article 9 of the Code, where it is stated that joint control means control exercised by a limited number of associates who have agreed that management decisions may be taken only with their common agreement.

640. Article 9 of the Company Code lists three conditions all of which must be met for control to be considered joint control:

    a) Joint control is exercised by a limited number of associates.

    b) There is an agreement between the associates. The shareholder agreement of 31 May referred to above[335] constitutes an agreement between associates. The

[332] Form CO, annex 6b.

[333] Elia reply (No 13549) of 19 July 2006 to question 7 from the Commission.

[334] CREG reply (No 13256).

[335] Form CO, annex L. 6 b.

condition is interpreted in a fairly broad sense, and Elia's articles of association would in any case suffice to meet this requirement.

c) The associates have a right to veto decisions regarding the management of the undertaking.

641. The notion of 'joint control' found in Article 9 of the Belgian Company Code is therefore very close to the notion of joint control to be found in the Merger Regulation. According to Commission practice, joint control can be said to exist when minority shareholders have additional rights which allow them to veto decisions which are essential for the strategic commercial behaviour of the joint venture[336].

642. The Elia board of directors currently comprises three representatives from Electrabel, three from Publi-T and six independent directors. Thus the undertaking has three interest groups at its head. The question that arises, therefore, is whether these interest groups can veto decisions which are essential for the strategic commercial behaviour of the joint venture.

643. According to the first indent of Article 19.5 of Elia's articles of association, when a consensus cannot be reasonably attained, in particular instances that are set out in the articles of association, decisions are taken only 'by a majority of the independent and a majority of the non-independent directors'. These situations include:

a) the appointment or dismissal of members of the management committee;

b) the approval and/or refusal of development, investment and adaptation plans;

c) decisions related to the launch or continuation of activities other than operating electricity networks;

d) strategic decisions to manage or acquire electricity networks outside of Belgium.

The clause requiring a special majority and the categorisation of directors as independent or non-independent enables Electrabel and its three directors (A shares) to exercise a veto on the board of directors in the specific circumstances described in the first indent of Article 19.5 of the articles of association. Suez (Electrabel) therefore has a right of veto that notably affects staff appointments in managerial and investment matters. Under Community law, these rights are sufficient to give Suez joint control of Elia[337].

644. This is true in all cases, even if it is theoretically possible for decisions to be taken without Electrabel's agreement[338]. Such an eventuality could only come about if

---

[336] Commission notice on the concept of concentration under Council Regulation (EEC) No 4064/89 on the control of concentrations between undertakings (98/C 66/02), paragraph 21.

[337] Commission notice on the concept of concentration under Council Regulation (EEC) No 4064/89 on the control of concentrations between undertakings (98/C 66/02), paragraphs 25 (appointment of management) and 27 (investment).

[338] Under Article 19.3 of Elia's articles of association, the board of directors 'may neither deliberate nor lawfully take decisions unless at least half the members are present or represented'. If Electrabel, for

Electrabel voluntarily decided not to send a representative or replacement to a board meeting[339]. Electrabel would then have voluntarily chosen not to exercise its veto at the board meeting. If Electrabel so wishes, it can therefore always veto decisions by having its representatives participate in board meetings.

645. None of the above is negated by the fact that, pursuant to the Law on Electricity, Elia's articles of association[340] delegate the management of the electricity transmission network to the management committee[341]. First, the management committee has to give an account of the use of the delegation to the board of directors[342]. Second, the business plan and the budgets are approved, monitored and amended by the board of directors[343]. The board of directors also approves or refuses the development plan, the investment plans and the adaptation plan that must be submitted periodically by the network manager, on the understanding that these plans can be refused only on grounds related to their financial impact on the company[344].

646. That last restriction on the powers of the board of directors does not mean that the board has no influence over investment in the network: not only does the budget depend on the board of directors, but the board can also refuse investment plans which would go against the financial interests of the company. Given that the main threat to competition presented by the integration of the network manager with the largest energy supplier is under-investment in capacity in general, and in interconnection in particular, it would be wrong to underestimate the impact of control over the budget and the capacity to refuse investment plans on financial grounds.

647. Moreover, the management committee, which has to submit its investment plan to the board of directors for approval or rejection (on financial grounds), is itself appointed by the board of directors[345]. Five of the seven managers who currently comprise the Elia management committee previously worked for Electrabel, and another previously worked for SPE. Only the financial director has not previously worked in the electricity sector.

648. This assessment of the independence of the management committee should also take account of a finding in the market survey which revealed that a considerable number of

---

whatever reason, decides not to attend an Elia board meeting, the board may still lawfully take decisions under Article 19.5 of the articles of association if (i) three independent administrators and (ii) three Publi-T representatives are present, and two administrators from each group approve the decision.

339 In practice, and according to the information supplied by Elia, board meetings have always been attended by the full complement of administrators appointed by Electrabel (A shares). Elia reply (No 13744) to question 6(a), with annex 6.2.

340 Article 17.3 of the articles of association (form CO, Annex L6).

341 Paragraph 647 of the parties' reply to the statement of objections.

342 Article 17.3 of the articles of association, paragraph 2.

343 Article 17.2 of the articles of association.

344 Article 17.2 of the articles of association.

345 Article 17.4 of the articles of association.

electricity user undertakings did not agree with the view that Elia was not under Suez control. This should clearly be taken into account[346].

649. It follows from the above that Suez has the means to exercise joint legal control over Elia.

650. Electrabel can in fact veto any decision taken by the Elia general meeting too. Under Article 6.1 of the Elia Systems Operator SA shareholder agreement[347], [...]*. Electrabel's approval is therefore necessary for all decisions made at the general meeting.

651. In itself, the above is sufficient to establish that Electrabel, and therefore the Suez group, has joint control over Elia. A further point confirms this conclusion. This is the right of reciprocal pre-emption that industry shareholders (A shares) and public shareholders (C shares) granted each other in the shareholder agreement referred to in paragraph 635 above.

652. The right of reciprocal pre-emption between industrial shareholders (A) and public shareholders (C) is enshrined in Articles 4 and 5 of the shareholder agreement. Under Article 4.2.1, [...]*.

653. The right of reciprocal pre-emption described above effectively ensures the future joint control of Elia by A shareholders (primarily Electrabel, the Suez group) and C shareholders (local authorities).

654. This is also apparent from paragraph 3.6.3 of the shareholder agreement, which stipulates that the [...]*[348]. The same restriction is repeated for Publi-T in Article 4.4.5.

655. In the notification the parties state that by letter of 16 May 2002, before the reduction in Electrabel's holding to 27.45%, the Commission had already decided that CPTE and Publi-T did not have joint control over Elia[349]. But the letter of 16 May 2002 from the Merger Task Force Director itself says that this is only an opinion based on the information available, and can by no means be regarded as a Commission decision[350].

656. In their observations on the Article 6(1)(c) decision the parties also argue that under the Electricity Law, Elia has a strict obligation to be independent and impartial, and that this has been the case since its official designation as transmission system operator on 13 September 2002[351]. In reply to a request for information about the nature of the

---

346 The question asked in Phase I, No 59, was: 'the parties state that Suez does not control Elia and the *intercommunales*, and that the transmission and distribution markets will not therefore be affected by the merger. Do you agree? Yes - no. If you reply in the negative, please give your reasons in full'.

347 Form CO, Annex L6.

348 Annex L 6 b of Form CO.

349 Form CO, p. 537.

350 See Annex L7 to Form CO.

351 Paragraph 218.

voting system used for each item discussed by Elia's board of directors from the beginning[352], Elia provided more information than requested. After noting that all board decisions were taken by consensus, Elia added that building a consensus on the board of directors was recommended by the Belgian legislature when the first Electricity Directive was transposed, to ensure that Elia remained independent from the previous network owners, namely Electrabel and SPE[353].

657. Although the consensus obtained on all the decisions that have been taken could result partly from causes other than the joint control exerted over Elia by the A and C shareholders, it is nonetheless true that this long-lasting consensus demonstrates that the solidarity between groups of shareholders bound by the shareholder agreement works well in practice.

658. Elia refers also to the rules of 'corporate governance' that the Belgian legislature recently adopted, or rather amended, by adapting the Royal Decree on the management of the national electricity transmission system[354]. It is not apparent what these changes comprise. An amendment dated 9 May 2006 to Elia's articles of association, which was communicated in the Elia reply of 18 July[355], makes the following changes to Article 14 of the articles. Firstly, the 'corporate government committee' [comité de gouvernement d'entreprise] is to be known henceforth as the 'corporate governance committee' [comité de gouvernance d'entreprise] (Article 14.1). Secondly, the internal rules of procedure, which are to be jointly drawn up by the corporate governance committee and the board of directors, and are to set out, inter alia, the rules concerning reporting by the corporate governance committee, no longer require the approval of the CREG (new Article 14.3[356]), as they did previously (old Article 14.3[357]). In any event, the fact that the internal rules of procedure must be drawn up together with the board of directors leaves the joint control described above intact.

659. It can be concluded from the above that Suez (Electrabel) has control over Elia jointly with the public shareholders who hold C shares, as a result of the terms of the shareholder agreement and Elia's articles of association and through its three members of the board of directors.

B.2.5 Suez control of (the operation) of mixed public- and private-sector utility companies

660. In the past, mixed private- and public-sector utility companies subcontracted the operation of electricity and gas distribution networks to subsidiary companies of Suez (Electrabel), which were responsible for the technical operation, maintenance and development of the gas and electricity distribution systems for the utility companies. Suez (Electrabel) did this by setting up separate entities specialised in network

352 CREG reply No 13744 to question 6.

353 CREG reply No 13744 to question 6, p. 21.

354 Current consolidated text in Annex 6.3 of the Elia replies (N° 13744) p. 22.

355 CREG replies (No 13744), annex 6.1, in reply to question 6 from the Commission.

356 CREG replies of 18 July 2006 (No 13744), annex 6.1, in reply to question 6 from the Commission.

357 The version of the articles of association communicated in annex L6a of Form CO .

management in the three regions, namely Netten Vlaanderen, Netten Réseaux Bruxelles and Réseaux Wallonie[358]. These arrangements are however changing in Flanders and in the Brussels Region.

661. In Flanders: at the end of 2005, it was decided that Netmanagement Vlaanderen, GeDis and Indexis should be regrouped under a single operator, Eandis. From 6 September 2006 onward, Suez has no longer had a direct holding in Eandis, which is henceforth owned entirely by Flanders's eight mixed private- and public sector utility companies. Suez (Electrabel) will, however, continue holding a 30% participation in these eight mixed utilities. The withdrawal of Suez (Electrabel) from the mixed private- and public-sector utility companies in Flanders is planned for 31 December 2018.

662. A similar operation was started in the Brussels Region in 2006. Operational network management activities are being regrouped inside Newco X, a new entity which includes Netten Réseaux Bruxelles and a part of Suez's staff who previously provided services to Netten Réseaux Bruxelles. On 1 September 2006, the Suez (Electrabel) holding was transferred to Sibelga, the Brussels utility company, in which Suez (Electrabel) retains a 30% holding, the remaining 70% being held by the Brussels municipalities. Electrabel's total withdrawal from Sibelga is planned for 31 December 2012.

663. In Wallonia the initial structure remains, and operation of the mixed private- and public-sector distribution networks will continue to be subcontracted to Réseaux Wallonie, a Suez business unit over which Suez has exclusive control.

664. In the statement of objections the Commission did not seek to argue that Suez controlled or wielded significant influence over the mixed private- and public-sector utility companies in Wallonia. On the other hand, however, there is no reason to rule out the possibility of such control or influence, despite the fact that Suez holds only minority shares[359].

665. But the question whether Suez (Electrabel) controls mixed private- and public-sector utility companies is no longer relevant, as Electrabel definitely has exclusive control of Réseaux Wallonie and can thereby exercise a significant influence over mixed private- and public-sector utility companies in Wallonia.

666. The claim that the operational services provided by Suez (Réseaux Wallonie) through Réseaux Wallonie are nothing more than 'simple technical assistance services' fails to take account of the fact that the mixed Walloon private- and public-sector utility companies do not themselves carry out any of the activities that are essential to the daily operation of the distribution networks, and have sub-contracted everything to Suez (Réseaux Wallonie)[360], which performs numerous important functions[361].

---

358 Form CO, pp. 99 and 529.

359 It appears that in certain Walloon utilities there is a right to reject the decisions of the Board of Directors and the general meeting, and conditions relating to a minimum presence of representatives of the minority shareholder, allowing an empty chair policy.

360 Opinion of the CWaPE CD-5e24-CWaPE-96 on the plan to set up an energy expertise and management company (SEGE), 26 May 2005, p. 10.

667. It follows from its involvement in all the essential network management tasks that all the operational decisions of the mixed utilities are prepared and implemented by Suez (Réseaux Wallonie)[362]. It is therefore not surprising that a number of respondents in the market survey drew attention to the disparity between the technical and management skills of Electrabel staff and local authority representatives on the management bodies[363]. Suez's influence over the decision-making processes of the Walloon mixed utilities is further strengthened by the fact that, where the articles of association of the mixed private- and public-sector utilities allow for the possibility that the directors representing local authorities may be assisted by one or more experts, the directors choose these experts only after they have heard the views of the Electrabel directors[364].

668. The Walloon regulator appears to share the Commission opinion: in an opinion on the future development of the current arrangements it says *'the CWaPE position has always been to recognise the added value a new structure might bring, allowing a sufficient number of 'sensitive' functions (i.e. functions which could potentially generate distortions of competition or conflicts of interest) to be carried out by staff who were not hierarchically dependent on superiors who have responsibilities or interests in supply or production activities'*[365]*. Th*e CWaPE recommends therefore that Réseaux Wallonie should be reorganised to form a structure that is independent of Electrabel, with corporate governance rules and independent directors[366].

669. The Commission therefore maintains that Suez can at least significantly influence the mixed private- and public-sector utilities in the Walloon Region on account of its exclusive control of Réseaux Wallonie.

670. The existence of strict confidentiality rules regarding commercially sensitive information, of which the TSO staff were informed, and which also cover staff at Suez (Réseaux Wallonie)[367], does not affect this conclusion, as there is nothing to prevent Réseaux Wallonie from promoting the interests of Suez without communicating commercial information. At all events, these confidentiality rules do not apply to the same extent to Réseaux Wallonie's staff as non-compliance therewith is of no consequence (see below).

671. According to the parties, the absence of control by Electrabel over the mixed utilities has been implicitly confirmed by both the Commission and the Belgian Competition

---

361 Opinion of the CWaPE CD-5e24-CWaPE-96 on the plan to set up an energy expertise and management company (SEGE), 26 May 2005, p. 8.

362 Letter from SourcePower (No 17566) of 18 September, p. 21.

363 See the replies to question 60 of the Phase I questionnaire, and in particular that from

364 Article 22 of the IGH utility articles of association, No 12405.

365 Opinion CD-5e24-CWaPE-96 on the project to create an energy expertise and management company (SEGE), 26 May 2005, p. 1.

366 Opinion CD-5e24-CWaPE-96 on the project to create an energy expertise and management company (SEGE), 26 May 2005, p. 9.

367 Reply to the statement of objections, paragraph 686.

Council in the ECS/Intercommunales decisions in so far as the transactions concerned would not have constituted notifiable transactions if Suez (Electrabel) had exercised control over the mixed utilities.

672. It should be added therefore that the parties' reference to earlier Commission decisions concerning the utility companies should be rejected, because there the notified transactions concerned the transfer of eligible customers from the utility companies to ECS, which became their default supplier. ECS's acquisition of the customers constitutes acquisition of sole control within the meaning of Regulation (EC) No 4064/89. If, beforehand, Electrabel already had joint control of the utility companies (including their customers), then acquiring sole control of the customers constituted a change in the nature of that control, and was therefore notifiable[368] (see also above).

B.3 Relevant markets

B.3.1 RELEVANT PRODUCT MARKETS

673. As the notified operation does not have any horizontal effects on the electricity infrastructure markets, this Decision does not require a precise definition of those markets. However, the situation concerning ownership, management and rights of use of the different infrastructures described above will be taken into account in the analysis of the effects of the merger on the downstream markets.

B.3.1.1 Electricity generation and wholesale supply

674. In the light of Commission practice in previous decisions[369], the parties identify a single product market for electricity generation and wholesale supply (the 'wholesale electricity market'). This market comprises electricity generation in power stations and electricity that is physically imported via interconnectors to be sold on to retailers.

675. The Commission has previously considered that traders are part of both the supply of and demand for the wholesale electricity market. Major industrial and commercial customers may also be part of wholesale electricity market demand, provided certain conditions are met.

676. Other electricity retailers active in the Belgian market (including Nuon and Essent) and the local authority utility companies are also part of wholesale electricity demand.

B.3.1.2 The electricity trading market

677. The market for electricity trading is a market where the electricity bought and sold is not necessarily intended for the final consumer. Although it has ultimately left the question open, the Commission has also suggested that a distinction can be drawn between two product sub-markets: physical electricity trading and financial electricity trading[370].

---

368 See paragraph 16 in the Commission Notice on the concept of concentration.

369 COMP/M. 3440 *EDP/ENI/GDP*.

370 COMP/M.JV28 *Sydkraft/Hew/Hanse Energy Trading*, 30 November 1999. Financial electricity trading was singled out in COMP/M.3868-DONG/Elsam/Energi E2 of 14 March 2006.

678. Physical electricity trading involves a firm commitment to deliver electricity to the Belgian transmission system. Financial electricity trading concerns financial products which refer to a product (electricity in this case) the trading of which results in a purely financial arrangement between the purchaser and the seller not involving the physical supply of the product.

679. Physical electricity trading for delivery on the Belgian system only takes place bilaterally with standardised products via a brokering platform (the 'over the counter', or OTC, market) or through individualised bilateral contracts. The contracts sold by Suez at virtual power plant auctions (VPP)[371] are also considered to be part of the physical electricity trading market[372]. The survey carried out by the Commission confirmed that these contracts are part of this market[373]. The brokers who trade blocks of OTC electricity for delivery on the Belgian transmission system include ICAP, TFS, GFI, Spectron and Endex[374]. Electrabel also has a platform for trading electricity from the VPP auctions.

680. There are plans to create an organised electricity trading market, to be known as Belpex. Its launch is currently on hold, partly because the regulators concerned have yet to approve the mechanism for allocating capacity at the interconnectors[375]. The assumption is that it will be introduced in the last quarter of 2006[376]. The organised market would be limited, at least initially, to 'day-ahead' products, i.e. electricity contracts for physical delivery the following day.

681. Compared with other areas inside the EU, physical electricity trading is not very advanced in Belgium. The strong vertical integration of electricity companies in Belgium means that most electricity is supplied directly by producers to final consumers, and no significant volume is produced for trading on the physical electricity market[377].

---

371 Following decisions of the Belgian competition authority, Electrabel was obliged to offer 1 200 MW capacity in the form of a virtual power plant auction, including products which can be regarded as physical electricity option contracts (See CREG reply (No 13256) to question 4(c)).

372 The parties refer to a survey carried out among VPP capacity purchasers indicating that traders bought up to 40% of the auctioned capacity, traders who, by definition, do not buy electricity for immediate resale to final consumers. VPP products are therefore part of the electricity trading market. The fact that VPP products are part of the trading market does not mean that account need not be taken of their specific nature in a competition analysis (see CREG reports provided by the parties on 12 May 2006).

373 See the replies from RWE (No 13515), EDF (No 13426), Centrica (No 13872), SPE (No 13997), Nuon (No 13797), and Iberdrola (No 14002) to questions 25(a) and (b) of the '(Potential) Competitors Electricity' questionnaire.

374 See the replies from RWE (No 14744), EDF (No 13426), Centrica (No 13872), SPE (No 13997), Nuon (No 13797), Iberdrola (No 14002) to question 25(c) of the '(Potential) Competitors Electricity' questionnaire.

375 CREG reply (No 13256) to question 2(b).

376 See the replies from the RWE (No 13515), EdF (No 13426), Centrica (No 13872), SPE (No 13997), Nuon (No 13797) and Iberdrola (No 14002) to question 26(a) of the '(Potential) Competitors Electricity' questionnaire. Also see the parties' reply to the statement of objections, paragraph 594.

377 Form CO, p. 551.

682. Financial electricity trading does exist in Belgium, but the volumes of the contracts involved are even smaller than the volumes of contracts for physical electricity. The development of a financial derivatives market generally requires a well developed physical market[378], and this does not currently exist in Belgium. There seems to be little reason, therefore, for distinguishing between the markets for physical electricity trading and financial electricity trading.

B.3.1.3 Balancing power and ancillary services

683. In the light of the Commission's practice in previous decisions, the parties have identified a market for balancing current and ancillary services, since this service cannot easily be replaced by other electricity supplies on the wholesale market[379].

684. Ancillary services and balancing current are defined in detail in Belgian law[380]. The regulations make a distinction between primary frequency regulation, secondary regulation within the Belgian zone (balancing current), the tertiary reserve, voltage control and reactive power control, congestion management and the black start service[381].

685. The only immediate customer for these services is Elia who, as transmission system operator, is legally obliged to provide the ancillary services[382]. Elia is however prohibited from owning any generation capacity[383]. It meets its obligations by contracting with third parties after a tender procedure.

686. Elia covers the costs of the ancillary services through:

a) the tariff for primary frequency regulation, secondary balance regulation within the Belgian area, and the black start service; this tariff also covers the reservation costs for secondary and tertiary reserves;

b) the tariff for voltage control and reactive power control;

c) the tariff for easing congestion;

---

378 See Iberdrola reply (No 14002) to the '(Potential) Competitors Electricity' questionnaire, p. 12.

379 See, for example, case COMP/M. 3268 *Sydkraft/Graninge* or case COMP/M. 3440 *EDP/ENI/GDP*.

380 Article 231 of the Royal Order of 19 December 2002 establishing technical regulations for operating the electricity transmission system and access thereto. See the replies from the CREG (No 13256) and Elia (No 14133) Phase II for a detailed description of these services.

381 Elia also buys electricity to compensate for network losses as system operator for the distribution networks that work on voltages between 30KV and 70KV. Transmission system losses by contrast are compensated in kind by the access responsible parties. (CREG reply (No 13256) to question 3(a)). Electricity bought to compensate for losses, although associated with the network, is not of a nature that distinguishes it from electricity offered for sale on the wholesale market. It is therefore more correct to consider that Elia acts as a buying party in this market to compensate for network losses.

382 Chapter XIII of the technical regulations, Article 231 paragraph 3.

383 Law of 29 April 1999 on the electricity market. *Moniteur Belge/Belgisch Staastsblad*, 11 May 1999. See also Elia reply (No 14119) to question 1.

d) the tariff to compensate network losses;

e) the tariff to offset quarter-hourly imbalances; this tariff covers the activation costs for secondary and tertiary reserves.

Whereas tariffs (a), (b), (c) and (d) are invoiced to all network users who use energy ('socialised'), the (e) tariff for quarter-hourly imbalances is invoiced to individual access responsible parties on the basis of the volume of their imbalances. Since the 2006 financial year, costs recovered via the quarter-hour tariff have been based on the real cost of activating secondary and tertiary reserves[384].

687. For example, market actors known in this context as 'access responsible parties' (ARPs) are obliged to balance current drawn off and delivered to the transmission network for each 15-minute period. When ARPs are unable to correct an imbalance themselves[385], Elia corrects the imbalance at the agreed rate by activating its secondary and tertiary adjustment reserves.

B.3.1.4 Supply to large commercial and industrial customers

688. The parties consider that supply to eligible final customers constitutes a market and that it is not appropriate to make distinctions inside that market between categories of eligible customers.

689. The market survey however confirmed the existence of a distinction between the market for supplying large industrial and commercial customers connected to the transmission network (at above 70kV), the market for small industrial and commercial customers connected to the distribution networks (below 70kV) and eligible household customers[386].

690. The supply market for large industrial and commercial customers should be distinguished from the market for small industrial and commercial users and households for the following reasons (among others):

Demand side:

a) The consumption profile of large industrial and commercial customers is very stable, and falls at weekends. Small industrial and commercial customers, by contrast, are characterised by lower consumption levels and considerable variations in their daily profile[387].

---

384 CREG reply (No 13256) to question 3(g).

385 The access responsible parties can correct the imbalance themselves by producing more or less electricity, negotiating current bilaterally with other access responsible parties or, in certain cases, by calling on the reserves Elia has at its disposal.

386 See the replies to the questionnaires on Belgian electricity Phase I. Fifteen answers out of 22 support segmentation of eligible customers according to criteria drawn up with this statement of objections in mind. Most of the other seven replies also support the existence of separate supply markets to eligible customers, but propose other segmentation criteria.

387 Iberdrola reply (No 14002) to question 24(b) '(Potential) Competitors Electricity' questionnaire.

b) Large industrial and commercial customers are always telemetered. Although some customers connected to the distribution system can also be telemetered, their meters are more generally read monthly or annually[388].

c) Those substantial differences in consumption gives large industrial and commercial customers a purchasing power that enables them to obtain prices more advantageous than those offered to smaller customers[389]. Prices charged to industrial customers seem lower than those applied to other customers[390].

d) Large industrial and commercial customers have greater price elasticity than small customers and are therefore more likely to change their supplier[391].

e) Large industrial and commercial customers are indifferent to companies' reputations[392], and the only factor that influences their choice of supplier is price.

Supply side:

a) Supplying large commercial and industrial customers implies de facto back-up contracts with producers in Belgium and/or local generation capacity in Belgium[393]. Some types of activity carried out by large industrial and commercial customers generate imbalances on a scale that cannot be absorbed by customer portfolios limited to a few dozen TWh[394].

b) The prices charged by incumbent operators to large industrial and commercial customers contribute to the fact that it is particularly difficult to enter the market for supplying large industrial and commercial customers[395].

c) Only EDF and RWE have a substantial presence as competitors with Suez (Electrabel) in the market to supply large customers. By contrast EDF and RWE are not present on the market for supplying small industrial and commercial customers (and households). Electrabel's main competitors in those markets are Nuon, Essent and GDF (SPE) (see the competition analysis above). There are considerable differences in the supply structures of these markets.

---

388 Nuon reply (No 13797) to question 24(b) '(Potential) Competitors Electricity' questionnaire (No 13979).

389 Iberdrola reply (No 14002) to question 24(b) '(Potential) Competitors Electricity' questionnaire.

390 The price of electricity per tariff component (CREG press conference of 5 July 2006, p. 11, No 14542).

391 Iberdrola reply (No 14002) to question 24(b) '(Potential) Competitors Electricity' questionnaire.

392 Iberdrola reply (No 14002) to question 24(b) '(Potential) Competitors Electricity' questionnaire.

393 EdF reply (No 13426) to question 24(a) on the '(potential) Competitors Electricity, questionnaire. CREG reply (No 13256) to question 5.

394 EdF reply (No 13426) to question 24(b) '(Potential) Competitors Electricity' questionnaire and Nuon reply (No 13797) to question 24(c) on the same questionnaire.

395 EdF reply (No 13426) to question 24(b) '(Potential) Competitors Electricity' questionnaire.

d) The possibility of dual fuel contracts is essential for small industrial and commercial customers[396], but has little or no importance for large industrial and commercial customers.

e) Organising sales to large industrial and commercial customers requires specialised sales engineers. Smaller customers are served by dedicated account managers.

f) Large customers operate through calls for tender. Smaller industrial and commercial customers (and households) are approached by call centres or visited by salesmen.

g) Large customers need to be offered structured contracts tailored to their individual requests. Standardised contracts are used for smaller customers[397]. Large customers enjoy prices that are customised on a case-by-case basis, whereas standardised prices are applied to smaller customers.

B.3.1.5 Supply to small industrial and commercial customers

691. Small industrial and commercial customers are defined as non-household customers who are connected to the distribution network (i.e. at voltages below 70KV). As noted above, this market needs to be distinguished from supply to large customers.

692. The market for supplying small industrial and commercial customers needs to be distinguished from the market for supplying households for the following reasons (among others):

a) Small industrial and commercial customers have an S11 or S12 profile, while household customers have S21 or S22 profiles[398] . Demand from households and demand from small industrial and commercial customers follow consumption patterns that are quite different.

b) Products, contracts and price scales for households are highly standardised[399].

c) Supply to households is subject to specific regulations that reflect public service obligations of a social nature[400]. Commercial customers do not require that sort of protection vis-à-vis their suppliers. Compliance with these regulations can create significant expenses for suppliers, particularly when they enter the market[401].

---

396 Iberdrola reply (No 14002) to question 24(b) '(Potential) Competitors Electricity' questionnaire.

397 Iberdrola reply (No 14002) to question 24(b), '(Potential) Competitors Electricity' questionnaire.

398 See http://www.synergrid.be/index.cfm?PageID=16896 #

399 Nuon reply (No 13797) to question 24 of the ('Potential) Competitors Electricity' questionnaire.

400 Replies from CWaPE (No 13209), VREG (No 13108) and IBGE/BIM (No 13537) to question 3 in Phase II questionnaires.

401 VREG reply to question 3, in particular under A.1

d) Both the Flemish and the Walloon regulators note that several suppliers have stated a wish not to be active in the households sector. This confirms the need to make a distinction between the residential and professional markets. The regulator of Brussels points out that it is more than probable that the residential market of the supply of energy has to be distinguished from the professional market[402]. This implies different supply structures for supplying households and for supplying small industrial and commercial customers.

e) Households also have a higher debt risk profile than non-household (information is always available about the debt history of the latter). This is exacerbated by the fact that suppliers collect the amounts due for use of the transmission and distribution networks from customers, and therefore themselves take on the customers' debt risk here.

B.3.1.6 Supply to eligible household customers

693. At present, the market for supplying eligible household customers comprises solely households in Flanders. Households in Brussels and Wallonia will become part of this market when they become eligible, i.e. on 1 January 2007.

694. The market for supplying household customers should be distinguished from the market for supplying small industrial and commercial customers for the reasons explained above.

695. Although the survey carried out by the Commission confirmed the advisability of distinguishing between different supply markets according to the type of customer being supplied, it should be noted that this distinction is not essential for an evaluation of the proposed merger. Whether such a distinction is maintained or whether one considers, as the parties propose, the possibility of a broader market for supplying eligible customers of all types, the conclusion of the competition analysis that follows would be the same.

B.3.2 THE RELEVANT GEOGRAPHIC MARKETS

B.3.2.1 Electricity generation and wholesale supply

696. In earlier decisions the Commission has generally defined the wholesale electricity market as a national rather than an international market[403]. It has sometimes left open the possibility that markets might be broader. In the light of Council Directives 2003/54/EC and 2003/55/EC, it has to be considered whether bigger markets may be emerging. To decide whether a market is merely national or has a broader dimension, the Commission has often looked at restrictions on the capacity available at the interconnectors with neighbouring countries.

[402] Replies from CWaPE (No 13209), VREG (No 13108) and IBGE/BIM (No 13537) to question 3 in Phase II questionnaires.

[403] COMP/M.3075 to 3080, 13 December 2003; COMP/M.3318 *ECS/Sibelga*, 19 December 2003. See also *EDP/ENI/GDP*.

697. The market survey confirms that the wholesale market is a national one. It is regarded as national in the great majority of the answers received. The lack of interconnector capacity is often cited as the main reason[404].

698. The Elia network is interconnected with the transmission networks in the Netherlands and France and with the Sotel grid in Luxembourg.

The Sotel grid in Luxembourg

699. The Belgian network is interconnected with one network in Luxembourg, namely the Sotel grid. The Sotel grid covers only part of Luxembourg, and it is not connected to any transmission network other than Elia: in normal operation it is not connected even to the Cegedel grid, which covers the rest of Luxembourg[405].

700. There is no congestion between the Elia and Sotel grids. Elia provides the ancillary services and balancing power needed to run the Sotel grid, and the same market rules apply there as on the Belgian market[406].

701. It is doubtful, however, whether the Sotel grid forms part of the Belgian geographic market, since Elia and Sotel have not drawn up tariffs for the use of Sotel's network[407]. The Commission considers that this makes it difficult if not impossible for outsiders to offer electricity to customers connected to the Sotel grid. The conditions of competition on the Elia and Sotel grids are therefore appreciably different.

702. But this question can be left open, because the positions of the parties are not appreciably affected by the inclusion or exclusion of Sotel. For purposes of this Decision, the Sotel grid and the parties' business in the part of Luxembourg covered by the Sotel grid will be excluded[408].

Interconnectors between Belgium, France and the Netherlands

703. According to the parties, the rate of congestion in transmission from France to Belgium (the proportion of total hours for which demand for capacity exceeded the capacity available) was [40-50]*% in 2003, [20-30]*% in 2004, and [20-30]*% in 2005. Over the same period congestion in the opposite direction, from Belgium to France, was rare.

704. On the Belgium-Netherlands interconnection, according to the parties, the rate of congestion in transmission from Belgium to the Netherlands was [20-30]*% in 2003, [30-40]*% in 2004 and [40-50]*% in 2005. Over the same period congestion in the opposite direction was rare.

---

404 Replies to 'Customer and Competitors Questionnaire Belgium', Phase I, question 66.

405 Reply by Luxembourg Regulatory Institute, No 13584, p. 2/9.

406 Reply by Luxembourg Regulatory Institute, No 13584, p. 3/9, specifications of electricity transport and distribution grids in the Grand Duchy of Luxembourg.

407 Reply by Luxembourg Regulatory Institute, No 13584, p. 7/9.

408 Inclusion of the Sotel grid increases the parties' shares, because the Twinerg power station belonging to Suez (Electrabel) feeds the Sotel grid, and there is a net export of part of its output to Belgium. Reply by the Luxembourg Regulatory Institute, No 13584, Annex, specifications of electricity transport and distribution grids in the Grand Duchy of Luxembourg.

705. The direction of congestion on Belgium's southern and northern borders shows that Belgium serves as a country of transit for electricity generated in France and consumed in the Netherlands. This is consistent with the systematic differences in prices between France, where prices are generally lower, and Belgium and the Netherlands, where they are generally higher.

706. An increase in prices in Belgium could be expected to raise demand for imports from France. But the rate of congestion in transmission towards Belgium over the interconnection on Belgium's southern border is already high, so that imports from France cannot exert additional competitive pressure.

707. The direction of congestion between the Netherlands and Belgium would in principle allow greater volumes of electricity generated in the Netherlands to be imported into Belgium. But that electricity cannot exert competitive pressure on the level of prices in Belgium, because its own price is substantially higher than that of power generated in Belgium, which is of course why the interconnector is congested in the other direction.

708. This will be clear from the following:

a) In 2005, the average price of electricity in the Netherlands was about 5% higher than that of the electricity available in Belgium on weekdays and during weekends and on public holidays[409].

b) Compared hour by hour, the price of electricity in the Netherlands was over 5% higher than the price in Belgium for 41% of hours in 2005[410].

c) In terms of seasons, the disparities in the average price of electricity per month between the Netherlands and Belgium vary significantly, with gaps of about 10% or even more in November, December and January[411].

709. The significant and continuing disparities in prices show that the presence of generators in the Netherlands is not a major competitive constraint on generators in Belgium. The figures cited above are by themselves enough to indicate that the Belgian market is a geographic market separate from that of the Netherlands.

710. It should also be noted that forward prices do not show any convergence between the Netherlands and Belgium between now and the end of 2008[412]. Thus market players do not expect developments in trade between Belgium and the Netherlands, such as increases in interconnection capacity or the introduction of market coupling, to bring about greater integration of the Belgian and Dutch markets than there is at present.

---

409 Factors affecting geographic market definition and merger control for the Dutch electricity sector (June 2006) Final report; non-confidential version, No 16832, p. 2.

410 Factors affecting geographic market definition and merger control for the Dutch electricity sector (June 2006) Final report; non-confidential version, No 16832, p. 24.

411 Factors affecting geographic market definition and merger control for the Dutch electricity sector (June 2006) Final report; non-confidential version, No 16832, p. 30.

412 Factors affecting geographic market definition and merger control for the Dutch electricity sector (June 2006) Final report; non-confidential version, No 16832, p. 32.

711. On the question of potential competitive pressure from imported electricity, there are several further points to be made.

a) An additional argument for holding that there is a Belgian geographic market separate from those of the Netherlands and France is this: for a supplier to be able to sell imported electricity competitively in Belgium, it is not enough that the prices of the imported electricity should be competitive at certain times, on certain days, or in certain seasons, because a supplier undertakes to provide customers with electricity continuously over longer periods.

b) Prices for supply to final customers are often set for several years in advance. But the availability of interconnection capacity and the prices charged for it cannot be known more than a year in advance[413]. This creates risks for electricity suppliers who import all or part of their requirements[414], especially as margins on supply activities are small.

c) The risks of imbalance are not symmetrical. Market players who depend on imported electricity are more exposed to the risks of imbalance than those who have (flexible) generation capacity in Belgium. Nominations for the interconnectors have to be made in the course of the morning before the day of actual delivery. Fluctuations in demand which are known only after this deadline cannot be corrected, and incur balancing charges[415]. The risks of imbalance are higher even where there are no mistakes in forecasts of demand, because the time resolution of nominations for the interconnectors is hourly, while in Belgium the balancing system has a time resolution of 15 minutes[416]. This means that even accurately forecast demand fluctuations within the hour, such as can occur at dawn, for example, cannot be offset, and incur balancing charges. All of the parties' competitors are dependent on imports of electricity, or have generation capacity in Belgium that is not sufficient to permit self-balancing. The new system of balancing introduced on 1 January 2006, although it is now based on the real costs of activating secondary and tertiary reserves[417], is considered even harder on new entrants, owing to the ending of the +10% margin which applied previously[418].

   The risks related to imports are confirmed in more detail by the experience of RWE, Nuon and SourcePower, which will be described below.

---

413 The products sold at interconnection capacity auctions have a maximum lifetime of one year.

414 EDF's supplementary reply, No 13758, to the '(Potential) Competitors Electricity' questionnaire, question 28(e). Reply by Nuon, No 13797, to the '(Potential) Competitors Electricity' questionnaire, question 28(a).

415 Reply by Centrica, No 13872, to the '(Potential) Competitors Electricity' questionnaire, question 23(h). Similar factors to do with the close of nominations on the borders of Germany and the Netherlands and the close of EEX make it difficult to import from Germany (reply by Vattenfall, No 13541, to the '(Potential) Competitors Electricity' questionnaire, question 28(e)).

416 See Iberdrola's reply, No 14002, to the '(Potential) Competitors Electricity' questionnaire Phase II, p. 10 and question 23(h), and Essent's reply, No 13797, to the same questionnaire, question 24.

417 The CREG's reply, No 13256, question 3(g).

418 EDF's reply, No 13426, to the '(Potential) Competitors Electricity' questionnaire, question 3.

The parties have pointed out that the roadmap drawn up by the CRE, the CREG and the DTe on 7 December 2005 provides for the introduction of an 'intraday' cross-border exchange mechanism. They say the introduction of a mechanism of this kind will enable importers to vary the volumes they import less than a day before physical delivery, and could go some way towards reducing the risks inherent in cross-border trade in electricity.

But the TSOs made an initial proposal for a system of intra-day trading only on 1 August 2006, and it cannot be put into effect until it has been approved by all three of the regulators concerned. Even when intra-day trading has been introduced, it is reasonable to suppose that it will be used only to a limited extent, because there is no plan to reserve dedicated interconnection capacity[419]. The availability of capacity for intra-day trading would therefore depend essentially on loop flows[420]. By definition loop flows are highly unpredictable, and the scope for intra-day trading would consequently be highly unpredictable too.

d) Net imports of electric power into Belgium amounted to 6.2 TWh in 2005, which was down on the 2004 figure by about 1.6 TWh.

712. In its statement of objections the Commission referred to the importance of having local generating capacity available in Belgium. In their reply to the statement of objections the parties argue that access to the markets for supply does not in any way require the availability of generation units in Belgium, given the interconnection capacity that is available, and the fact that there is sufficient scope for competitors to build production units[421].

713. The parties here ignore the substantial barriers that impede the construction of new generation units (see below), and the other factors governing the importation of electricity which, as already explained, make it misleading to claim that the availability of importation capacity, though it is a necessary condition, is sufficient to allow a company to establish itself as a viable competitor.

714. In its statement of objections, the Commission underlined that the disadvantages of relying on imports were compounded by the absence of liquidity in the market for electricity trading in Belgium. This is corroborated by the example of several of the parties' competitors who have attempted to enter the Belgian market.

RWE

715. RWE attempted to penetrate the Belgian market in the year 2000. It assembled a large portfolio of customers, which it planned to supply partly via imports. Owing to congestion problems it had difficulty in acquiring interconnector capacity, and in 2001 and 2002 it had to liquidate its portfolio of customers[422].

---

419 The CREG's reply, No 13256, question 2(i).

420 The CREG's reply, No 13256, question 2(h).

421 The parties' reply to the statement of objections, paragraph 630.

422 RWE's reply, No14744, to the '(Potential) Competitors Electricity' questionnaire, question 18.

716. RWE did then penetrate the Belgian market, by building a power station at Zandvliet, as a joint venture with Suez (Electrabel); this was intended mainly to supply a single industrial customer, BASF. Even though it now had its own access to generation capacity, however, RWE was not able to develop its business. According to RWE, '*RWE has been active in the market for the supply of electricity to large industrial customers from 2000 to 2004 but […] eventually decided to exit […] it turned out that, even with the back-up of (minor) generation capacities*[423]*, it was not feasible to serve customers being largely dependent on the wholesale market. In particular RWE concluded, based on its own – quite extensive – experiences from 2001 through 2004, that the Belgian wholesale market lacked – and is still lacking – the degree of liquidity required to gain flexible complementary profiles at competitive prices*'[424].

717. In their reply to the statement of objections, the parties observe that RWE was quite capable of supplying its Belgian customers using electricity produced in Germany, via the Dutch network, given the absence of congestion between the Netherlands and Belgium. They add that if there is congestion on the border between Germany and the Netherlands the responsibility lies with RWE itself, since it controls RWE Transportnetze Strohm GmbH, the TSO on the German side of the border[425].

718. This argument must be rejected. It is true that the Netherlands-to-Belgium interconnection is rarely congested. But the Commission can confirm that the interconnectors between the Netherlands and Germany are congested frequently. This argument consequently does not affect the Commission's conclusion. The fact that RWE controls RWE Transportnetze Strohm GmbH is irrelevant here.

SourcePower

719. The example of SourcePower also provides a good illustration of the risks of a strategy based on imports[426].

720. SourcePower entered the Belgian market in January 2002, importing electricity from Switzerland via the interconnection at the French-Belgian border[427]; according to SourcePower, it built up a portfolio of customers amounting to 7% of the Flemish market, which had been liberalised at the time[428].

721. In May 2002 SourcePower was unable to import electricity via the France-Belgium interconnection or via the interconnection with the Netherlands, and found itself obliged to buy electricity from Suez (Electrabel), the only source of supply with generation capacity in Belgium. Although SourcePower was prepared to enter into supply

---

423 A reference to RWE's Zandvliet power station.

424 RWE's reply dated 17 August 2006, No 15303, to question 4. Original English.

425 Reply to the statement of objections, paragraph 581.

426 See the letters submitted by SourcePower in these proceedings on 31 May 2006, No 10595, and 19 September 2006, No 17566.

427 SourcePower's reply, No 10595, to the Phase I questionnaire, p. 11.

428 SourcePower's reply, No 10595, to the Phase I questionnaire, p. 40.

arrangements, no such transactions were concluded. SourcePower was now thrown back on Elia's balancing system, at prices much higher than its initial source of Swiss electricity[429], and financial difficulties subsequently compelled it to cease delivery.

722. It should be noted that SourcePower would not have been forced to turn to Suez (Electrabel) if it had had access to its own generation capacity, or to a liquid electricity trading market[430].

Nuon

723. Nuon likewise emphasised the difficulties associated with a strategy based on imported electricity, especially given the lack of liquidity in the trading market, which made it important to have access to flexible generating capacity. According to Nuon[431]:

- *'[…] the fact that there is no liquidity on the wholesale market restricts our scope for supplying such big volumes (the wholesale market being a market which – if it is liquid enough by 2007, for example, or if it has established itself sufficiently by 2008, 2009, etc. – consists of block deliveries, 'strips' of base load or peak load[432]) . And we can import these big volumes only to a limited extent. As a result of the cross-border risks, we are obliged to source from local producers who will not always make us an offer or who make an offer above the Endex[433] rates.*

- *Alongside blocks of this kind a supplier also has to 'shape' effectively, i.e. to cover the residual volumes between the actual profile (continuous and variable, on a daily, weekly, monthly and seasonal basis) and the wholesale blocks. Nuon ought to import these residual volumes, because there is no such product available on the market. We are unable to do this because of the cross-border risk […]*

- *Balancing: as a result of Elia's balancing system, the balancing risks of big individual customers can be very high. Nuon has no pump stations, for example, to mitigate balancing risks[434], and cross-border dealings do not allow profile variations to be handled adequately on a fifteen-minute basis[435].*

---

429 SourcePower's reply, No 10595, to the Phase I questionnaire, p. 44.

430 SourcePower's reply, No 10595, to the Phase I questionnaire, p. 91.

431 Nuon's letter dated 15 September 2006, No 17399. Nuon was speaking of the supply of electricity to large industrial and commercial customers, but its arguments hold good for the other electricity markets.

432 Nuon uses the term 'wholesale market' to refer to what in this Decision is called the 'trading market'.

433 Endex is an electricity trading platform on which OTC contracts for delivery on the Belgian market are traded.

434 Pump stations, or pumped storage stations, are a form of generation facility particularly suitable for producing electricity to match variable demand, which is a necessity given the impossibility of storing electricity.

435 Thus Nuon's example also supports the view that the importation of electricity involves substantial risks associated with the balancing system.

[…] the fact that there is almost no scope for securing enough flexible electricity generation capacity, either from power stations of our own or from contractual positions, makes it impossible for Nuon Belgium to play an active role […]'[436].

724. A great number of replies drew attention to the importance of the lack of a liquid physical and financial trading market for electricity in Belgium[437]. The constraints imposed by the lack of interconnection capacity are aggravated by the lack of liquidity in the electricity trading market. The lack of such a market penalises especially those suppliers who have little or no generating capacity in Belgium[438].

725. The disadvantages of suppliers who depend on imports are even greater in the market for supply to large industrial and commercial customers. In practice the volumes that such customers consume necessitate back-up contracts to prevent serious imbalances in the event of unforeseen difficulties. Given the unreliability of the capacity available across the interconnectors, it is not possible to conclude back-up contracts with foreign producers[439]. Suppliers who depend on imports are consequently forced to conclude back-up contracts with producers who have generating capacity in Belgium.

726. The Commission takes the view, in any event, that the wholesale energy market in Belgium is a national one.

---

436 Letter from Nuon dated 15 September 2006 (N°17399)

- *[…] het feit dat er geen liquiditeit is op de wholesale markt (ttz de wholesale markt is een markt -als ze al voldoende liquide is voor bv 2007 of als ze al voldoende bestaat voor 2008, 2009, etc ..- die bestaat uit blok leveringen 'strips' van baseload of piekload) beperkt onze mogelijkheden om zulke grote volumes te beleveren. We kunnen zulke grote volumes ook slechts beperkt importeren. Als gevolg van cross-border risico's zijn we genoodzaakt te sourcen bij lokale producenten die niet altijd offertes voor ons maken of offertes maken boven Endex noteringen.*

- *Naast zulke blokken dient een leverancier effectief nog te 'shapen', ttz de residuele volumes tussen effectief profiel (cf continue en grillig op dag/week/maand/seizoensbasis) en wholesale blokken. Nuon dient dan ook nog deze residuele volumes te importeren omdat zulk product niet beschikbaar is op de markt. We kunnen dit niet omwille van cross border risk […]*

- *Balancing: omwille van het Elia onbalanssysteem lopen de balancing risico's van grote individuele klanten erg op. Nuon heeft oa geen pump stations die balancing risks kunnen mitigeren, alsook de cross border laat niet op een adequate manier toe om profielschommelingen op kwartierbasis te bedienen.*

[…] Het vrijwel ontbreken van mogelijkheden om voldoende flexibele productie van electriciteit te bemachtigen, ofwel via eigen centrales ofwel via contractuele posities, maakt het voor Nuon België niet mogelijk om een actieve rol […] te spelen

437 See for example the replies to question 3 to the '(Potential) Competitors Electricity' questionnaire from Nuon (No 13797), Centrica (No 13872), Theolia (No 13285), Iberdrola (No 14002), EDF (No 15074), Total (No 13842) and Essent (No 13297).

438 EDF's reply, No 13426, to the '(Potential) Competitors Electricity' questionnaire, question 3.

439 The CREG's reply, No 13256, question 5. Vattenfall's reply, No 13541, to the '(Potential) Competitors Electricity' questionnaire, question 28(e).

B.3.2.2 Electricity trading

727. On previous occasions the Commission has held that the electricity trading market has no European dimension[440]. It based this view on structural factors, such as the limited availability of interconnection capacities, which reduced the scope for traders to arbitrage the price differences between Member States. It also argued that the absence of standard contracts, or at least comparable contracts, made arbitrage more difficult.

728. For the reasons already outlined with reference to the market for the generation and wholesale supply of electricity, the geographic extent of the market in electricity trading too is national. In addition, the contracts traded in Belgium and in the neighbouring countries, and especially peak-load contracts, are of a different kind, and this hinders arbitrage between the Belgian trading market and those in other countries.

729. It should be added that the Belgian electricity trading market, by comparison with those of neighbouring countries, is not liquid, and consequently operates under conditions of competition very different from those in the adjacent countries (see below).

730. The parties accept the Commission's practice here, and take the view that the geographic extent of the electricity trading market is national, but they nevertheless argue that the situation in the electricity trading market has changed as a result of the recent expansion in interconnection capacity. The launch of Belpex and market coupling will also change market conditions for the better.

731. It should be added, therefore, that in the case of Denmark the Commission has doubted the existence of markets bigger than the eastern and western control blocks in the country. Yet Nord Pool, which links the transmission networks in several countries of northern Europe, is a stronger argument for the existence of a supranational market than what in the present case is still only a plan to couple the electricity exchanges in France and the Netherlands with the Belgian Belpex exchange, an exchange which is not active at the present time[441].

732. Thus even the establishment of Belpex and the associated market coupling with the Netherlands and France (a system which has similarities with the Nord Pool system that operates in the Nordic countries) does not affect the conclusion regarding the geographic dimension of the Belgian wholesale market for electricity. The introduction of a system of market coupling may improve the efficiency with which the available interconnection capacities are utilised, but it will not in any way affect the physical

---

440 JV.28 *Sydkraft/HEW/Hansa Energy Trading*, 30 November 1999; M.3210 *EDF/EDFT*, 26 August 2003.

441 For example, the interconnection capacities between eastern Denmark and the Nord Pool areas and between western Denmark and the Nord Pool areas, at respectively 74% and 67% of peak demand, are much higher than the interconnection capacity across the northern and southern borders of Belgium: the figure for Belgium is estimated at 34% (4.7 GW interconnection capacity in 2005 / 13.7 GW peak demand on 20 December 2004 at 18.30). Interconnection capacity is also currently allocated more efficiently by Nord Pool, via an implicit auction system, and there is a market for financial derivatives, which can smooth out some of the risks associated with cross-border supply. See also M.3868 *DONG/Elsam/Energi E2*, 14 March 2006. The Danish wholesale electricity market was found to have a national scope in the decision of the Danish Competition Authority on the Elsam/NESA merger in 2004.

constraints on the networks concerned. It is very probable that there will continue to be congestion, especially during peak periods[442].

B.3.2.3 Ancillary services and balancing current

733. In the decisions the Commission has taken in the past it has treated the markets in ancillary services and balancing current as national[443], or more accurately as delimited by the control area of the transmission network operator[444]. Elia also operates the Sotel grid in Luxembourg, but that is not important for the assessment of the proposed merger[445].

734. The parties agree that the market in ancillary services and balancing current is national. In the market investigation, too, the vast majority of replies confirmed that the market in ancillary services and balancing current was national[446].

735. For purely technical reasons, the services of voltage and reactive power control, black start capacity and congestion management can be bought only from companies with connected generation capacity in the control area concerned. The international UCTE rules impose major constraints on purchases by TSOs of primary, secondary and tertiary reserves outside their control areas[447]. This also necessitates the reservation of capacity on interconnectors, and that in turn imposes further constraints, because interconnector capacity is limited. EDF confirms that at the present time supply services for primary, secondary and tertiary reserves are markets accessible only to producers present in the Belgian control area[448].

736. The CREG confirms that in Elia's ancillary service contracts for 2006 all ancillary services are to be provided out of resources situated in the Belgian control area. The ancillary service most likely to be provided using resources outside Elia's control area is the tertiary reserve service[449]. Elia confirms that marginal supplies have been obtained outside Belgium[450]. But they came from inter-TSO tertiary reserves of last resort arranged by Elia with the French TSO, RTE, and the Dutch TSO, TenneT, so that these were not purchases from electricity suppliers outside the Belgian control area who were competing with those inside it[451].

---

442 Centrica's reply, No 13872, to the '(Potential) Competitors Electricity' questionnaire, question 26(b).

443 COMP/M.3696 *E.ON/MOL*, 12 December 2005.

444 COMP/M.2947 *Verbund/EnergieAllianz*, 11 June 2003.

445 Elia is the sole purchaser of ancillary services and balancing current. The only generating unit connected to the Sotel grid belongs to Suez (Electrabel), which means that generators located in Luxembourg but connected to the network operated by Elia cannot exert competitive pressure on the market for the supply of ancillary services and balancing current.

446 Replies to the Belgian Phase I questionnaire, question 69.

447 RWE's reply, No 14744, to the '(Potential) Competitors Electricity' questionnaire, question 30. See also EDF's reply, No 13426, to the '(Potential) Competitors Electricity' questionnaire, question 30.

448 EDF's reply, No 13426, to the '(Potential) Competitors Electricity' questionnaire, question 30.

449 The CREG's reply, No 13256, question 3(c).

450 Elia's reply, No 13575, to the Phase II questionnaire, question 1(e).

451 The CREG's reply, No 13256, question 3(c).

737. The market for ancillary services and balancing current is consequently a national one.

B.3.2.4 Supply to large and small industrial and commercial customers

738. The Commission has several times found that markets for supply to downstream customers are national[452].

739. The scale of the markets for supply to final customers cannot be wider than national, for the reasons explained above.

B.3.2.5 Supply to households

740. The Commission has several times found that the markets for supply to downstream customers are national[453]. In a recent decision it did consider the possibility that the markets for supply to households might be sub-national, but ultimately left the question open[454].

741. The regulatory conditions in the three regions of Belgium are not entirely the same, especially as regards the time when this category of customer is to be thrown open to competition. Markets for the supply of electricity to household customers are currently open to competition only in the Flemish Region, where households have been eligible since 1 July 2003. In the Walloon Region and the Brussels Region household customers are to be eligible from 1 January 2007.

742. The Commission consequently takes the view that the markets for supply to households are regional. In the alternative, however, the Commission will also analyse the effects of the proposed merger on a hypothetical market for supply to households whose geographic extent is national.

743. It may be added that the scale of the markets for supply to final customers cannot be wider than national, for the reasons set out above.

B.4. Competition analysis

744. According to the CREG's annual report for 2005, net electricity generation in Belgium amounted to 83.3 TWh in 2005. The following table summarises electricity consumption by sector of activity:

[452] COMP/M.2857 *ECS/IEH*, 23 December 2002; COMP/M.3075 to 3080 *ECS/Intercommunales*; COMP/M.3318 *ECS/Sibelga*, 19 December 2003; M.3883 *GDF/Centrica/SPE*, 7 September 2005.

[453] COMP/M.2857 *ECS/IEH*, 23 December 2002; COMP/M.3075 to 3080 *ECS/Intercommunales*; COMP/M.3318 *ECS/Sibelga*, 19 December 2003; M.3883 *GDF/Centrica/SPE*, 7 September 2005.

[454] M.3883 *GDF/Centrica/SPE*, 7 September 2006, paragraphs 24 and 25; see also M.3729 *EDF/AEM/Edison*, 12 August 2005, paragraphs 38-45.

Sector of activity	Consumption (%)
Industry	48.6
Households	21.9
Commercial and public services	20.8
Energy	2.4
Transport	2.7
Agriculture	1.8
Public lighting	1.2

Source: CREG annual report 2004

B.4.1 Horizontal effects

B.4.1.1 The wholesale electricity market

745. Domestic electricity generation uses a variety of fuels. In 2004 nuclear fuels accounted for 55.1% of all electricity generated in Belgium. Natural gas accounted for 26.6%, and solid fuels (such as coal) for 17.0%. The remaining 5.8% was produced using liquid fuels (such as fuel oil), other thermal sources, and hydraulic and wind power.

746. In 2003, 2004 and 2005 net electricity generation by generators located in Belgium amounted respectively to 80.8, 81.4 and 83.3 TWh. Belgium is a net electricity importer. In 2003, 2004 and 2005 net imports amounted respectively to 6.3, 7.6 and 6.4 TWh, equal to 7.3%, 8.6% and 7.1% of net annual electricity production.

747. In the wholesale electricity market the parties would have a combined market share, measured in net electricity production, of [80-90]*% ([80-90]*% generated in Belgium and [0-5]*% imported). GDF (via SPE) is at present the biggest competitor with Suez (via Electrabel), with [5-10]*% of net production ([5-10]*% generated in Belgium and [0-5]*% imported). The figures for net production in Belgium and total imports have been confirmed by the CREG[455].

[455] The CREG's reply, No 13256, question 14.

Net electricity production

	2003		2004		2005	
	Volume (TWh)	**Market share (%)**	**Volume (TWh)**	**Market share (%)**	**Volume (TWh)**	**Market share (%)**
Net electricity production in Belgium	**80.8**	**92.8**	**81.4**	**91.4**	**83.3**	**92.9**
Suez (Electrabel)	[...]*	[70-80]*	[...]*	[70-80]*	[...]*	[70-80]*
incl. VPP[456]	[...]*	[0-5]*	[...]*	[0-5]*	[...]*	[5-10]*
GDF (SPE)	[...]*	[0-5]*	[...]*	[0-5]*	[...]*	[5-10]*
Suez+GDF	[...]*	[70-80]*	[...]*	[70-80]*	[...]*	[80-90]*
Électricité de France	[...]*	[0-5]*	[...]*	[0-5]*	[...]*	[0-5]*
SPE	[...]*	[5-10]*	[...]*	[5-10]*	[...]*	[0-5]*
RWE	[...]*	[0-5]*	[...]*	[0-5]*	[...]*	[0-5]*
Autoproducers	[...]*	[0-5]*	[...]*	[0-5]*	[...]*	[0-5]*
Decentralised generation	[...]*	[0-5]*	[...]*	[0-5]*	[...]*	[0-5]*
Imports	**6.3**	**7.3**	**7.6**	**8.6**	**6.4**	**7.1**
Suez	[...]*	[0-5]*	[...]*	[0-5]*	[...]*	[0-5]*
GDF	[...]*	[0-5]*	[...]*	[0-5]*	[...]*	[0-5]*
Suez + GDF	[...]*	[0-5]*	[...]*	[0-5]*	[...]*	[0-5]*
Others	[...]*	[0-5]*	[...]*	[5-10]*	[...]*	[0-5]*
Total production and imports	**87.1**	**100**	**89**	**100**	**89.7**	**100**
Suez + GDF	[...]*	[80-90]*	[...]*	[70-80]*	[...]*	[80-90]*
Others	[...]*	[15-20]*	[...]*	[20-30]*	[...]*	[10-15]*

Source: For net production in Belgium, the parties' reply to the request for information of 5 July 2006. For imports, the parties' reply to the Commission's questions of 8 June 2006. Calculations by the Commission.

748. In 2005, 7.1% of electricity consumed in Belgium was of foreign origin. It was often imported at prices lower than those applied in Belgium. Nevertheless, no competitive pressure can be exercised on Suez by competitors who rely entirely on such imports, or who hope to do so. Because companies competing with the parties have very limited generating capacity[457], and because of the lack of liquidity in the electricity trading market (see below), their wholesale business has to be confined largely to importation. But electricity importing has substantial competitive disadvantages (see above). In order to establish oneself as a reliable supplier in a particular market, therefore, it is of great importance to have access to generating capacity located in Belgium[458], and the parties' access to Belgian generating capacity will now be considered.

749. In 2005 Suez (Electrabel) held [70-80]*% of generation capacity in Belgium (VPP included). GDF (SPE) controlled [5-10]*%. The merged entity would therefore control

456 The electricity sold by Suez at the VPP product auction is produced by Suez, and is included in the parties' market share accordingly. The VPP products are contracts traded on the electricity trading market. They can be regarded as options (see the CREG's reply, No 13256, question 4(c)), up to 40% of the capacity sold is bought by traders (replies by the parties dated 12 June 2006). Their special features can nevertheless be taken into account in a competition analysis.

457 Only EDF can currently cover its electricity requirements for retail sale on downstream markets out of generating capacity located in Belgium. The [400-500]* MW of capacity corresponds to maximum output of [0-5]* TWh, which was in excess of the needs of its portfolio of customers in 2005.

458 Iberdrola's reply, No 14002, to the '(Potential) Competitors Electricity' questionnaire, question 8.

[80-90]*% of generating capacity installed in Belgium. These figures are confirmed by the data provided by the CREG[459].

750. Thus the parties have few competitors with generating capacity in Belgium:

a) EDF has [40-50]*%, or [400-500]* MW, of the capacity of Unit 1 at the Tihange nuclear power station (the remaining capacity of the unit belongs to Electrabel).

b) RWE has built a gas-fired station jointly with Electrabel; it started up in 2005. Half of its capacity, or about 200 MW, is available to RWE, but the bulk of that is intended for BASF, in whose works the generation unit was built.

c) Nuon has a wind plant in Belgium.

d) In 2005 decentralised production units, which accounted for [0-5]*% of the capacity installed in Belgium, generated [0-5]* GW. None of them was owned or operated by these competitors of the parties.

e) Last, [0-5]* GW, or [0-5]*% of the capacity installed in Belgium, belongs to autoproducers, who are usually industrial companies who themselves consume the electricity they produce in their own works[460].

Production capacity in Belgium

	GW			% share		
	2003	2004	2005	2003	2004	2005
Suez	[...]*	[...]*	[...]*	[80-90]*	[70-80]*	[70-80]*
Suez (VPP)	[...]*	[...]*	[...]*	[0-5]*	[0-5]*	[5-10]*
GDF	[...]*	[...]*	[...]*	[0-5]*	[0-5]*	[5-10]*
GDF+ Suez	[...]*	[...]*	[...]*	[80-90]*	[80.90]*	[80.90]*
Electricité de France	[...]*	[...]*	[...]*	[0-5]*	[0-5]*	[0-5]*
SPE	[...]*	[...]*	[...]*	[5-10]*	[5-10]*	[0-5]*
RWE	[...]*	[...]*	[...]*	[0-5]*	[0-5]*	[0-5]*
Nuon	[...]*	[...]*	[...]*	[0-5]*	[0-5]*	[0-5]*
Autoproducers	[...]*	[...]*	[...]*	[0-5]*	[0-5]*	[0-5]*
Decentralised generation	[...]*	[...]*	[...]*	[0-5]*	[0-5]*	[0-5]*
Total	[...]*	[...]*	[...]*	100.0	100.0	100.0

Source: Calculated from figures supplied with the parties' reply to the Commission's questions of 8 June 2006.

751. In their observations on the Article 6(1)(c) decision the parties pointed out that the responsible Belgian Minister had recently authorised a number of competitors to build new electricity generating plant[461]. This is true, but the parties themselves also have

[459] The CREG's reply, No 13256, question 1, Table 2.

[460] It should be pointed out that, in so far as this electricity is not supplied to third parties and only serves to meet the needs of the (auto)producer, electricity produced by these means is not part of the wholesale electricity market.

[461] The parties' observations on the Article 6(1)(c) decision, paragraph 248.

construction projects in progress. Up to and including 2009, according to the CREG, there are to be seven commissionings of new units or existing units with increased generating capacity[462]. Of the planned increase in capacity the parties account for about [50-60]*%. Thus the strong position they hold in terms of capacity installed in Belgium will not change substantially between now and 2010. It can be calculated that the parties' share of production capacity will diminish only by about [0-5]*%, bringing it down to [80-90]*% in 2010.

Planned increases in generating capacity in Belgium up to 2009 (units with a capacity of 25 MW or more).

Unit		Planned start-up	Net increase (MW)
INEOS	Essent	2006	132
SLECO	Indaver & Sita (decentralised producer)	2006	34
T-Power	Interelectra, SIIF Energies, Ecotech Finance, Socofe and Dredging International	2008	86 (120 MW depending on the turbines chosen)
HAM	GDF (SPE)	2008	30
Angleur	GDF (SPE)	2008	[...]*
Amercour 1	Suez (Electrabel)	2009	291
Doel 1	Suez (Electrabel)	2009	40
Total			[600-800]*
Total Suez + GDF			[400-500]*
Total others			252-286

Source: CREG, No 13256.

752. It should be pointed out, too, that the barriers to access to generation in general, and to the construction of new generating capacity in particular, are high. This will be explained in more detail below.

753. In the statement of objections the Commission drew attention to the fact that the generation capacity of Suez (Electrabel) ensured it an especially advantageous position. This is partly because: (1) it includes a large share of the nuclear capacity, which (i) has already been depreciated and (ii) does not require a CO2 permit, and (iii) its base-load capacity[463] is very competitive in comparison to capacity that might be built by newcomers to the market (using coal); (2) its fuel is diversified, and this protects it against fuel price rises[464]; (3) Suez (Electrabel) has preferential access (via Distrigaz) to gas and flexibility for its gas-fired facilities, an advantage made all the more import as Suez is less dependent on gas a fuel for its power stations (as it also has coal and nuclear capacity), and because of the importance of gas for future expansion of its generation capacity.

754. The parties contest this view[465]. However:

462 The CREG's reply, No 13256, question 6.

463 Centrica's reply (No 13872) to question 18 on the '(Potential) Competitors Electricity' questionnaire.

464 Centrica's reply (No 13872) to question 18 on the '(Potential) Competitors Electricity' questionnaire.

465 Reply to the statement of objections, paragraphs 566 to 575.

(a) There is no denying the fact that Suez has considerable nuclear generation capacity in comparison to any other competitor in the Belgian electricity market (including GDF (SPE) and EDF[466]) and that this represents a considerable financial advantage. This competitive advantage cannot be replicated, as there is a moratorium on building nuclear power stations in Belgium;

(b) even in comparison to GDF (SPE), the only other electricity producer which has a diversified portfolio in terms of fuel, Suez (Electrabel), is clearly better protected against rises in the relative price of fuels. While Suez was able, to a significant degree, to switch from gas- to coal-based electricity generation when their relative prices were reversed[467], SPE had no such option, as it did not possess coal-fired power stations. This advantage would be difficult to replicate, given the difficulty of building new power stations, especially coal-fired ones (see below)[468];

(c) Suez's access to gas (via Distrigaz) for electricity generation constitutes a major competitive advantage because, other than Suez (Distrigaz), only one other supplier (GDF) is in a position to supply gas-fired power stations (see above). Suez (Electrabel) is therefore guaranteed a competitive supply in terms of gas and the attendant flexibility, and, unlike other Belgian electricity producers, is not exposed to unfavourable conditions in the gas supply market.

It should be noted that the proposed merger would further strengthen the competitive advantage held by Suez (Electrabel).

755. It follows that Suez, with its share of the market for the generation and importation of electricity and its advantageous position in terms of access to generating capacity located in Belgium, occupies a dominant position in the Belgian wholesale electricity market. It likewise follows that GDF (SPE), given its market share and especially its access to generating capacity located in Belgium, is the competitor best placed to exert competitive pressure on Suez (Electrabel). The proposed merger would therefore strengthen Suez's dominant position in the Belgian wholesale electricity market.

756. The effects of the proposed merger on the wholesale electricity market are aggravated when account is taken of the parties' generation portfolios. Since electricity cannot be

---

[466] Suez has a capacity of 5161 MW, GDF has 260 MW (Form CO, pp. 632-637), and EDF 481 MW (Form CO, p. 648). The proposed merger would only reinforce this situation.

[467] Reply to the statement of objections, paragraph 573.

[468] One remark should be made, however: in the statement of objections the Commission said that 'an electricity producer must have local generating facilities that are diversified enough … Only the generating facilities of Suez (Electrabel) and GDF (SPE) meet this criterion' (statement of objections, paragraph 650). The parties cannot claim that this supports their position: it is clear from the context and from the facts being discussed that the observation refers to the availability of several generating units, irrespective of the fuel they consume (see also the clarification supplied by EDF, dated 22 September 2006, No 17747).

stored[469], actual production has to keep in close step with demand. In an efficient market this is done by reducing output or by disconnecting the generating unit with the highest marginal costs at the particular time. The power stations with the lowest marginal costs are almost always generating electricity (and are called 'base-load' stations). Generation units with higher marginal costs generate electricity regularly but not all the time ('mid-merit' stations), or only at times of peak demand ('peak-load' stations).

757. Marginal costs are closely linked to fuel costs. Nuclear stations are considered base-load facilities, and coal-fired stations are mid-merit. Gas-fired units are usually mid-merit or peak-load. This classification is confirmed by the figures for marginal costs by generation unit and type of fuel provided in the notification[470].

758. Suez (Electrabel) has base-load, mid-merit and peak-load facilities. SPE's facilities are mainly mid-merit and peak-load gas-fired stations. In a competitive market, electricity prices are determined by the station with the highest marginal costs generating at the particular time, or in other words by the producer at the high point on the supply curve, which in electricity is often called the 'merit curve'. As a result of the merger, therefore, Electrabel would not only absorb its main competitor, but would also eliminate the only other electricity producer in Belgium that is present, as it itself is, on the parts of the supply curve where prices are determined; this would greatly increase the parties' ability to determine prices on the wholesale market in Belgium.

759. The parties submit that the Commission's understanding of the matter is based on an analysis of the production portfolio of GDF (SPE) at one particular time. Essentially, they argue that the sole reason that SPE's power stations are in the sections of the merit curve that determine the price of electricity is that the price of gas is momentarily very high by comparison with the price of coal.

760. This view is contradicted by the facts. 'Spark spreads' for the generation of electricity from gas and coal do not suggest any change in the relative prices of gas and coal between now and the end of 2008[471], and certainly not a change in relative prices such as to alter the positions of gas- and coal-fired power stations in the order of merit.

761. In any event, even if there were to be a change in the relative prices of gas and coal that resulted in a reversal of the merit order of coal- and gas-fired power stations, the gas-fired stations, which would now have become mid-merit facilities, would continue to influence the price of electricity. Their influence would be exercised only when demand for electricity was weaker, that is to say at other times of the day or of the year.

---

469 The exception to this general rule is Electrabel's pumped storage facilities. This is not storage as such: the facilities consist of hydroelectric dams with pump and turbine plants. At times of slack demand the available surpluses of electricity are used to pump water from a lower reservoir to the reservoir behind the dam. The losses of energy during the exercise are considerable.

470 See for example Centrica's reply, No 13872, to the '(Potential) Competitors Electricity' questionnaire, question 23(b). The [consulting company]* report, which the parties have submitted as Annex 13 to their reply to the statement of objections, is based on a concept of the wholesale electricity market similar to the market described in this paragraph (see, for example, p. 13 of the report).

471 See *Power Europe*, Volume VI, 17, 7 September 2006, p. 13. See also the article 'The China Angle' in the same volume, p. 1, which argues that the price of coal relative to gas is leading producers (Electrabel is mentioned) to consider the construction of coal-fired facilities.

762. This is also aggravated by the fact that other parties with generating capacity in Belgium have base-load capacity (EDF) or decentralised or wind-generation capacity (Nuon), which cannot act as a competitive constraint because they cannot be utilised with the flexibility needed to react to changing prices, or else (RWE) capacity largely intended for sale to a single customer. After a merger, therefore, the effect on wholesale prices of the capacity available to competitors is likely to be negligible.

763. The advantageous position of GDF (SPE) by comparison with other competitors with Electrabel is further strengthened by the access GDF can provide to supplies of natural gas, which is a major fuel for SPE's present power stations, and to flexible gas supplies, which are important for optimising gas-fired power stations (see below). This is made especially serious by the fact that the new generating capacities are gas-fired (see below), and SPE's existing power stations and the future generating capacities in construction at Ham and Angleur are likewise gas-fired[472].

B.4.1.2. Ancillary services and balancing power

764. The parties themselves state that they are currently the only electricity producers that supply ancillary services and balancing power to Elia[473].

765. The table below illustrates the parties' positions in the market for ancillary services and balancing power, excluding tertiary reserves. These figures have been confirmed by Elia[474].

Payments by Elia to the parties for the supply of ancillary services (2005)

Product	Suez (€ million)	GDF (€ million)	Total parties (€ million)	Others	Suez's share	GDF's share	Parties' share
Primary reserves	[...]*	[...]*	[...]*	[...]*	[80-90]*	[10-15]*	[90-100]*
Secondary reserves	[...]*	[...]*	[...]*	[...]*	[90-100]*	[0-5]*	[90-100]*
Tertiary reserves	[...]*	[...]*	[...]*	See above			
Black start services	[...]*	[...]*	[...]*	[...]*	[70-80]*	[20-30]*	[90-100]*
Control of voltage and reactive power	[...]*	[...]*	[...]*	[...]*	[90-100]*	[5-10]*	[90-100]*
Total	[...]*	[...]*	[...]*				

Source: Parties' reply (No 12882) to the request for information dated 5 July 2006.

For the supply of primary, secondary and tertiary reserves, amounts include the provision of capacity and payments for energy consumed. Payments for the supply of congestion management services are included among those for primary, secondary and tertiary reserves (tertiary reserves in the case of SPE).

472 Notification, p. 636.

473 Notification, pp. 219-220.

474 Reply by Elia (No 13256) to question 1(e).

766. Prior to the merger, Suez (Electrabel) accounts for a very large share of Elia's purchases - at least [70-80]*% and as high as [90-100]*% for purchases of secondary reserves[475]. The only competitor for the supply of these services is GDF (SPE). After the transaction the share of Elia's purchases accounted for by the merged entity would increase to [90-100]*% in the case of primary and secondary reserves, black start services and control of voltage and reactive power. The proposed merger would therefore eliminate all competition for the provision of these services to Elia.

767. Only in the case of tertiary reserves are there sources of supply other than electricity producers – in the form of interruptible customers. These are large industrial consumers directly connected to the Belgian power grid which have concluded contracts with Elia and are willing, in return for compensation, to reduce their electricity consumption without notice whenever the balance on the Belgian grid is threatened. Elia can also issue a call as a last resort under its arrangements with TenneT and RTE (see below). However, the quantities involved here are marginal[476].

768. The table below shows that, before the transaction, Suez (Electrabel) already accounts for a [50-60]*% share of Elia's purchases of tertiary reserves. After the merger, the parties' share would increase to up to [70-80]*%. Around [20-30]*% is supplied by [5-10]*interruptible customers which have a contract with Elia allowing their electricity consumption to be reduced without notice.

Capacity (MW) of tertiary reserves contracted with Elia (2005)

	Volume (MW)	Market share (%)
Suez (Electrabel)	[...]*	[50-60]*
GDF (SPE)	[...]*	[10-15]*
Suez + GDF	[...]*	[70-80]*
Interruptible customers	[...]*[477]	[20-30]*
Inter-TSO[478]	Marginal	Marginal
Total market	[...]*	100.0

Source: Parties' reply to the Commission's questions of 5 July 2006, question 5 and the notification.

769. Moreover, given the generating capacity available to other competitors and its technical specifications, it is inconceivable that any significant competition could subsist or potentially emerge in the supply of ancillary services and balancing power (excluding tertiary reserves), for the following reasons:

[475] If the services identified here were to be treated as separate markets, SPE could be seen as a potential competitor for the supply of secondary reserves which would be eliminated by the proposed merger.

[476] Reply by Elia (No 13575) to question 1(e).

[477] The parties estimate that in 2005 interruptible customers supplied Elia with the same energy reserves as in 2004. A total of six interruptible customers have contracted reserves with Elia.

[478] Elia's reply (No 13575) to question 1(e).

a) The generating capacity available to EDF[479] and RWE is incapable[480] of providing Elia with ancillary services and balancing power. This is also true for Nuon (wind turbines), for decentralised capacity and for cogeneration capacity, as they do not allow the controlled variations in production required to supply reserves.

This fact alone serves to counter the parties' argument in their reply to the statement of objections[481] that, if they were to increase their prices for the supply of ancillary services and balancing power, Elia would turn to potential suppliers other than the parties, such as RWE.

It can also be added that:

b) It makes more economic sense to offer these services from power stations that are not used for base-load and mid-merit generation, as that would increase the opportunity costs of capacity kept in reserve. The power stations of GDF (SPE) meet both criteria, unlike the plant available to the other owners of generating capacity in Belgium.

c) In order to offer primary, secondary and tertiary reserves and to enter into risk-free commitments vis-à-vis the TSO, an electricity producer must have local generating facilities that are diversified enough – i.e. consisting of several generating units[482] – to be able to reserve part of the power generated[483]. Only the generating facilities of Suez (Electrabel) and GDF (SPE) meet this criterion. Since none of the competitors currently has even a single power station capable of providing ancillary services and balancing power and given the major barriers to the construction of generating units (see above), it is unlikely that competitive pressure can develop in the near future.

d) The situation as regards tertiary reserves is hardly more favourable. According to the parties, Elia's needs can be met only by having customers who can reduce their consumption without notice, and in principle the number of electricity consumers capable of providing such tertiary is limited[484].

e) In any event, interruptible customers can provide no other ancillary services and exert competitive pressure on only one market segment at most.

---

479 EDF's reply (No 13426) to question 30 of the '(Potential) Electricity Competitors' questionnaire.

480 RWE is capable of supplying voltage support and reactive power only through its capacity in Belgium - and even then only to a limited extent. Reply by RWE (No 13515) to question 30 of the '(Potential) Electricity Competitors' questionnaire.

481 Paragraph 715 of the reply to the statement of objections. Another point worth making as regards RWE's capacity to supply ancillary services and balancing power is that its generating capacity is earmarked for supplying a single industrial customer, BASF, and therefore cannot be reserved for other purposes.

482 Letter from EDF dated 22 September 2006 (No 17747).

483 EDF's reply (No 13426) to question 26(d) of the '(Potential) Electricity Competitors' questionnaire.

484 Form CO, p. 719.

Contrary to the parties' claims in their reply to the statement of objections[485], the Commission considers that it has accurately assessed the competitive pressure exerted by interruptible customers, given their share of supplies of tertiary reserves and the weight of tertiary reserves in ancillary services as a whole.

770. The parties' view that there would still be sufficient competition in the market for ancillary services and balancing power is not credible.

771. In their reply to the statement of objections[486], the parties argue that prices in the market for ancillary services are governed by prices in the wholesale electricity market, as there is scope for arbitrage if generating capacity is offered in both the wholesale market and the market for ancillary services.

772. However, this argument fails to take account of the technical and economic constraints, already mentioned above, which prevent electricity producers from supplying ancillary services too. Even though there are other electricity producers with generating facilities capable of offering reserve power, the wholesale market does not exert competitive pressure in the market for ancillary services[487].

773. It is true that the roadmap, drawn up by the CRE, the CREG and the DTe on 7 December 2005 and submitted by the parties, mentions a mechanism for exchanging balancing power which must be implemented by 1 July 2007.

774. However, the CREG has confirmed that, although the roadmap expresses the intention that a balancing-power exchange mechanism should be introduced, the TSOs are not expected to submit an initial proposal until 1 January 2007[488]. It has also emerged that the regulators prefer a system that allows the exchange of balancing power only between TSOs, which consequently would not allow electricity producers established outside the Belgian control area from submitting bids to Elia direct.

775. It cannot be ruled out that some competitive pressure might emerge in the supply of reserves. However, such pressure would be only indirect, uncertain and insufficient to offset the effects of the proposed merger.

776. In their reply to the statement of objections, the parties claim that the Commission is calling into question the simple fact that a mechanism for cross-border exchange of reserves will enter into force and may have an influence on the market for ancillary services and balancing power.

777. The Commission does not deny that there is a commitment to introduce such a mechanism. However, in the absence of any information on how the mechanism will operate in practice (an initial proposal is not expected until 1 January 2007), it would be

485 Paragraph 617 of the reply to the statement of objections.

486 Paragraph 625 of the reply to the statement of objections.

487 See also COMP/M.3868-DONG/Elsam/Energi E2 of 16 March 2006, paragraphs 238-239.

488 Reply by the CREG (No 13256) to question 2(g) of the questionnaire on electricity in Belgium.

pure speculation to take this factor into account in a competition analysis. Furthermore, the report submitted by the parties along with their reply to the statement of objections concerns only the cross-border supply of tertiary reserves, i.e. a significant but nevertheless limited portion of ancillary services and balancing power as a whole.

778. In their reply to the statement of objections, the parties point out that Elia has already concluded contracts for the supply of tertiary reserves with TenneT and RTE (the TSOs in the Netherlands and France) and that those contracts represent a great deal of competitive pressure.[489]

779. Elia does indeed have contracts with TenneT and RTE for the supply of reserves. However, they contain the following provisions[490]:

a) the reserve energy requested is to be delivered when an emergency situation arises in the area of the requesting TSO;

b) reserve energy is to be called on as a 'last resort' when all other possibilities open to the requesting TSO have been exhausted;

c) the actual supply of reserves is not guaranteed; the TSO receiving a request for reserve energy is obliged to supply it only if it has sufficient reserves and has no need of them to meet requirements in its own control area.

Moreover, any reserves made available by TenneT and RTE cannot be deducted from the amount of tertiary reserves contracted by Elia with Belgian producers, which are laid down in advance in consultation with the CREG[491].

780. The mere fact that the reserves contracted by Elia with TenneT and RTE do not lead to any reduction in the reserves which it must contract with producers established in Belgium rules out any competitive pressure, as Elia cannot replace reserves contracted with producers in Belgium with reserves contracted with TenneT and RTE, whatever the terms laid down in those contracts.

781. The same conclusion can in fact be drawn from the terms of the contracts between Elia and TenneT and RTE. The absence of firm deliveries and the fact that the reserves can be called on only after all other means available to the TSO have been exhausted - i.e. reserves contracted with producers established in its own control area - mean that the reserves available to Elia under its contracts with TenneT and RTE cannot be substituted for those made available by producers in Elia's control area[492].

---

489 Paragraph 619 of the reply to the statement of objections.

490 Reply by the CREG (No 17531) of 15 September 2006 to questions 1 and 2.

491 The availability of reserves under contracts with TenneT and RTE has simply allowed Elia to reduce the guaranteed availability of tertiary reserves contracted with Belgian producers. Reply by the CREG (No 17531) to question 4.

492 Similar conclusions were reached by the CREG in its reply to question 6 in the letter of 15 September 2006 (No 17531)

782. It should also be borne in mind that the delivery volumes of these reserves using these means are marginal.

783. The Commission therefore takes the view that the reserves contracted by Elia with TenneT and RTE do not exert any competitive pressure in the Belgian market for ancillary services, of which they do not form part.

784. The parties claim there is little risk of a price increase because the price at which reserves are contracted is submitted for approval to the CREG and, in the last instance, to the Minister responsible for energy[493]. In particular, they point out that, under Article 12(1) of the Electricity Law as it currently stands, the system operator submits a proposal for tariffs for ancillary services and balancing power to the CREG for approval. The CREG can accept or reject Elia's tariff proposal. If its proposal is rejected, Elia may either submit a new proposal, after renegotiating with suppliers, or send its initial tariff proposal to the Minister responsible for energy, for a final decision on the matter. The parties argue that the two authorities can therefore impose certain tariff restrictions on Elia, adding that the CREG rejected the tariff proposal submitted by Elia on 30 September 2005 *inter alia* because it deemed the costs of certain ancillary services to be too high.

785. Nonetheless, the Commission's understanding is that neither the CREG nor the Minister responsible for energy has the power to regulate the price of the supply of ancillary services and balancing power by electricity producers. The parties' arguments already point to such a conclusion. If its tariff proposal is rejected by the CREG, Elia may (but is not obliged to) renegotiate the bids submitted by the potential suppliers of ancillary services. However, nothing compels those suppliers to submit more advantageous proposals.

786. The Commission's interpretation is borne out by the CREG, which states that, in examining Elia's tariff proposal, it must among other things assess whether the cost factors are reasonable, rejecting any unreasonable costs[494]. This simply means that the part of the costs deemed unreasonable by the CREG cannot be incorporated in the transmission network tariffs. The CREG has no power to regulate the prices which Elia pays its suppliers for that purpose. The CREG specifically confirms that *'it is therefore incorrect to assert that no market power can be exerted in the market for ancillary services and balancing capacity because the prices Elia pays its suppliers for that purpose must be approved by the CREG'.*

787. The CREG also points to the short statutory deadlines it has in which to examine the long and complex files containing Elia's tariff proposals and budget and to take a decision on them[495]. Moreover, despite several requests from the CREG, the suppliers concerned have agreed to provide only very little information on the relevant price calculations in order to help the CREG examine these files. This means that the CREG's ability to carry out detailed studies and verifications is in practice severely restricted by

---

493 Observations by the parties on the decision adopted under Article 6(1)(c) of the Regulation, in particular paragraphs 265-267.

494 Reply by the CREG (No 13256) to question 3(1).

495 Reply by the CREG (No 13256) to question 3(l).

the short deadlines for approving tariff proposals and the limited information on which it must base its decision[496].

788. So, although it cannot be ruled out that the Belgian authorities might exert some indirect influence on the market for the supply of ancillary services and balancing power, their influence is restricted by fact that the Belgian authorities' formal powers are restricted in practice, and their scope for examining and verifying proposals is limited.

789. It follows from the above considerations that Suez (Electrabel) already has a dominant position even before the proposed merger. The merger would strengthen that dominant position and eliminate GDF (SPE) from the Belgian market for the supply of ancillary services and balancing power. Given its access to generating capacity, GDF (SPE) is the best placed - indeed the only - competitor to exert competitive pressure. The regulatory framework in Belgium is not sufficient to prevent the parties from exploiting the strengthened dominant position they would thereby obtain.

B.4.1.3 Supply to large industrial and commercial customers

790. The table below shows the parties' position in the market for supply to large industrial and commercial customers. These figures have also been confirmed by the CREG[497]. With a market share of [70-80]*%, Electrabel has a dominant position in this market.

Supply of electricity to large industrial and commercial customers in Belgium (> 70kV)

Supplier	2003		2004		2005	
	Sales (TWh)	Market share (%)	Sales (TWh)	Market share (%)	Sales (TWh)	Market share (%)
Electrabel	[...]*	[80-90]*	[...]*	[70-80]*	[...]*	[70-80]*
ECS	[...]*	[0-5]*	[...]*	[0-5]*	[...]*	[0-5]*
Suez total	[...]*	[80-90]*	[...]*	[70-80]*	[...]*	[70-80]*
Luminus	[...]*	[0-5]*	[...]*	[0-5]*	[...]*	[0-5]*
SPE	[...]*	[0-5]*	[...]*	[0-5]*	[...]*	[0-5]*
GDF total	[...]*	[0-5]*	[...]*	[0-5]*	[...]*	[0-5]*
Suez + GDF	[...]*	[80-90]*	[...]*	[70-80]*	[...]*	[70-80]*
RWE AG	[...]*	[5-10]*	[...]*	[5-10]*	[...]*	[5-10]*
EDF	[...]*	[0-5]*	[...]*	[0-5]*	[...]*	[5-10]*
Other competitors	[...]*	[10-15]*	[...]*	[5-10]*	[...]*	[5-10]*
Total	[...]*	100	[...]*	100	[...]*	100

Source: parties' best estimates.

791. According to the parties[498], the merger appears to have no immediate effect on this market, mainly because SPE and Luminus do not supply such customers at present.

---

[496] The Law of 1 June 2005 amending the Electricity Law does not amend Article 12(1) with respect to ancillary services or the CREG's powers and hence does not affect the Commission's conclusions. However, the new Law does allow the CREG to refer a case to the Competition Council if it considers that the prices for ancillary services offered to Elia are not in line with European practice. Of course, this provision is not to be confused with the power to regulate the prices for ancillary services and balancing power.

[497] Reply by the CREG (No 13256) to question 14.

792. However, GDF (SPE) has already had some customers in this market since 2003. Moreover, in September 2005 SPE launched a Strategic Sales Department dedicated to customers with an annual consumption of 30 GWh, which has been staffed since March 2006[499].

793. The following points should also be made:

a) The activities of large industrial and commercial customers cause imbalances which cannot be absorbed in a customer portfolio confined to just a few dozen TWh[500].

b) The only way of supplying large customers without running a major risk of imbalances is by using base-load and peak-load generating capacities located in Belgium[501] or back-up contracts with a generator that has capacities in Belgium (see also above). This places at a disadvantage suppliers who are dependent on imports. Indeed importers are now absent from this market.

Consequently, suppliers with generating capacity located in Belgium and an already extensive customer portfolio have a competitive advantage when it comes to supplying large industrial and commercial customers.

794. In their reply to the statement of objections[502], the parties argue that, given the scope for interconnection and the possibility of building new generating units, it is not necessary to have generating units located in Belgium in order to enter the market for supply to large industrial and commercial customers (or other supply markets).

795. As the Commission has already stated above, the risks involved in using electricity imports as a source of supply, combined with the lack of liquidity in the Belgian trading market (see above), mean that access to generating capacity is an important prerequisite for any operator wishing to establish itself as a credible competitor. It is worth mentioning here the negative experiences of SourcePower and RWE in supplying industrial and commercial customers, described in detail above.

796. Apart from Suez (Electrabel), only RWE and EDF have substantial shares of the market for supply to large industrial and commercial customers.

797. However, RWE cannot exert any competitive pressure. Although its interest in Zandvliet power station gives it a presence in Belgium, it sells nearly all its output to a single customer under a long-term contract. As already stated above, even with access to generating capacity, RWE is unable to develop as a supplier to large industrial and commercial customers in Belgium, as it cannot acquire profiles. In their reply to the

---

498 Contrary to the views stated by some respondents in the market investigation.

499 SPE's reply (No 13997) to question 15 of the '(Potential) Electricity Competitors' questionnaire.

500 EDF's reply (No 13426) to question 24(b) of the '(Potential) Electricity Competitors' questionnaire and Nuon's reply (No 13797) to question 24(c) of the same questionnaire.

501 EDF's reply (No 13426) to question 24(a) of the '(Potential) Electricity Competitors' questionnaire.

502 Paragraph 630 of the reply to the statement of objections.

statement of objections, the parties did not contest RWE's statement that it is incapable of exerting competitive pressure in this market.

798. The [400-500]* MW of generating capacity available to EDF corresponds to a maximum output of [0-5]* TWh. According to figures supplied by the parties, EDF's customer portfolio in Belgium accounts for [0-5]* TWh[503]. EDF is therefore in a position to exert a certain degree of competitive pressure on Suez (Electrabel). However, that pressure is severely restricted, as EDF has access to only limited generating capacity in Belgium and lacks an energy mix combining base-load, mid-merit and peak-load power stations that would make it sufficiently competitive[504]. The recent growth in EDF's market share is linked to the fact that its sole source of supply in Belgium – its drawing rights on generation at Tihange nuclear power station – was unavailable to it from 2003 to 2005 because of maintenance.

799. It should also be noted that the proposed merger would eliminate the only supplier that can compete with Suez (Electrabel) for back-up contracts to importers wishing to supply large industrial and commercial customers. Supplying back-up contracts requires substantial and flexible capacity in Belgium, which only Suez (Electrabel) and GDF (SPE) possess. It is therefore even less likely that electricity importers would be able to exert competitive pressure on the parties in this market, as the merger would raise the barriers to entry.

800. The parties argue that, in a liberalised electricity market, it is the trading market which serves to maintain balance in generating capacity, particularly where back up is required. However, one need only recall here that the Belgian trading market is currently unable to perform this function because of its lack of liquidity (see above).

801. Finally, in their reply to the statement of objections, the parties argue that, in the market for supply to large industrial and commercial customers, their biggest competitors are the customers themselves. This category of customer is supposedly well-placed to build co-generation units, an activity rendered even more attractive by the introduction of CHP certificates by governments[505].

802. The first point to be made here is that co-generation units often produce combined heat and power for internal consumption by the industrial undertaking concerned. Insofar as the power generated is solely for the undertaking's internal consumption and not offered to third parties, this generating capacity cannot be regarded as forming part of the wholesale electricity market. The very limited generating capacity of some of the co-generation projects mentioned by the parties suggests that they are intended mainly for the internal consumption of the undertaking concerned.

803. In any event, even if all the projects mentioned are actually built[506], the co-generation units in question would generate only [300-400]* MW of available capacity by around

---

503 Form CO, p. 661.

504 Comment by EDF on the statement of objections (No 17368).

505 Paragraphs 628-629 of the reply to the statement of objections.

506 According to the parties, two projects with a generating capacity of 159 MW are under construction. An additional [100-200]* MW is planned (paragraph 629 of the reply to the statement of objections).

2009. This represents no more than [0-5]*TWh of electricity generated, or less than [10-15]*% of electricity consumed by large industrial and commercial customers in 2005.

804. Given the importance of having generating capacity located in Belgium in order to supply large industrial and commercial customers, its concrete plans to increase its presence in that market and the inability of its (potential) competitors to expand their supply activities in that market, GDF (SPE) is one of the two competitors best placed to exert competitive pressure on Suez (Electrabel). The proposed merger would therefore strengthen the already dominant position of Suez (Electrabel) in the market for supply to large industrial and commercial customers.

805. In their reply to the statement of objections, the parties acknowledge that SPE is a potential competitor in the Belgian market for supply to large industrial and commercial customers[507].

B.4.1.4 Supply to small industrial and commercial customers

806. As the table shows, Suez (via Electrabel and ECS) currently has a share of [70-80]*% in the market for supply to small industrial and commercial customers, while GDF (via SPE and Luminus) has a share of [15-20]*%. These figures have been confirmed by the VREG, CWaPE and BIM[508].

807. Nuon and Essent have made some incursions into this market. However, the competitive pressure they exert must be regarded as limited, particularly as they have practically no generating assets in Belgium.

808. The proposed transaction would therefore strengthen Electrabel's already dominant position in this market.

Supply of electricity to small industrial and commercial customers in Belgium (< 70 kV)

Supplier	2003		2004		2005	
	Sales (TWh)	**Market share (%)**	**Sales (TWh)**	**Market share (%)**	**Sales (TWh)**	**Market share (%)**
Electrabel	[...]*	[20-30]*	[...]*	[20-30]*	[...]*	[15-20]*
ECS	[...]*	[40-50]*	[...]*	[50-60]*	[...]*	[50-60]*
Suez total	[...]*	[70-80]*	[...]*	[70-80]*	[...]*	[70-80]*
Luminus	[...]*	[15-20]*	[...]*	[5-10]*	[...]*	[5-10]*
SPE	[...]*	[0-5]*	[...]*	[0-5]*	[...]*	[10-15]*
GDF total	[...]*	[15-20]*	[...]*	[10-15]*	[...]*	[20-30]*
Suez + GDF	[...]*	[90-100]*	[...]*	[90-100]*	[...]*	[90-100]*
E.ON La Belgique SA	[...]*	[0-5]*	[...]*	[0-5]*	[...]*	[0-5]*
Nuon Belgique SA	[...]*	[0-5]*	[...]*	[0-5]*	[...]*	[0-5]*
Essent Belgique SA	[...]*	[0-5]*	[...]*	[0-5]*	[...]*	[0-5]*
Other competitors	[...]*	[0-5]*	[...]*	[0-5]*	[...]*	[0-5]*
Total	[...]*	**100**	**[...]***	**100**	**[...]***	**100**

Source: parties' best estimates.

[507] Paragraph 633 of the reply to the statement of objections.

[508] Replies by the VREG (No 13108), CWaPE (No 13209) and IBEG/BIM (No 13537) to question 5.

B.4.1.5 Supply to eligible household customers

809. The Commission believes that the markets for supply to household customers are regional in scope. At present these markets are open to competition only in the Flemish Region, where household customers have been eligible since 1 July 2003.

810. In the Walloon Region and the Brussels Region, household customers will be eligible only from 1 January 2007. However, since these liberalisation arrangements are already well-defined and due to come into force soon, analysis of the effects of the merger must focus not only on the conditions of competition in the Flemish Region, but also on potential competition in the Walloon and Brussels Regions. The fact that the market for supply to households in Brussels and Wallonia is not yet open prompts the following comments.

811. The Court of First Instance has considered that, where there is no competition in the markets for gas in accordance with the Gas Directive, it is not possible to conclude that the conditions of Article 2(3) of the Merger Regulation have been met[509]. In particular, it found that the Commission is not able to assess whether a merger prevents the introduction of effective competition within the binding timetable laid down in the Gas Directive[510].

812. Nevertheless, the competition situation existing on the date when a decision is adopted or the date when the markets in question are opened up to competition is an objective fact, the assessment of which is not affected by the non-fulfilment of a legal criterion[511]. The Court also stated in its judgment that the Commission may analyse the immediate effects of such a transaction, if they exist, and take them into account in its overall assessment of the transaction[512]. In the case before it, the Court said an immediate effect of the merger, as modified by the commitments, would have been to bring forward the opening of certain markets compared with the timetable proposed in the Gas Directive[513].

813. Furthermore, when the Commission examines a merger, it must establish whether the transaction would have the direct and immediate effect of the SIEC test. In so doing, it may, where appropriate, take into consideration the effects of the merger in the near future[514].

814. In the present case, the merger, as notified, has no immediate effect on the timetable for opening up the markets for supplying households with electricity in Brussels and

---

509 Case T-87/05 *EDP* v *Commission*, paragraph 116.

510 Case T-87/05 *EDP* v *Commission*, paragraph 127.

511 Case T-87/05 *EDP* v *Commission*, paragraph 131.

512 Case T-87/05 *EDP* v *Commission*, paragraph 124.

513 Case T-87/05 *EDP* v *Commission*, paragraph 125.

514 Case T 5/02 *Tetra Laval* v *Commission* [2002] ECR II-4381, paragraph 153.

Wallonia. So, for the purposes of its overall assessment, the Commission can find no positive immediate effect on the conditions of competition in these markets. However, although the markets will not open to competition until 1 January 2007, the merger is likely to have an immediate effect on the preparations of potential competitors for the opening. In particular, the merger would immediately eliminate GDF (SPE) as competitors of Suez (Electrabel) in the Walloon Region and as potential competitors in the Brussels Region and create barriers to entry for other potential competitors. These barriers are likely to have the immediate effect of discouraging investment by potential competitors in expectation of market entry from 1 January 2007. The merger is also likely to remove or reduce the incentive for Suez (Electrabel) to anticipate the effects of the market being opened up by immediately offering more competitive prices or other terms and conditions designed to keep customers loyal.

815. By the time this Decision is adopted, the opening up to competition of the markets for supply to households in Wallonia and Brussels in accordance with Belgian law and Directive 2003/54/EC will be imminent. Consequently, the merger will have an immediate effect on commercial decisions by the parties to the merger and by third parties, and this will have an impact on the conditions of competition in the very near future.

816. The Commission therefore considers it should take into consideration the effects on competition which are already imminent, and will be felt in these markets from January 2007.

B.4.1.5.1 Supply to eligible household customers in the Flemish Region

817. In the Flemish Region, Suez (via Electrabel and ECS) currently has a market share of [50-60]*% in the market for supplying eligible household customers, while GDF (via SPE and Luminus) has [20-30]*%. These figures have been confirmed by the VREG[515].

818. Nuon and Essent have made some incursions into this market. However, the competitive pressure they exert must be regarded as limited, particularly as they have practically no generating assets in Belgium.

[515] Replies by the VREG (No 13108) to question 5.

Supply of electricity to eligible household customers in Flanders

Supplier	2003		2004		2005	
	Sales (TWh)	Market share (%)	Sales (TWh)	Market share (%)	Sales (TWh)	Market share (%)
Electrabel	[...]*	[0-5]*	[...]*	[0-5]*	[...]*	[0-5]*
ECS	[...]*	[60-70]*	[...]*	[60-70]*	[...]*	[50-60]*
Suez total	[...]*	[60-70]*	[...]*	[60-70]*	[...]*	[50-60]*
Luminus	[...]*	[20-30]*	[...]*	[20-30]*	[...]*	[20-30]*
SPE	[...]*	[0-5]*	[...]*	[0-5]*	[...]*	[0-5]*
GDF total	[...]*	[20-30]*	[...]*	[30-40]*	[...]*	[20-30]*
Suez + GDF	[...]*	[90-100]*	[...]*	[90-100]*	[...]*	[80-90]*
Nuon Belgique SA	[...]*	[5-10]*	[...]*	[0-5]*	[...]*	[5-10]*
Essent Belgique SA	[...]*	[0-5]*	[...]*	[0-5]*	[...]*	[0-5]*
Other competitors	[...]*	[0-5]*	[...]*	[0-5]*	[...]*	[0-5]*
Total	[...]*	**100**	[...]*	**100**	[...]*	**100**

Source: parties' best estimates.

819. The proposed merger would therefore strengthen the already dominant position of Suez (Electrabel) in the market for supplying households in Flanders.

B.4.1.5.2 Supply to eligible household customers in the Brussels Region

820. In the Brussels Region the supply of electricity to household customers will be fully liberalised from 1 January 2007. All households in Brussels are currently supplied by the local authority company, Sibelga. Sibelga has now designated Suez (ECS) as the default supplier for household customers who do not choose a supplier by 1 January 2007[516].

821. According to the parties' estimates, Suez (through ECS) and GDF (in 2007 through SPE in particular[517]) will have respective market shares of [80-90]*% and [0-10]*% in 2007. Suez (ECS) would therefore be in a dominant position in the market for supply to households in Brussels.

[516] Decision No 2004-C/C-26 of 8 March 2004 in Case CONC-C/C-04/00005 *Electrabel Customer Solutions S.A.* v *Sibelga*.

[517] Since 31 July 2006, SPE, Luminus, ALG Négoce, ALE trading and City Power have been consolidated under a single legal entity - SPE. In 2007, SPE will constitute the group's sole legal structure.

Supply of electricity to household customers in Brussels (2007)

	Electricity	
Supplier	**Sales (TWh)**	**Market share (%)**
Suez (Electrabel)	[...]*	[0-5]*
Suez (ECS)	[...]*	[80-90]*
Suez (Distrigaz+ ECS)	[...]*	[80-90]*
SPE	[...]*	[0-5]*
TOTAL GDF	[...]*	[0-5]*
Suez + GDF	[...]*	[80-90]*
Nuon	[...]*	[5-10]*
Essent	[...]*	[5-10]*
Other competitors	[...]*	[5-10]*
Total	[...]*	**100**

Source: parties' best estimates.

822. In its statement of objections, the Commission took the view that the fact that SPE has a significant presence in the markets for supply to households in the Flemish and Walloon Regions (see below) and a presence in the neighbouring market for small industrial and commercial customers in the Brussels Region means that the proposed merger would eliminate a potential competitor from the market for supply to households in Brussels.

823. In their reply to the statement of objections, the parties expressed surprise that the Commission reached this conclusion, arguing that there was no indication that GDF (SPE) would build up its own customer base in this field in the medium or long term and that GDF (SPE) did not regard the market in question as a priority.

824. First, the Commission still maintains that demonstrating the presence of GDF (SPE) in neighbouring markets is enough to conclude that it is a potential entrant to the market for supply to households in Brussels. Moreover, since the statement of objections was sent, it has been confirmed that SPE fully intends to enter the market for electricity supply to households in Brussels when it is opened up on 1 January 2007[518].

825. Attention should also be drawn here to two aspects of the Brussels regional legislation governing the electricity market: (i) pursuant to Article 21(1) of the Order of 19 July 2001 on the organisation of the electricity market in the Brussels Region, the authorisation required to operate as a supplier in the Brussels Region is valid for all categories of eligible customers[519]; (ii) pursuant to Article 25(c) of the draft Brussels

[518] Letter from SPE of 13 September 2006 (No 17215).

[519] Article 21(1) of the Order of 19 July 2001 on the organisation of the electricity market in the Brussels Region, *Moniteur belge/Belgisch Staatsblad*, 17 November 2001.

Order[520], any supplier that holds such an authorisation must offer to supply electricity at reasonable and non-discriminatory prices to all eligible household customer who request it within ten working days of the request.

826. This means that, for a supplier such as GDF (SPE), which already holds an authorisation for supplying eligible customers in the Brussels Region before the market for household customers is opened up, entry to that market is not just possible but almost inevitable.

827. Furthermore, GDF (SPE) supplies L gas, which is the type of gas consumed by all household customers in Brussels. Given the importance of dual offers in the market for supply to households (see above), this puts GDF (SPE) in an even better position as a potential competitor for the supply of electricity to households in Brussels.

828. The Commission therefore maintains that the proposed merger would eliminate a potential competitor from the market for supply to household customers in Brussels.

B.4.1.5.3 Supply to eligible household customers in the Walloon Region

829. The supply of electricity to household customers in Wallonia will be fully liberalised from 1 January 2007. All households in Wallonia are currently supplied by local authority companies. The local authority supplier in Liège, A.L.G., has now designated Luminus, a firm in the SPE group, as the default supplier for household customers who do not choose a supplier by 1 January 2007[521]. The parties estimate that Suez (through ECS) and GDF (in 2007 through SPE in particular[522]) will have respective market shares of [40-50]*% and [20-30]*% in 2007.

830. It should be noted that the figures provided by the parties still appear to be too low. The parties assume that in the single year 2007 their competitors will be in a position to acquire more than 20% of the market for supplying household customers in Wallonia. This percentage clearly exceeds the market share attained by the same competitors in Flanders over a much longer period[523].

---

520 Order amending the Orders of 19 July 2001 and 1 April 2004 on the organisation of the internal market in electricity and gas in the Brussels Region and repealing the Order of 11 July 1991 on the right to minimum supplies of electricity and the Order of 11 March 1999 establishing measures to prevent the cutting off of gas supplied for domestic use. See in particular p. 20, Article 25(c). (See letter from Mr Devuyst dated 25 September 2006 (No 18410).

For the time being this is a draft Order, but the condition in question is likely to become law by November 2006. […]* As its adoption is both likely and imminent, this factor may be taken into account in an ex ante competition analysis.

521 http://www.alg.be/news_libe.html.

522 Since 31 July 2006, SPE, Luminus, ALG Négoce, ALE trading and City Power have been consolidated under a single legal entity - SPE. In 2007, SPE will constitute the group's sole legal structure.

523 The household supply market in Flanders was opened up to competition on 1 July 2003. In 2005, the market share of the parties' competitors (see the table above) was estimated to be [10-15]*%.

Supply of electricity to household customers in Wallonia (2007)

	Electricity	
Supplier	**Sales (TWh)**	**Position (%)**
Suez (Electrabel)	[...]*	[0-5]*
Suez (ECS)	[...]*	[40-50]*
Suez (Distrigaz+ ECS)	[...]*	[40-50]*
SPE	[...]*	[20-30]*
TOTAL GDF	[...]*	[20-30]*
Suez + GDF	[...]*	[60-70]*
Nuon	[...]*	[5-10]*
Essent	[...]*	[0-5]*
Other competitors	[...]*	[15-20]*
Total	**8.8**	**100**

Source: parties' best estimates.

831. The proposed transaction would therefore eliminate GDF (SPE), which would be Suez's biggest competitor in the liberalised market. The notified merger would therefore give the parties a dominant position in the market for the supply of electricity to households in Wallonia.

B.4.1.5.4 Hypothetical national market for supply to household customers

832. The Commission considers that the markets for the supply of electricity to household customers are regional in scope. However, in the alternative, it should be demonstrated that the proposed merger would also strengthen the dominant position of Suez (Electrabel) in a hypothetical, national market for supply to household customers, once households in the Walloon and Brussels Regions become eligible on 1 January 2007.

833. The parties have provided figures for their projected market shares following that change. These figures are consistent with data supplied by the VREG, the CWaPE and the BIM[524].

Supply of electricity to household customers in Belgium

Supplier	**2007**		**2008**	
	Sales (TWh)	**Market share (%)**	**Sales (TWh)**	**Market share (%)**
Electrabel	[...]*	[0-5]*	[...]*	[0-5]*
ECS	[...]*	[50-60]*	[...]*	[50-60]*
Subtotal Suez	[...]*	[50-60]*	[...]*	[50-60]*
Luminus	[...]*	[10-15]*	[...]*	[20-30]*
SPE	[...]*	[10-15]*	[...]*	[0-5]*
Subtotal GDF	[...]*	[20-30]*	[...]*	[20-30]*
Suez + GDF	[...]*	[80-90]*	[...]*	[70-80]*
Nuon Belgium SA	[...]*	[5-10]*	[...]*	[5-10]*
Essent Belgium SA	[...]*	[0-5]*	[...]*	[0-5]*
Other competitors	[...]*	[5-10]*	[...]*	[10-15]*
Total	**25**	**100**	**26**	**100**

Source: parties' best estimates.

* On that date all of SPE's customers will be taken over by Luminus.

524 Replies by the VREG (No 13108), CWaPE (No 13209) and IBGE/BIM (No 13537) to question 5.

834. According to the parties, the projected figures reflect the gradual decline in Suez's share of the market segment for the supply of electricity to household customers, with competitors such as Nuon and Essent gaining ground. However, there has been a marked downturn in the acquisition of new customers by Nuon and Essent since 2005[525]. It is therefore to be feared that, in 2008, Suez's market share would still be higher than that shown in the above table.

B.4.1.5.5 Supply to eligible customers, with no segmentation

835. The parties have argued that the only relevant market is the wider market for supply to all eligible customers. They therefore deny the existence of narrower, sub-national markets for supply to large industrial and commercial customers, small industrial and commercial customers and households.

836. The Commission does not share this view, for the reasons already set out above. However, in the alternative, it should be demonstrated that the proposed merger would also strengthen the dominant position of Suez (Electrabel) in a hypothetical market for supply to eligible customers on a countrywide basis without distinction between categories of customers.

837. The table below shows the market shares in the hypothetical market for supply to all eligible customers. Suez (through Electrabel and ECS) currently has a market share of [70-80]*% and GDF (through Luminus and SPE) has a share of [10-15]*%. After the proposed merger, their combined share would therefore be [80-90]*% of the hypothetical market for supply to all eligible customers. These figures have been confirmed by the CREG, VREG, CWaPE and BIM[526].

[525] Centrica's reply (No 13872) to question 3 of the '(Potential) Electricity Competitors' questionnaire.

[526] Replies by CREG (No 13256) to question 14 and by VREG (No 13108), CWaPE (No 13209) and IBGE/BIM (No 13537) to question 5.

Supply of electricity to final eligible customers in Belgium (all categories combined)

Supplier	2003		2004		2005	
	Sales (TWh)	Market share (%)	Sales (TWh)	Market share (%)	Sales (TWh)	Market share (%)
Electrabel[527]	[...]*	[40-50]*	[...]*	[40-50]*	[...]*	[30-40]*
ECS	[...]*	[20-30]*	[...]*	[30-40]*	[...]*	[30-40]*
Subtotal Suez	[...]*	[70-80]*	[...]*	[70-80]*	[...]*	[70-80]*
Luminus	[...]*	[10-15]*	[...]*	[5-10]*	[...]*	[5-10]*
SPE	[...]*	[0-5]*	[...]*	[0-5]*	[...]*	[5-10]*
Subtotal GDF	[...]*	[10-15]*	[...]*	[10-15]*	[...]*	[10-15]*
Suez + GDF	[...]*	[80-90]*	[...]*	[80-90]*	[...]*	[80-90]*
EDF	[...]*	[0-5]*	[...]*	[0-5]*	[...]*	[0-5]*
RWE AG	[...]*	[0-5]*	[...]*	[0-5]*	[...]*	[0-5]*
Nuon Belgium SA	[...]*	[0-5]*	[...]*	[0-5]*	[...]*	[0-5]*
Essent Belgium SA	[...]*	[0-5]*	[...]*	[0-5]*	[...]*	[0-5]*
E.ON Belgium SA	[...]*	[0-5]*	[...]*	[0-5]*	[...]*	[0-5]*
Other competitors	[...]*	[5-10]*	[...]*	[0-5]*	[...]*	[0-5]*
Total	**60.2**	**100**	**72**	**100**	**77.2**	**100**

Source: parties' best estimates.

838. The proposed merger would therefore strengthen the already dominant position of Suez (Electrabel) in a hypothetical market for supply to eligible final customers (all categories combined).

B.5 Vertical effects

839. Electricity markets are closely linked with one another and with gas markets. The proposed merger would therefore have not only direct effects resulting from the parties' overlapping market shares on a given market but also effects across markets. The main reasons for this are as follows:

a) Gas is an important fuel for power stations. This can:

- lead to strategies aimed at increasing costs for competitors;
- and provide access to sensitive information relating to competitors' generating and pricing policy on electricity wholesaling and trading markets.

b) Access to H gas and L gas is necessary for developing dual offers of gas and electricity.

c) The provision of ancillary services and balancing power concerns the management of the electricity transmission system, which can influence the conditions of competition on downstream markets, the wholesale electricity market, the electricity trading market and markets for the supply of electricity to final customers.

[527] Electrabel's sales to final eligible customers in Belgium do not include sales to electricity suppliers. In 2005, for example, Electrabel supplied [0-5]* TWh of electricity to suppliers. These figures are included in sales by those suppliers to eligible customers and/or sales to local authority companies.

This can lead to strategies aimed at increasing costs for competitors. These vertical effects of the proposed merger would further strengthen the already dominant position of Suez (Electrabel) on the electricity markets.

B.5.1 Increase in the costs of flexible gas supplies to competitors

840. The notified merger would also strengthen the already dominant position of Suez (Electrabel) by eliminating GDF as a potential entrant on the market for the supply of gas to electricity producers. Since Suez (via Electrabel) is present on all electricity markets, it would have an opportunity and an incentive to increase the costs of competitors with gas-fired generating capacity and deter entrants from constructing such capacity in the future by increasing the cost of gas supplies. This is all the more serious because most new power stations built will be gas-fired (see below).

841. The increase in the cost of obtaining flexible gas supplies would have a direct impact on the generating and wholesale market. It would also have indirect effects on all supply markets owing to the importance of access to generating capacity located in Belgium as an important factor for being a credible competitor on these markets.

842. The incentives for the parties to the proposed merger to increase the costs of gas-fired generating capacity are further compounded by the fact that Electrabel is the only player on the Belgian market with any significant base-load generating capacity. Wholesale electricity prices are often determined by gas-fired mid-merit and peak power plants. As a result, increasing the costs of gas-generated electricity would not only weaken competitors and make entry more costly, it would also make Suez (Electrabel) the chief beneficiary of the resulting price increases on the electricity wholesale and trading markets.

843. Moreover, gas-fired power stations do not just need large volumes of gas, they need flexible gas supplies. The profile of mid-merit plants calls for a gas supply that is highly flexible on a seasonal and monthly basis (since they are used more in winter than in summer), on a weekly and daily basis (since they tend to be used during the week and not during weekends) and on an hourly basis (to optimise them in relation to the spark spread, which may be limited to a few hours a day)[528]. The flexibility requirements of gas-fired peak power stations are more or less the same[529]. The lack of flexibility can significantly reduce the operating profit from a power station[530] and so increase costs to competitors and deter new entrants.

844. There are many sources of flexibility for gas-fired power stations: (1) storage, (2) the flexibility offered by the Belgian balancing system, (3) the flexibility offered by a portfolio of gas customers, and (4) upstream flexibility (bought in or part of own portfolio). There are, however, disadvantages:

---

[528] Replies by EDF (No 14002) and Essent (No 14121) to question 2 of the questionnaire on gas flexibility.

[529] SPE's reply (No 14708) to question 2 of the questionnaire on gas flexibility.

[530] EDF's reply (No 14002) to question 3 of the questionnaire on gas flexibility. Nuon's reply (No 13797) to question 4 of the questionnaire on gas flexibility.

a) Belgium's Gas Law requires the administrators of storage facilities to give priority to authorised suppliers supplying gas-distribution facilities when allocating existing capacity[531]. Because gas-storage capacity is scarce in Belgium and gas-fired power stations are connected to the gas transmission system[532], the operators of gas-fired power stations (or their suppliers) are not eligible for gas-storage capacity in Belgium.

b) The Belgian balancing system does not offer the flexibility needed to optimise a gas-fired generating plant[533].

c) The diversity of consumption patterns offered by large downstream portfolios frees up flexibility for other uses, which can help optimise the load profile of electricity generation[534]. The use of this flexibility is, however, confined to players with large portfolios of gas customers and/or players able to vary the fuels they use to generate power, namely Suez (Distrigaz and Electrabel)[535].

d) Long-term upstream contracts and, to a lesser extent, LNG contracts offer considerable flexibility in competitive (daily and annual) volumes[536]. Indeed, it would appear that upstream contracts bring even more flexibility to the Belgian market than storage (38.8% compared with 25.1% for H-gas and 43% for L-gas)[537]. Suez (Distrigaz) and GDF are the only players on the Belgian gas market with substantial flexibility capacity in upstream contracts.

845. In their reply to the statement of objections, the parties contest the view that they would be able to increase the cost of gas supplies to competitors. Some of their arguments simply deny the horizontal effects of the proposed merger on the market for the supply of gas to electricity producers. These arguments are refuted above. The parties also deny any incentive to engage in such a strategy, an argument that will be refuted here.

846. In support of their arguments, the parties have submitted a study drawn up by [a consulting company]*. The [consulting company]*'s report basically argues that a strategy of increasing the cost of gas supplies to SPE would shift SPE's gas-fired power

---

[531] Article 15/11 § 2, 1 of the Gas Law. See also EDF's reply (No 14002) to question 1 of the questionnaire on gas flexibility.

[532] EDF (No 14002) also points out that gas-fired stations can connect directly to LNG terminals or storage facilities. This does not undermine the argument set out here since these power stations will have no connection to the distribution system and, accordingly, no priority when storage capacity is being allocated. However, small generating units are sometimes connected to the gas distribution system (see Essent (No 14121) and Nuon (No 13797)).

[533] Nuon's reply (No 13797) to question 3 of the questionnaire on gas flexibility.

[534] EDF's reply (No 14002) to question 4 of the questionnaire on gas flexibility. Nuon's reply (No 13797) to question 3 of the questionnaire on gas flexibility.

[535] Nuon's reply (No 13797) to question 5 of the questionnaire on gas flexibility.

[536] EDF's reply (No 14002) to question 5 of the questionnaire on gas flexibility and Essent's reply (No 14121) to question 1 of that questionnaire.

[537] Nuon's reply (No 13797) to question 3 of the questionnaire on gas flexibility.

stations towards the edge of the merit curve. As a result, SPE's plants would be used (dispatched) less often because of the increase in their marginal cost, and their use would be economically justifiable only if demand for electricity (and the price thereof) were higher than before. Since increases in electricity prices following an increase in gas prices are, however, limited and price discrimination in the supply of gas is easily detectable, the report concludes that the parties have no incentive to increase gas prices.

847. In order to argue that SPE would easily be able to detect a strategy aimed at increasing competitors' costs, the [consulting company]* report presumes a close, exclusive causal relationship between the fact that a generating plant is running and the price of the gas supplied to that plant. The existence of such a relationship presupposes that electricity producers optimise their generating plants by running them when the price of electricity is higher than the marginal price, which is largely determined by the price of gas, and shutting them down when it falls lower.

848. The causal relationship is actually more complicated[538]. For example:

a) A close relationship presumes that all producers optimise their plants against a single electricity price, which, as the [consulting company]* report confirms[539], does not exist in Belgium.

b) Technical factors ('ramp-up' and 'ramp-down' costs and periods) may make it economically rational to continue (provisionally) using a power plant even where the marginal costs (i.e. the price of gas) are higher (and vice versa).

c) Whether a plant is used may depend on aspects of gas supply other than price, and in particular on flexibility. Flexibility issues may prevent a plant from operating even where the opportunity price of the gas alone makes its use economically justifiable, and vice versa. This relationship with flexibility is further complicated where the flexibility available for a power station is adapted to the overall flexibility needed for a power generator's gas portfolio, for instance, owing to its activities as a gas supplier.

d) Generating capacity may be completely or partly devoted to supplying the market for ancillary services and balancing power. The use of a power station is in this case dictated by an imbalance in the transmission network totally unrelated to the price of gas.

e) The power station may or may not be used to avoid imbalances in relation to the programme nominated to the TSO (in the event of self-balancing or intra-day supply to a third party). In such a situation, the relevant electricity price is that of the supply of balancing power under the TSO's balancing system rather than the price of electricity per se.

---

538 Note that these arguments have no bearing on the Commission's argument that the parties would have access to sensitive information on competitors. The Commission's argument is based on the fact that the parties would have access to data because they would be supplying gas to competitors' power stations. The [consulting company]* report's argument hinges on the fact that it is easy to detect whether a power station is generating electricity.

539 See the [consulting company]* report supplied by parties in Annex 13 to their reply to the statement of objections, p. 7.

f) The parties' argument that discrimination is easily detectable is based on the assumption that the prices of supplies to Suez gas-fired plants would remain at a competitive level and that only the prices of supplies to SPE would increase[540]. Otherwise, according to the [consulting company]* report, Electrabel would lose money.

This argument is incorrect in that the supply of Electrabel's power stations involves deliveries within the Suez group, so an increase in the price of gas to Electrabel is financially neutral for the Suez group as a whole.

Moreover, since a strategy to raise the cost of gas for SPE and Electrabel in no way changes a gas-fired plant's position in the merit order, it is perfectly conceivable that Suez might be able to conceal increases in gas prices from third parties. Such a strategy is all the more likely because it would further increase electricity prices, which would be of benefit mainly to Suez (Electrabel), given its base-load power stations and its position as gas supplier to competitors with gas-fired generating capacity.

849. The parties consider there is no incentive to increase the price of gas supplies to SPE because doing so would not lead to big increases in electricity prices. There is, however, an incentive to increase prices wherever the impact on the price of electricity is advantageous. Furthermore, more advantageous and less easily detectable strategies are open to Suez (Electrabel).

850. At any rate, the [consulting company]* report also concedes that 'a margin squeeze would likely cause serious financial problems for SPE'[541]. What is more, the [consulting company]* report considers only the immediate impact of an increase in the price of gas on the use of SPE's generating capacity and overlooks the fact that SPE is also an electricity supplier. A supplier undertakes to supply customers for considerable periods. An increase in costs for its power stations would force SPE to do one of four things: (i) buy in more electricity on the trading market[542] (an option that would expose SPE to a market that the [consulting company]* report itself describes as lacking in liquidity), (ii) generate electricity at a loss, (iii) default on its obligations to supply the network and so expose itself to the balancing system and its high electricity prices (see the example of SourcePower) or (iv) shed some or all of its portfolio of customers. All these options are detrimental to SPE's position as an electricity supplier both in financial terms and in terms of the image projected to existing and potential customers. Taking into account SPE's business as an electricity supplier, it follows that the repercussions on SPE would be even greater than the immediate impact on the use of its generating portfolio examined and judged serious in the [consulting company]* report.

---

[540] See the [consulting company]* report supplied by parties in Annex 13 to their reply to the statement of objections, p. 5.

[541] See the [consulting company]* report supplied by parties in Annex 13 to their reply to the statement of objections, p. 5.

[542] According to the figures supplied by the parties (Reply by the parties to Decision 6(1)(c)), SPE is already a net purchaser of electricity on the trading market.

851. In admitting that a rise in the price of gas would have negative financial consequences for SPE, the parties have admitted that a rise in the price of gas, or the real possibility of such a rise, would have a dissuasive effect on market entrants.

852. Finally, it should be underlined that the price of gas is only one of the essential elements in the supply gas. Flexibility in gas contracts is another. As was noted above, a lack of flexibility can have a significant negative effect on the profitability of gas-fired power stations, and an alternative strategy may consist of offering contracts with little or no flexibility. A strategy of that nature is all the more likely given that (i) storage capacity in Belgium is limited; (ii) in Belgium, consumption of gas in gas-fired power stations linked to the transport network does not entail any corresponding right to storage capacity; and (iii) the strategy would be difficult to detect.

853. To prove that such strategies can be used, it should be noted that it has emerged that Suez (Distrigaz) only offered Essent a zero-flexibility gas supply contract for the gas-fired power station it was building (which was limited to 50% of its requirements)[543].

854. The Commission therefore maintains that the impact of the proposed merger on the market for the supply of gas to electricity producers would affect the conditions of electricity generation, since it would bring together the only two suppliers with access to gas with the flexibility needed to optimise gas-fired power stations. This is all the more serious because the new power stations to be built will be gas-fired (see below), and the merger would therefore be a major deterrent to new entrants.

B.5.2 ACCESS TO SENSITIVE INFORMATION ON COMPETITORS

855. The parties would be able to find out the gas costs of their main (potential) competitors on the wholesale electricity market. GDF is the firm best placed to penetrate the market for supplying electricity producers (see above). Thus, SPE, without the proposed merger, would have a real opportunity to obtain its gas supplies from GDF and avoid this competitive disadvantage. The same goes for other current and future electricity producers using gas in Belgium.

856. Gas is the biggest cost factor in the total cost of generating electricity. More importantly, gas accounts for at least 90% of marginal costs when generating electricity from natural gas[544]. The optimal dispatching of power plants is determined by the marginal costs of producing electricity compared with the price applying on the electricity trading market.

857. It follows that knowing the cost of the gas they supply to competitors would enable the parties to estimate the marginal costs of competitors on the wholesale electricity market and so determine the ranking of competitors' generating units in the merit order at any given moment, the minimum price at which competitors are ready to sell the electricity generated, the periods in which competitors are most likely to generate or buy in electricity and the price they are prepared to pay.

---

543 See the letter from Essent dated 23 September 2006 (No 18586).

544 See the [consulting company]* report supplied by parties in Annex 13 to their reply to the statement of objections, p. 5.

858. Hourly gas withdrawals from the network have to be announced in advance (usually a day beforehand). As a result, the parties, as operator of the gas network and gas supplier, would be able to obtain advance knowledge of the generating pattern planned by their competitors for their gas-fired plants the following day.

859. This means that the parties would have a detailed inside view of competitors' generation plans, their decisions to produce or purchase and the prices at which competitors are prepared to buy and sell electricity on the market. The anticompetitive effects of this information would increase as the merger leads to greater transparency about competitors' behaviour when bidding on the future Belpex exchange.

860. Access to inside information by the parties to the merger would:

a) further deter new entrants considering the construction of gas-fired power plants;

b) further undermine (already very low) confidence in price formation on the Belgian electricity trading market in general and the future Belpex in particular;

c) and thereby increase the risks and costs for competitors depending on imported electricity.

B.5.3 DUAL OFFERS

861. Dual offers bring substantial economies of scope in IT, invoicing and other operations[545], which can be reckoned at a 50% saving on single product offers[546]. Furthermore, the cost of acquiring an electricity customer to whom a supplier is already selling gas (and vice versa) is lower than the costs associated with acquiring a new customer and enables a supplier to exploit its portfolio of inert customers to whom it is already selling one of the two products. Dual offers give the final customer the advantage of receiving bills from a single supplier or more advantageous prices[547].

862. In Belgium, there is considerable scope for dual offers: 55% of electricity customers have gas contracts, and in some regions the proportion of dual-offer customers is substantially higher. In parts of Flanders where ECS is the default supplier, 80% of customers are dual-offer customers[548]. This is borne out by investigations by the VREG, the Flemish regulator. The possibility of buying both electricity and gas is the main reason for choosing an electricity supplier for 82% of people taking part in a VREG

[545] SPE's reply (No 13977) to questions 30 and 82 of the Phase I questionnaire.

[546] Reply (No 14958) to question 81 of the Phase I questionnaire.

[547] Extracts from the Data Monitor report enclosed in Nuon's mail of 12.28 on 20 July 2006 (No 13697). See also, for instance, reply (No 14958) and Total's reply (No 14549) to questions 30 and 82 of the Phase I questionnaire and the replies of Nuon (No 13797) and Essent (No 13297) to question 23(n) of the questionnaire on (potential) competitors.

[548] SPE's reply (No 13977) to questions 30 and 82 of the Phase I questionnaire.

survey. When choosing a gas supplier, as many as 89% of those taking part in the survey cited the dual offer as the main reason for their choice of supplier[549].

863. Given their current importance on markets for the supply of household customers, dual offers will become even more important after 1 January 2007, when household customers in the Brussels Region and Wallonia become eligible for them[550].

864. The capacity to provide dual offers is a prerequisite for competing on, and entering, the market for the supply of small industrial and commercial customers and the markets for the supply of residential customers[551]. Big industrial and commercial customers, however, select their suppliers mainly on the basis of gas and electricity prices, attaching little importance to combined offers[552].

865. Given the advantages to suppliers of making dual offers and consumers' preference for such offers, it is important that suppliers be able to make dual offers if they are to compete on an equal footing, attract new customers and keep them.

866. By removing GDF as a credible alternative source of L and H gas, the notified merger would strengthen the position of Suez (Electrabel) on the markets for the supply of electricity to small industrial and commercial customers and to residential customers, because the merged entity would be the only operator capable of making combined offers of L gas and/or H gas and electricity at attractive prices.

B.5.4 Increase in competitors' costs through ancillary services and balancing power

867. It has already been established above that the proposed merger would increase the opportunities for raising prices for the supply of ancillary services and balancing power to Elia. It will now be shown that the parties would also have an incentive to raise prices since doing so would increase the costs of competitors on markets downstream of the Elia network. And the balancing system's prices do indeed seem to be higher than in neighbouring countries[553].

868. It is true that the impact of any price increase for ancillary services and balancing power would first be felt directly by the sole purchaser of these services, Elia. However, Elia passes on the costs in its tariffs for users of the transmission and balancing systems.

869. In particular, the tariffs cited in indents (a), (b), (c) and (d) of the section defining the market for ancillary services and balancing power are charged to network users taking off energy. The tariff cited in (e), for settling imbalances on a quarter-hourly basis, is charged to access managers[554]. It covers the costs of activating (but not of reserving)

---

549 VREG, 'Gedrag en ervaringen van huishoudelijke energie afnemers op de geliberaliseerde Vlaamse energiemarkt', 13 January 2006.

550 Centrica's reply (No 13872) to question 23(n) of the '(Potential) Competitors Electricity' questionnaire.

551 EDF's reply (No 13426) to question 23(n) on the '(Potential) Competitors Electricity' questionnaire.

552 See replies of major customers to question 82 of the Phase I questionnaire.

553 EDF's reply (No 13426) to question 3 on the '(Potential) Competitors Electricity' questionnaire.

554 CREG's reply (No 13256) to question 3(h).

secondary and tertiary reserves. The CREG reckons the socialised costs of ancillary services via network tariffs for 2006 at EUR 132.64 million, whereas access managers will be billed EUR 16 million[555].

870. In their reply to the statement of objections, the parties contest the existence of an incentive for them to increase the prices at which they supply ancillary services and balancing power, because they would, as major users of the Elia network, be penalising themselves[556].

871. It is true that a tariff increase would also affect the charges paid by the parties themselves for using the transmission network and the balancing system. However, for the parties, the increase in tariffs would be more than offset by the increase in their margins on the supply of ancillary services and balancing power. Almost all gains from increases in the price of ancillary services and balancing power would accrue to Suez (Electrabel). In contrast, the tariffs for primary frequency regulation, for regulating secondary balancing in the Belgian control area and for black start services would be charged to all network users, including the parties' competitors on markets for supply to final customers. The share of costs imposed on the parties' competitors on markets for the supply of final customers would constitute net income for the parties.

872. The incentives for the parties to increase their competitors' costs would become even greater if their share of the various markets for supply to final customers declined, since that would further increase the gap between the gains derived from the increase in prices for ancillary services and balancing power, on the one hand, and the tariffs payable by the parties to Elia, on the other. According to the data provided by the parties they do expect to lose market share on the supply markets (see above tables).

873. The tariff for settling imbalances on a quarter-hourly basis is, moreover, charged to access managers[557]. Note that the risks of imbalances are not symmetrical but most affect market players depending on imports, namely the parties' competitors on the wholesale electricity market. This factor would therefore further increase the parties' incentive to increase prices, especially for the supply of secondary and tertiary reserves, since they have been directly passed through to access managers since the start of 2006[558].

874. It should be borne in mind that the barriers to the parties' competitors in the supply of ancillary services and balancing power are still considerably greater than in the supply of eligible customers for the following reasons: (i) there is almost no way of providing these services using imports; (ii) diversified generating capacity with specific technical features is called for; and (iii) it is impossible to procure ancillary services and balancing power on the electricity trading market. This limits the danger to the parties of engaging in a strategy of increasing competitors' costs and thereby makes such a strategy all the more likely.

---

555 CREG's reply (No 13256) to question 3(j).

556 Reply to the statement of objections paragraph 716.

557 CREG's reply (No 13256) to question 3(h).

558 CREG's reply (No 13256) to question 3(g).

875. Since gas-fired peak capacity is relatively well suited to providing ancillary and balancing reserves, and especially secondary and tertiary reserves, the above arguments concerning the proposed merger's impact on competitors' costs, the deterrent effect on new entrants and access to sensitive information on competitors apply mutatis mutandis to the supply of ancillary services and balancing power. In short, the parties would have even greater opportunities and incentives to increase their competitors' costs for ancillary services and balancing power.

B.6 Barriers to entry

876. Supplying electricity calls for:

a. generating capacity;

b. a liquid trading market;

c. green and CHP certificates;

d. infrastructure such as power transmission and distribution systems.

The difficulties of gaining access to these factors are major entry barriers for competitors wishing to penetrate the electricity market. They therefore exacerbate the horizontal effects of the notified operation examined above.

B.6.1 ACCESS TO GENERATING CAPACITY

877. As emphasised above, access to generating capacity located in Belgium confers a major competitive advantage. This competitive advantage is all the greater in Belgium for two reasons:

a. The Belgian electricity trading market is lacking in liquidity (see below). This increases dependency on imports as a sources of supply, and the associated risks (see above).

b. The capacity available through the VPP auctions[559] will be phased out by the end of 2008 (see above).

878. The competitive advantage conferred by access to generating capacity is, however, hard to reproduce. The barriers to building new generating plants are considerable. The main reasons for this are the following:

a. The procedures for obtaining construction permits are highly complex because they involve both the federal and regional authorities[560].

b. There is a lack of futures products on the electricity trading market[561].

---

[559] Replies by EDF (No 13426), BP (No 13842) and Iberdrola (No 14002) to question 3 of the '(Potential) Electricity Competitors' questionnaire.

[560] Replies by EDF (No 13426) and Nuon (No 13797) to question 3 of the '(Potential) Electricity Competitors' questionnaire. See also Nuon's reply to question 14.

c. The costs of the balancing system are higher for isolated plants (since the risks of imbalance cannot be spread across a number of generating plants), which adversely affects the profitability of projects by new entrants with no pre-existing generating capacity in Belgium[562].

d. No new nuclear power plants can be built because Belgian law provides for the phasing-out of nuclear power.

e. There is little scope for building hydropower plants[563].

f. It is more difficult to construct coal-fired power stations than gas-fired plants. Coal-fired plants are not economic compared with the base-load generating capacity already in place (Suez's nuclear power stations[564]), inter alia owing to the costs of emission rights[565]. Furthermore, sites suitable for constructing coal-fired power stations are few and far between[566]. The only potential locations for new coal-fired plants are in Antwerp (owing to the costs of transporting coal). However, the CO2 plan makes it uneconomic to construct coal-fired power stations[567]. It is, moreover, very difficult to obtain environmental permits for such power stations[568].

g. It follows from the previous three points that any new generating plants constructed in Belgium, especially those of any significant size[569], will have to be gas-fired. Combined cycle gas turbine (CCGT) plants have the advantage of limiting the initial investment required[570]. There are, however, disadvantages:

    i. The rising price of gas has adversely affected the profitability of projects.

---

561 Replies by EDF (No 13426) and Centrica (No 13872) to question 3 of the '(Potential) Competitors Electricity' questionnaire.

562 EDF's reply (No 13426) to questions 3 and 12 of the '(Potential) Competitors Electricity' questionnaire.

563 Nuon's reply (No 13797) to question 3 of the '(Potential) Competitors Electricity' questionnaire.

564 SPE's reply (No 13997) to question 23(a) of the '(Potential) Competitors Electricity' questionnaire.

565 EDF's reply (No 13426) to question 23(a) on the '(Potential) Competitors Electricity' questionnaire.

566 SPE's reply (No 13997) to question 23(a) of the '(Potential) Competitors Electricity' questionnaire.

567 Nuon's reply (No 13797) to question 3 of the '(Potential) Competitors Electricity' questionnaire. See also Nuon's letter of 17 July 2006 (No 13394).

568 EDF's reply (No 13426) to question 23(a) on the '(Potential) Competitors Electricity' questionnaire. Nuon's letter of 17 July 2006 (No 13394).

569 Several replies referred to projects to generate renewable energy. These, however, involved limited generating capacity.

570 Iberdrola's reply (No 14002) to question 23(a) of the '(Potential) Competitors Electricity' questionnaire.

ii. Sites for developing gas-fired plants are hard to find[571].

iii. Access to gas (transit capacity, access to flexibility and gas quality) is identified as a major barrier by many respondents[572], and it would, moreover, be adversely affected by the proposed merger.

iv. Belgium's lack of a liquid electricity trading market makes it difficult to optimise gas-fired mid-merit and peak plants, which adversely affects the profitability of projects.

h. Decentralised generating plants (CHP, biomass, etc.) have limited capacity and are not suited to capturing substantial market share.

i. The lack of a liquid trading market deprives new power stations of a sales tool, meaning that a customer base has to be acquired while the plant is being built.

879. Data provided by the parties suggests that it takes, on average, at least 4.7 years to build a new power station[573]. Indeed, the considerable time taken for any power station built to come on stream is proof in itself of the major barriers to access to generating capacity.

880. It is true, as the parties observe in their reply to the 6(1)(c) decision[574], that the 'Pax Electrica' concluded with the Belgian government in 2005 provides that competing operators are to take over Electrabel sites capable, in Suez's view, of housing plants with an aggregate capacity of up to 1500 MW. Suez has launched a procedure to auction off three sites.

881. This auction's impact on entry barriers would, however, be limited. It has emerged that the sites on offer have a number of features likely to burden purchasers with considerable costs and risks, which make the sites economically unattractive. By way of example, connecting sites to the electricity transmission system would (depending on the site) require the construction of 10 to 17 km of underground line. This would cause delays of seven to ten years and, depending on the method chosen, cost EUR 1 to EUR 2 million a kilometre. The three sites can only house gas-fired power stations[575]. However, the sites have to be connected to the gas transmission system, which, depending on the site, is 10 to 17 kilometres away. There are, moreover, in some cases, doubts concerning stability, soil pollution[576] and whether the requisite building permits can be obtained.

---

571 Nuon's reply (No 13797) to questions 3 and 4 of the '(Potential) Competitors Electricity' questionnaire.

572 EDF's reply (No 13426) to question 3 on the '(Potential) Competitors Electricity' questionnaire.

573 Parties' reply of 15 September (No 17359) to question 2. And this is a conservative estimate since (i) it includes the construction of wind turbines (which takes less time but cannot provide large volumes of capacity) and (ii) where the date of purchase of the site is unknown, the year is taken to be 2006. The design phase of projects, however, starts much earlier.

574 Reply of the parties to paragraph 248 of the 6(1)(c) decision.

575 Nuon's reply (No 13797) to question 29 of the '(Potential) Competitors Electricity' questionnaire.

576 Annexes to Nuon's letter (No 13394), EDF's reply (No 13426) to question 29 of the '(Potential) Electricity Competitors' questionnaire.

882. Accordingly, the sites do not seem suitable for constructing economically viable power stations with an aggregate generating capacity of 1500 MW[577].

883. The lack of connections to the gas and electricity transmission systems results in lead times of seven to ten years. Even setting aside the lead times specific to the sites put up for auction, it takes an average of four years and three months from the purchase of a greenfield site to the commissioning of a generating plant of any significant size[578]. It takes so long for any generating capacity built to come on stream (owing to the lack of connection to the electricity transmission system) that the Commission is unable to take account of the sale of these sites by Suez in its assessment of this merger project.

884. The Commission therefore maintains that there are major barriers to access to generating capacity.

B.6.2 ELECTRICITY TRADING MARKET

885. The existence of a liquid market for physical electricity is important, especially for new entrants. The reasons are as follows:

a. It enables electricity producers to sell surplus electricity and optimise their generating plant.

b. It enables downstream suppliers to obtain electricity supplies for resale to end consumers.

c. It enables electricity producers and suppliers to obtain and sell actual electricity to manage their risks and balance and adapt the volume and profile of their supply to their portfolio of customers.

d. A liquid market provides a reliable electricity price signal for optimising portfolios and investments.

886. According to all the indicators commonly used to assess the liquidity and maturity of electricity trading markets, the Belgian trading market lags far behind the trading markets of neighbouring countries.

887. The assessments are based on the tables in Annex 1 'Electricity trading market'. The above analysis is based on a comparison of the Belgian market with the other markets considered separately for each enterprise that provided information for this analysis.

a) 'Bid offer spread' for spot (EUR/MWh)

---

[577] Nuon has bid for just one of the three sites, and then only with considerable incentives. It initially considered the three sites unsuitable (Nuon (No 13394)). See also the replies of Nuon (No 13797) and Centrica (No 13872) to question 29 of the '(Potential) Electricity Competitors' questionnaire.

[578] Parties' reply of 15 September 2006 to question 2 of the request of 14 September for information on the Belgian electricity markets. This calculation excludes sites for wind turbines and brownfield sites (with existing power stations) to permit more reliable comparison with the sites put up for auction by Suez (Electrabel).

The 'bid/offer spread' on the spot market is the difference between the asking price and the bid price for spot electricity (day-ahead). A small difference indicates a competitive, liquid market.

The value of the indicator shows that the bid/offer spread on the Belgian spot market is significantly larger than on the markets assessed in other countries.

b) 'Bid/offer spread' for futures (EUR/MWh)

The 'bid/offer spread' on the futures market is the difference between the asking price and the bid price for electricity futures (contracts for delivery beyond the next day). A small difference indicates a competitive, liquid market.

The value of the indicator shows that the bid/offer spread on the Belgian spot market is significantly larger than on the markets assessed in other countries.

In their reply to the statement of objections[579], the parties express the view that the 'bid/offer spread' is primarily an indicator of the volatility of market prices and that this price volatility is attributable to a lack of generating capacity in Belgium, which means, as is the case in the Netherlands, that electricity prices are influenced by the steepness of the extremity of the supply curve of national generating capacity.

The Commission would begin by pointing out that price volatility is perfectly consistent with illiquid markets because the lack of supply and demand for electricity contracts causes prices to fluctuate.

Furthermore, even if the formation of electricity prices in the Netherlands and Belgium is held to be similar in so far as prices are influenced by the steepness of the supply curve, the figures provided by the Commission in the annex to the statement of objections concerning the bid/offer spreads for spot and futures contracts (which the parties do not contest) show that bid/offer spreads are better on the Netherlands' trading market than on Belgium's.

Moreover, the parties' confirmation that price formation in France and Germany, unlike Belgium, is influenced by the flat section of supply curves shows that the Belgian trading market is not part of the same trading market[580].

c) Availability and prices of base-load and peak products

The indicator shows that the Belgian trading market is characterised by an almost total lack of peak products.

Peak products are important in that they enable suppliers to adapt their profiles. A lack of peak output makes recourse to the balancing system very likely. It also makes supplying customers with a varying consumption profile more difficult.

---

[579] Paragraph 590 of the reply to the statement of objections.

[580] Were there any question of an integrated market, there would be a single curve for the countries concerned and the prices on that single market would be determined centrally for the countries concerned (at any time). The parties' reasoning implies separate supply curves.

In their reply to the statement of objections, the parties state that peak products, by their very nature, involve smaller volumes than base-load products[581]. While true, this line of argument overlooks the fact that the replies received by the Commission show a lack of peak products, not just a smaller volume of peak products than base-load products.

d) Availability of contracts covering different durations and delivery periods

The indicator shows that the Belgian trading market is characterised by a lack of longer-term products. These products are important in that they enable suppliers to supply and manage risks when making longer-term commitments to supply customers.

e) Number of bids and offers at a given moment

The indicator shows that the number of buyers and sellers on the Belgian trading market at a given moment is considered lower than on the markets assessed in other countries.

f) Number of players on the supply side

The indicator shows that the number of players on the supply side of the trading market is smaller than on the markets assessed in other countries. The merger would, moreover, eliminate one of the few players.

g) Number of players on the demand side

The indicator shows that the number of players on the demand side of the trading market is smaller than on the markets assessed in other countries. The merger would, moreover, eliminate one of the few players.

In their reply to the statement of objections, the parties observed that the players operating on the Belgian trading market are very much the same as on other national markets. This assertion is not, however, borne out by the facts and is contradicted by the information available to the Commission.

h) Type of players (physical (P)/financial (F))

The indicator shows that the Belgian trading market is considered to have very few financial players. Financial players bring liquidity to a market, but they do not generally enter that market until it has achieved a degree of liquidity. This therefore indicates an illiquid market.

i) Number of bids and offers at a given moment (in MW)

The indicator shows that the Belgian trading market is considered to have much smaller volumes of supply and demand than the markets assessed in other countries.

[581] Paragraph 591 of the reply to the statement of objections.

888. It can therefore be concluded that the Belgian electricity trading market is illiquid and underdeveloped in comparison with the markets of the neighbouring countries examined.

889. It should be added that liquidity on the Belgian trading market will diminish further as a result of the ending of the VPP auctions. In 2003 Suez (Electrabel) had to give the Belgian Competition Council[582] a commitment to arrange the auction of 1 200 MW by VPP. But it has invoked clauses permitting it to reduce the 1 200 MW volume, and there have been no auctions since 12 May 2005[583]. The capacity sold included some futures products conferring the right to electricity supplies until the third quarter of 2008. However, with the growing number of products maturing and the lack of auctions since 2005, the volume of electricity actually to be supplied by Suez has already fallen considerably, and will continue falling until the end of 2008[584]. The current liquidity is therefore partly attributable to the VPP auctions[585] and is set to decline as VPP products mature.

890. It is true that under the 'Pax Electrica' Suez (Electrabel) has given the Belgian government a commitment to sell 500 MW on the Belpex exchange once it is launched. However, this 500 MW can only partly replace the 1 200 MW sold under the VPP system. Furthermore, Belpex trading would be confined to products for physical delivery the next day, whereas VPP products have a duration of up to three years. Given that the lack of trading products is felt especially acutely in the case of longer-term products, the so-called 'replacement' of VPP products by sales on Belpex means not only a fall in the volumes put on sale by Suez but, in the long term, a decline in the quality of the trading products available.

891. It must not be overlooked that the introduction of Belpex may generate additional liquidity, because the markets with which it is to be coupled are more liquid than Belgium's present trading market. Belpex's impact should, however, be qualified:

    a) Its introduction is seen as a necessary condition but not a sufficient condition for the development of a mature, liquid market. It is felt that the lack of liquidity in the Belgian trading market is in part due to the fact that the volume of the Belgian electricity market remains limited[586].

---

582 Decision No 2003-C/C-56 of 4 July 2003 *ECS/INTEREST*; Decision No 2003-C/C-57 of 4 July 2003 *ECS/IEH*; Decision No 2003-C/C-58 of 4 July 2003 *ECS/IVEKA*; Decision No 2003-C/C-59 of 4 July 2003 ECS/IMEWO; Decision No 2003-C/C-60 of 4 July 2003 *ECS/INTERGEM*; Decision No 2003-C/C-61 of 4 July 2003 *ECS/IVERLEK*; Decision No 2003-C/C-62 of 4 July 2003 *ECS/IGAO*; Decision No 2003-C/C-63 of 4 July 2003 *ECS/GASELWEST*.

583 CREG's reply No 13256 to question 4.

584 See figure one in the CREG's reply (No 13256) to question 4.

585 Inevitably, since a large proportion of VPP products are sold to traders, who have no option but to sell them on to clear their positions.

586 Replies of RWE (No 14744) and Iberdrola (No 14002) to question 26 of the '(Potential) Competitors Electricity' questionnaire. Essent's reply (No 13297) to question 4 of the '(Potential) Competitors Electricity' questionnaire.

b) The introduction of Belpex will change the way trading is organised, but it will not directly affect the conditions of the market itself as expressed by the above indicators[587].

c) Belpex would be confined to the spot (day-ahead) market. The futures market is not affected[588].

The parties claim that they are unable to estimate the volumes traded on the Belgian trading market[589]. Using data provided by trading platforms and by the parties, and applying the scenario most favourable to the parties, the Commission estimates the volume of contracts for the supply of electricity on the Belgian network at 127.3 TWh (purchases and sales).

892. In their reply to the statement of objections, the parties argue that the Belgian electricity trading market is not illiquid. They cite information in their possession which they say shows that the volumes of supply contracts on the Belgian network are comparable to those in neighbouring countries. They also claim that evidence suggests the volumes of supply contracts negotiated on the Belgian network increased by 20% between 2005 and 2006 and are comparable to the volumes traded in neighbouring countries.

893. The parties have not submitted any factual data contradicting the Commission's estimates of the volumes of contracts for delivery on the Belgian network in 2005 or figures for neighbouring countries, though they claim to have such data. It would have been surprising if they had, since in their notification and in reply to the Article 6(1)(c) decision[590] they stressed that they were unable to provide estimates concerning the volumes traded. The Commission's conclusions, however, are based on tangible indicators and figures.

894. Since the parties are unable to provide a figure for the volumes traded in a given year, the claimed 20% increase in the volumes traded is all the more surprising in that it implies the availability of accurately measured and comparable volumes for 2005 and 2006. The claimed increase in the volumes traded, which is not supported by the facts, is contradicted by the effects of the end of VPP auctions on the trading market, which the parties do not contest.

895. In their reply to the statement of objections[591], the parties state that Suez (Electrabel) has an interest in a liquid electricity trading market and is ready to act as a market maker on a number of trading platforms. Leaving aside the fact that market-making activities on trading platforms that do not concern electricity for delivery on the Belgian network (e.g. Endex NL and Powernext) are irrelevant to the market under discussion, this

---

[587] Iberdrola's reply (No 14002) to question 26 of the '(Potential) Competitors Electricity' questionnaire. Essent's reply (No 13297) to question 4 of the '(Potential) Competitors Electricity' questionnaire.

[588] Replies of EDF (No 14002), Centrica (No 13872), SPE (No 13797) and Iberdrola (No 14002) to question 26(b) of the '(Potential) Competitors Electricity' questionnaire.

[589] Form CO, p. 552.

[590] Form CO, p. 550, the parties' reply to decision 6(1)(c) paragraph 261

[591] Paragraph 592 of the reply to the statement of objections.

activity, according to the parties, involves no more than guaranteeing a minimum of liquidity[592].

896. Furthermore, though Suez (Electrabel) may have an interest in developing electricity trading markets on markets where its presence is limited, there is reason to doubt that it has a similar interest in the case of Belgium, where a liquid market would create more favourable conditions for entrants, which could only be detrimental to the dominant position of Suez (Electrabel).

897. The parties' position is even less tenable now that the [consulting company]* report submitted with their reply to the statement of objections has pointed out that 'Belgium does not currently have a published electricity price which is formed by the result of liquid trading and supply-demand fundamentals'[593].

898. The Commission therefore stands by its view that the Belgian electricity trading market is illiquid. Given the importance of a liquid trading market stressed above, the lack of liquidity on the electricity trading market constitutes a very considerable barrier to entering the generating and wholesale market and downstream markets for the supply of final customers.

B.6.3 Green and CHP certificates

899. Directive 2001/77/EC of the European Parliament and of the Council of 27 September 2001 on the promotion of electricity produced from renewable energy sources in the internal electricity market[594]and Directive 2004/8/EC of the European Parliament and of the Council of 11 February 2004 on the promotion of cogeneration based on a useful heat demand in the internal energy market and amending Directive 92/42/EEC[595] oblige the Member States to establish support mechanisms for these sources of electricity in order to reduce the adverse environmental impact of generating electricity. The Member States enjoy considerable discretion in the choice of support mechanisms.

900. The two Directives contain provisions to ensure that the promotion of renewable energies does not adversely affect the completion of the internal market for electricity or create distortions of competition. In particular, they stipulate that support mechanisms must be approved by the Commission if they involve state aid within the meaning of Article 87(1) of the EC Treaty. The Commission has also adopted Community guidelines on state aid for environmental protection, which govern in detail the amount of aid that Member States may grant producers of renewable electricity. The rules stipulate that aid may not exceed the difference between production costs and the market price for electricity.

---

592 Paragraph 592 of the reply to the statement of objections.

593 Reply to the statement of objections, Annex 13, p. 7.

594 OJ L 283, 27.10.2001, p. 33.

595 OJ L 52, 21.2.2004, p. 50.

901. Belgium has implemented these two Directives by the systems of green and/or CHP certificates[596] applicable in the country's regions[597]. All those supplying final customers must submit a number of green and/or CHP certificates to the relevant regulatory authority at the end of a specified period. The number of certificates to be submitted is calculated on the basis of the volumes supplied to final customers and, to a lesser extent, customers' consumption. Only certificates issued for generation inside Belgium are recognised[598].

902. There are two ways to obtain certificates: (i) by using technologies or methods[599] meeting the criteria of the system of green and CHP certificates to generate electricity and (ii) by purchasing certificates from producers meeting these criteria.

903. Belgium has notified the Commission of these systems of green certificates under Article 88(3) of the EC Treaty. The Commission's analysis showed that Belgium's systems of green certificates do not constitute state aid within the meaning of Article 87(1) because they satisfy the tests of the *PreussenElektra* judgment. Accordingly, the Commission has been unable to verify whether support for producers of green electricity and CHP in Belgium is confined to the difference between production costs and the price at which electricity is sold. It cannot therefore exclude the possibility that support mechanisms for green electricity in Belgium might constitute barriers to entry.

904. During the market investigation, a number of third parties argued that compensation for producers of green electricity exceeds the difference between production costs and selling prices.

905. Since the sellers of green and CHP certificates are those with generating capacity in Belgium and the buyers those who import electricity, the net impact of the system of green and CHP certificates is a transfer of value from electricity importers to producers with generating capacity in Belgium, which have overcome the barriers to constructing

---

596 Green certificates are issued to promote electricity from renewable sources. CHP certificates are issued to promote the generation of electricity by combined heat and power facilities, which are considered particularly efficient.

597 The Flemish Region has separate systems of green and CHP certificates. The Walloon Region and the Brussels Region operate a combined system. Detailed descriptions can be found in the replies by the VREG (No 13108), the IBGE/BIM (No 13537) and the CWaPE (No 13121) to question 1.

598 More specifically, the Brussels and Walloon Regions have a system of mutual recognition of green and CHP certificates. The Flemish Region recognises only certificates issued for green and CHP electricity generated in Flanders. The denominations of green certificates for supplies to major commercial and industrial customers are lower than for supplies to other categories of customer. Detailed descriptions can be found in the replies by the VREG (No 13108), the IBGE/BIM (No 13537) and the CWaPE (No 13121) to question 1.

599 It seems that green certificates can also be obtained by using specific materials to fire existing thermal power stations. Nuon's reply (No 13797) to question 28(c) of the '(Potential) Electricity Competitors' questionnaire.

generating capacity[600]. This substantial disadvantage can, according to the CWaPE, amount to as much as EUR 2/MWh[601].

906. In their reply to the Commission's Article 6(1)(c) decision, the parties argue that the systems of green certificates are not barriers to entry (to the wholesale electricity market) for the following reasons:

    a. They are aimed at stimulating the production of green energy, which actually offers opportunities for new entrants on the generating and trading market.

    b. They fall under the public service obligation laid down in Directive 2003/54/EC.

    c. In Belgium the system of green certificates applies solely to suppliers on the supply market in a 'non-discriminatory manner'.

907. The Commission would point out that these arguments, while correct, do not preclude the fact that the systems of green certificates constitute barriers to entering the markets for the supply of electricity to eligible final customers. Since the systems of green and CHP certificates are incentives to construct green and CHP generating capacity, especially through the high level of compensation, which exceeds the difference between production costs and electricity prices, and, given that entrants to the supply market do not have such certificates, these new entrants can only overcome these obstacles by building their own power stations, which is difficult (see above).

B.6.4 THE ISSUE OF THE INDEPENDENCE OF INFRASTRUCTURE MANAGERS

908. Suez is a vertically integrated group, which *inter alia* supplies electricity and gas and operates electricity infrastructure. In addition to its activities as a supplier (Electrabel), Suez exercises joint control over Elia, the transmission system operator, and is effectively able to control – or at least exercise considerable influence over - the mixed public- and private-sector local authority utilities in the Walloon Region.

909. The very existence of such vertically integrated groups represents a structural conflict of interest when markets for the supply of electricity are liberalised and electricity suppliers other than Suez, the incumbent operator, are obliged to use that operator's electricity infrastructure.

---

600 It is quite possible to identify a separate market for green and CHP certificates. This market would also be affected by the merger since the parties are omnipresent on its supply side. However, given that the allocation of green certificates is closely linked to generating capacity located in Belgium, remedying the horizontal overlaps on the Belgian electricity market would also resolve the problems posed by green and CHP certificates.

601 EDF's reply (No 13426) to question 3 of the '(Potential) Competitors Electricity' questionnaire. The EUR 2/MWh relates to the Walloon Region's system. See also: Opinion-CD-6c07-CwaPE-112 on the possible distortion of competition by the granting of green certificates to power stations built before the entry into force of the system of green certificates, provided by CWaPE in its reply to the Phase II questionnaire. The impact is comparable in the Flemish Region.

910. Directive 2003/54/EC includes a number of provisions aimed at resolving this structural conflict of interest, two of them being Articles 10 and 15. These Articles stipulate that a transmission or distribution system operator that is part of a vertically integrated undertaking must be independent '*at least in terms of its legal form, organisation and decision making from other activities not relating to transmission. These rules shall not create an obligation to separate the ownership of assets of the transmission system from the vertically integrated undertaking*'. These Articles also lay down a number of minimum criteria for ensuring the independence of these infrastructure operators.

911. The Commission would point out that the Suez group's infrastructure managers, to varying degrees, do not yet offer every guarantee of independence.

B.6.4.1 Electricity and gas network operators

912. Access to the transmission system and interconnections is essential if Suez's competitors are to be able to import electricity from abroad and transmit it inside Belgium. But interconnection capacities are limited, and certain lines are often congested at certain periods. Reducing the bottlenecks would require Elia, as an economically rational network operator, to invest in expanding interconnection capacity. But such an increase in interconnection capacity is not necessarily in the interests of Suez, which would thereby be exposed to greater competitive pressure on downstream markets[602]. The same applies to the connection of new generating capacity, which often calls for the extension or reinforcement of the electricity transmission system inside Belgium.

913. In this context, it should be pointed out that Suez's rights as a minority shareholder in Elia include approving and/or rejecting the development plan, investment plans and the adjustment plan. In view of the group's geographic orientation in the wake of a merger, the parties might be more eager to bring Elia's investments in expanding interconnection capacity into line with the interests of the group.

914. The arguments put forward by the parties in their reply to the statement of objections are not convincing. As already explained, Suez is in a position to exercise control over Elia's investment plans; the fact that Elia may have investment projects does not mean that Suez has not exercised any influence over them, or could not have done so.

915. Moreover, on 4 April 2006 the Commission sent the Belgian Government a letter of formal notice stating its view that Belgium was in breach of Directive 2003/54/EC. This formal notice concerns *inter alia*:

a. the existence of grounds for refusing access to the network which are not provided for in the Directive, and the absence of a legal remedy;

b. the abolition of the controls of balancing costs carried out by the CREG.

602 Revenue from auctions of interconnection capacity is, or will at least soon be, neutral for Elia and will not therefore create incentives to avoid investing in increased interconnection capacity. (Draft Commission Decision amending the Annex to Regulation (EC) No 1228/2003 of the European Parliament and of the Council of 26 June 2003 on conditions for access to the network for cross-border exchanges in electricity, and in particular Section 6 thereof). Compliance with these provisions will be supervised by the regulators. The impact described in this text is therefore entirely attributable to Elia's membership of the Suez group.

916. The close ties between the gas and electricity markets, owing to the importance of gas and flexibility for electricity generation and dual offers, should also be borne in mind. Given the Suez group's presence on the electricity markets and the control it exercises over gas infrastructure (including storage facilities), there is a conflict between the Suez group's interests as manager of the gas transit and transport network and its interests as a supplier and producer on the electricity markets.

917. The entry barriers attributable to the Suez group's control of gas infrastructure are described above.

918. Note that the rules on the legal separation of managers of the gas transmission network laid down in Article 7 of Directive 2003/55/EC offer even less protection against conflicts of interest between, on the one hand, the managers of gas transmission networks and, on the other, vertically integrated undertakings on the electricity market. Indeed, there is no guarantee that the managers of the transmission system for gas are not part of the structures of the integrated enterprise directly or indirectly responsible for the day-to-day management of the generation, distribution and supply of electricity.

B.6.4.2 Entry barriers connected with the management of distribution network operators in the Walloon Region

919. It has been established above that Suez (Electrabel) controls or at least exercises significant influence over the electricity and gas distribution systems of mixed private- and public-sector utility companies in Wallonia since the mixed utilities of the Walloon Region have subcontracted the management of transmission system operators to Suez (Réseaux Wallonie).

920. The TSOs manage the distribution networks. Their activity influences the conditions of competition on downstream markets, in particular (1) the market for the supply of small industrial and commercial customers and (2) the markets for the supply of eligible residential customers (in Flanders now and in the Brussels and Walloon regions from 1 January 2007).

921. There is obviously a major conflict between the interests of the running of the networks of mixed local authority utilities in Wallonia and Suez's interests as a supplier. Indeed, the existence of such a conflict of interest is recognised by the Walloon regulator[603]. Effective management of the networks of mixed local authority utilities would directly facilitate competition with the Suez group in markets for the supply of electricity and gas. It is interesting to note here that the delay in the transfer of Réseaux Wallonie to the mixed local authority utilities is apparently attributable to Suez (Electrabel), and not to the municipalities involved in the mixed utilities[604].

922. The TSOs' services affecting players on the supply market are:

    a. the fixing of distribution tariffs;

---

603 CWaPE opinion CD-5e24-CWaPE-096 on the planned creation of an energy consultancy and management company (SEGE). See, for instance, paragraphs 2, 8 and 9.

604 Decision No 2006-C/C-08 of 14 June 2006, *Case CONC-C/C-06/002: SIBELGA SCRL/ELECTRABEL S.A.*

b. the implementation of customers' switches to other suppliers;

c. the communication of consumption measurements;

d. the operational management of the networks and the management of access to networks totally subcontracted to Netmanagement[605]. This includes technical operations and works to extend, renew and reinforce the network.

923. Almost all of the staff and computer systems involved in running the distribution networks of Wallonia's mixed local authority utilities belong to Suez (Electrabel). The computer systems are shared with other departments of Suez, including the Suez (Electrabel) customer service department. Therefore Electrabel, via its Réseaux Wallonie subsidiary, had and continues to have all the data it needs to manage its customers. Its customer management is not dependent on the performance of mixed TSOs[606]. Furthermore, Suez manages the data of customers who have already switched suppliers and are now supplied by its direct competitors[607]. According to the CWaPE, the shared use of computer systems means that transfers of information are not necessarily watertight[608].

924. Suez therefore has preferential access to key information for prospecting and billing customers, including those of its competitors. Competitors, however, depend on services provided by Suez subsidiaries to be able to offer services.

925. The parties[609] refer to Walloon rules imposing strict confidentiality on all commercially sensitive information to which TSOs' personnel have access in the course of their duties, breaches of which are subject to criminal prosecution. This obligation has been extended to the staff of Suez (Réseaux Wallonie) through the undertaking given by Suez (Electrabel) at the time of the *ECS/Intercommunales* cases[610].

926. It is true that Suez (Electrabel) has undertaken to have all staff responsible for the technical management of one or more TSOs sign a pledge of confidentiality. It should, however, be stressed that breaches of this pledge by employees of Réseaux Wallonie have no consequences; nor indeed have the criminal penalties provided for in the Walloon rules[611]. Since the mixed utilities employ few staff and the criminal penalties

---

605 CWaPE opinion CD-5e24-CWaPE-096 on the planned creation of an energy consultancy and management company (SEGE), p. 8.

606 Nuon reply (No 13797) to question 3 of the '(Potential) Competitors Electricity' questionnaire.

607 Reply (No 13797) to question 3 of the '(Potential) Competitors Electricity' questionnaire.

608 CWaPE opinion CD-5e24-CWaPE-096 on the planned creation of an energy consultancy and management company (SEGE), p. 8.

609 Paragraph 686 of the parties' reply to the statement of objections.

610 See, for instance, decision No 2003-C/C-56 of 4 July 2003 in CONC-C/C-02/65: *Electrabel Customer Solution S.A/Interet SCRL*.

611 The Walloon rules apply to the staff of TSOs. The staff of Réseaux Wallonie belong to Suez (Electrabel). Indeed, there would be no reason to extend the obligation to Suez's staff if the Walloon rules already applied.

do not apply to the staff of Réseaux Wallonie, it is hardly surprising that the parties do not know of any case in which the penalties were applied.

927. It is therefore hardly surprising that all competitors of the parties that have recently entered the markets for the supply of final customers emphasised in the survey that mixed TSOs are not functioning as well as they might. They make a number of points:

a. Distribution tariffs are fixed late and for short periods (in December of year N -1 for year N, for three months), which makes budget forecasting and the billing of final customers difficult. These tariffs differ considerably from TSO to TSO: the fact that tariff structures are disparate, progressive and applied in different ways by different TSOs entails major computer investment for the new entrants[612].

The parties cite the CREG's responsibility or at least its powers to remedy this situation.

b. Switches of supplier are often carried out late or ineptly. Reasons for this include failure to follow the procedures laid down, failure to transmit 'master data' or the inaccurate transmission of such data.

The parties cited the fact that working parties have been set up to develop the switching procedure and that Wallonia should therefore be spared the problems besetting switches of supplier in Flanders.

The Commission would begin by noting the parties' acknowledgment that such problems do indeed exist. It would also point out that the measures considered necessary to resolve the problems in Flanders involved not only developing switching procedures but the foundation of Eandis, namely the conversion of Netten Vlaanderen (the Flemish equivalent of Réseaux Wallonie) into a wholly owned subsidiary of Flanders's mixed TSOs.

c. TSOs communicate consumption histories late (often after negotiations with customers have ended) or inaccurately, and do not communicate quarter-hourly profiles[613].

The parties point out, rightly, that this task is handled not by Réseaux Wallonie but by a subsidiary of the utilities, Indexis.

d. The installation of metering equipment takes a long time[614].

e. There is a danger that the connection of decentralised generating capacity will be delayed or refused.

928. There are a number of consequences[615]:

---

612 EDF's reply (No 13425) to question 3 of the '(Potential) Competitors Electricity' questionnaire.

613 Replies by EDF (No 13425), Centrica (No 13872) and Nuon (No 13797) to question 3 of the '(Potential) Competitors Electricity' questionnaire.

614 SourcePower's observations on the statement of objections, 18 September 2006, p. 10 (No 17566).

a. The lack of consumption data means that new entrants run a much greater risk of imbalance and are unable to offer customers better services[616].

b. The lack of consumption histories makes it difficult to estimate properly the advances to be invoiced to customers, which increases the risk that invoices will be contested.

c. The delay in transmitting information (on consumption and distribution tariffs) results in adjusting bills, which represent a considerable added cost. New entrants have found themselves having to take on many extra staff to overcome these problems.

d. All this makes a bad impression on new entrants' customers.

e. There are increased risks in relation to the connection of decentralised generating capacity to the system. Several entrants are planning to build such units (biomass, wind turbines, etc.).

929. The impending liberalisation of the Walloon Region's electricity and gas markets on 1 January 2007 will greatly increase the number of eligible customers. It is therefore to be feared that the shortcomings of TSOs belonging to mixed public- and private-sector local authority utilities will have even greater repercussions in the near future. This is all the more serious because switching supplier in the Walloon Region requires customers to complete a number of formalities, which makes customers less ready to switch supplier[617].

B.6.5 CONCLUSIONS CONCERNING BARRIERS TO ENTRY

930. The Commission finds that very high barriers to entry make entering the Belgian electricity markets very difficult. Moreover, the barriers to entering the electricity markets would be compounded by the merger's impact on the market for the supply of gas to electricity producers, since it would reduce the incentive for new entrants to build gas-fired power stations.

931. It is therefore unlikely that other present or future competitors would be able to take over the role of GDF (SPE) and restore the competitive pressure that would be lost through the proposed merger. In this context, the elimination of GDF (SPE) as the alternative supplier best placed to stimulate competition in Belgium would have a strategic impact on effective competition far exceeding the horizontal impact of the transaction notified.

---

615 Replies by EDF (No 13425), Centrica (No 13872) and Nuon (No 13797) to question 3 of the '(Potential) Electricity Competitors' questionnaire.

616 SourcePower's observations on the statement of objections, 18 September 2006, p. 10 (No 17566).

617 EDF reply (No 13426) to question 3 on the '(Potential) Competitors Electricity' questionnaire.

B.7 Conclusion

932. The Commission has reached the conclusion that the notified merger would significantly impede effective competition within the meaning of Article 2(3) of the Merger Regulation on the following Belgian electricity markets:

- the national electricity generating and wholesale market
- the national market for ancillary services and balancing power
- the national market for the supply of electricity to large commercial and industrial customers (>70kV)
- the national market for the supply of electricity to small commercial and industrial customers (<70kV)
- the markets for the supply of electricity to eligible residential customers, whether the relevant geographic market is regional or national.

C. District heating networks in France

C.1 Relevant markets

C.1.1 Product market

933. District heating networks are collective systems for the distribution of heat generated in the form of steam or hot water by centralised generating units[618].

934. Since the 1930s, numerous municipalities in France have equipped themselves with a single boiler room and an urban heating network serving dwellings, public facilities and municipal buildings. In 1995, upwards of 250 municipalities had a total of 379 urban heating networks, situated mainly in northern France and the Rhône-Alpes region. The number of networks is increasing at a rate of 1% a year[619].

935. The main sources of primary energy used to generate heat in such networks are, at the national level and on the basis of the primary energy entering into the district heating networks (including the gas used to generate electricity by co-generation): gas (52%), heat from household refuse incineration plants (22%), coal (15%), heavy fuel oil (9%) and others (2%)[620].

936. The market survey showed that the choice of possible sources of primary energy is made by the municipality which delegates the management of its public service[621]. This choice often depends on geographic constraints (built-up area – countryside) and determines the type of plant needed. The choice of supplier of the primary energy source involves a long-term relationship in the case of sources such as geothermal energy, household refuse incineration and co-generation[622].[623] In the case of fossil fuels – gas, coal and fuel oil – on the other hand, networks can be fairly flexible and hence a degree of substitution is possible between different primary energy sources. The supplier of a primary fossil energy source may be chosen for shorter periods (of from

---

618 District heating networks are distinct from district cooling networks, which are collective systems for distributing chilled water supplied from cooling plants, the management of which is also often allocated by local authorities by means of calls for tenders. The parties are active in this market via two networks which they already jointly control (Decision COMP/M.2704 *Elyo/Cofathec/Climespace* of 5 March 2002).

619 Reply by Thion – Ne Varietur dated 10 July to the Commission's questionnaire, question 4, No 12972.

620 Reply by Thion – Ne Varietur dated 10 July, No 12972, question 28.

621 Reply by Idex dated 31 July 2006, No 14210, question 29.

622 Co-generation is the simulataneous production in the same plant of thermal energy for a heating network and of mechanical energy transformed into electrical energy for use in an industrial process or for resale to the electricity distribution network.

623 Reply by Idex dated 31 July 2006, No 14210, question 33. Reply by Dalkia dated 13 July 2006, No 13172, question 33 (long-term contracts whose term coincides with that of the public service delegation agreement as part of the exploitation of by-product heat sources).

one to three years)[624]. Gas has advantages in terms both of flexibility of supply and of lower pollution compared with other primary fossil energy sources[625].

937. A majority of networks are managed by means of so-called public service delegations, which also cover the renovation and restoration of the networks and the substations and the boilers feeding them[626]. Depending on the, sometimes considerable, investments required, the duration of the public service delegation contracts in this area varies between 12 and 24 years[627]. Under Law No 93-122 on the prevention of corruption and the transparency of economic life and public procedures, known as the Sapin Law of 29 January 1993, which introduces procedures based on the principles of advertising, competition and transparency in the choice of successful tenderers, concession contracts can no longer be concluded for a period exceeding 24 years[628].

938. Competition in this market therefore manifests itself when the delegation contracts come up for renewal. The demand side of the market is represented by local authorities, while the supply side consists of the various providers of this service.

939. Where the management of a district heating network is delegated, the primary energy source used to generate the heat is, more often than not, specified in the public service delegation agreement. For reasons of public service continuity, contracts always provide for a substitute energy source besides the main one. Variations in the prices of primary energy sources are passed on to consumers in the district heating network in accordance with pre-established formulae agreed between the delegating authority and the concession holder[629].

940. The parties consider that there is a product market for district heating networks which includes networks managed directly by the municipality. Other operators active in the market have stated that district heating networks which are operated directly by the local authority owning the network should be excluded and that the market comprises only the delegated management of district heating networks[630].

941. The difficulties facing a local authority wishing to acquire the in-house expertise needed to take over (or set up) a network itself are too great for it to be possible to consider

---

624 Reply by Idex dated 31 July 2006, No 14210, question 33.

625 Reply by Idex dated 31 July 2006, No 14210, question 44b.

626 Reply by Thion – Ne Varietur dated 10 July, No 12972, question 12.

627 Form CO, p. 819 (12-25 years for a public service delegation, 5-7 years for a leasing contract). Reply by Dalkia dated 13 July, No 13172, question 20 (16-24 years); reply by Enertherm dated 19 September 2006, No 17503, question 2b (14-25 years in six calls for tenders since 2003); reply by Idex dated 1 August 2006, No 14303 (14 calls for tenders since 2003: 14-24 years, the latter duration being applicable in 10 cases out of 14).

628 See also Opinion No 98-A-18 of the Competition Council of 25 November 1998 concerning a request for an opinion from the Mechanical Engineering Industries Federation on competition questions to do with the classification of district heating networks, BOCCRF No 15 of 31 August 1999.

629 Reply by Dalkia dated 13 July, No 13172, questions 29 and 30.

630 Memorandum from Veolia (Jones Day), p. 12, No 11413 (non-confidential version).

local authority managed networks as forming part of the same product market. One of the two examples given by the parties in support of their argument[631] concerns UEM (Usine d'Electricité de Metz, a local authority company), which won a tender for the public service delegation of a network in a neighbourhood adjacent to the network it already managed[632]. It is clear from UEM's replies that, apart from the specific case of an adjacent neighbourhood in respect of which a call for tenders was held for the public service delegation of a district heating network, that local public electricity distribution undertaking does not consider itself to be a potential competitor to undertakings specialising in the management of district heating networks elsewhere in France[633]. It follows from this that networks managed directly by a municipality itself should be excluded from the relevant market definition.

942. The relevant product market is therefore the market for the delegated management of district heating networks (hereinafter called the 'district heating networks market').

C.1.2 Geographic market

943. According to the parties, the district heating networks market is national in scope[634] and the only national market affected by the transaction is France.

944. This is borne out by the market survey. Under Article 39 of the Public Procurement Code, where they exceed an amount of €750 000 net of tax in the case of supplies and services and €5 270 000 net of tax in the case of works, municipalities' calls for tenders must be published in the Official Bulletin of Public Procurement Contract Announcements (*Bulletin officiel des annonces des marchés publics - BOAMP*) and in the *Official Journal of the European Union* at the European level[635]. Nevertheless, it is apparent from the replies received and from the data on calls for tenders for the years 2003-06[636] that, despite the publication of certain calls for tenders at the European level, basically the same five French groups[637] take part in the vast majority of tenders for the delegated management of district heating networks[638]. Foreign groups rarely participate

631 Parties reply to the statement of objections, paragraph 742.

632 Reply by UEM (Usine d'Electricité de Metz), No 13890, dated 25 July 2006, question 2d: district of Bormy renamed Metz-Est; see also http://www.uem-metz.fr/actualites/index.html for messages concerning work on the interconnection of the urban heating networks of Metz-Est and Metz-Cité (the latter being UEM's pre-existing network).

633 UEM's replies dated 25 July 2006, No 13890 and 10 July 2006, No 12940.

634 Form CO, p. 785.

635 Reply by Dalkia dated 13 July, No 13172, question 8.

636 Replies dated 26 July 2006 by Dalkia, No 13986, Soccram, No 13939 and the parties, No 13999.

637 Dalkia, SES-Elyo (Suez), Soccram (Thion - Ne Varietur), Cofathec-Coriance (GDF) and Idex. See paragraph 946 below.

638 Replies by local authorities to the questionnaire of 4 July, questions 26-27 (Nos 14642, 14062, 13487, 13586, 13429, 12891). Replies by Dalkia, No 13172, Soccram, No 12972 and Enertherm, No 12716, to the questionnaire of 4 July, questions 20-21. Reply by UEM dated 25 July, No 13890, question I. Parties' reply (Nos 13985 and 13999) dated 26 July: table of known calls for tenders for the years 2003-06. The Idex group has taken part in 14 tenders since 2003, winning 2 (out of 12 procedures closed, two of the 14

in tenders in France and as a rule they submit bids in conjunction with one of the national operators[639].

945. The relevant market affected by the transaction is therefore the district heating networks market in France.

C.2 Competition analysis

Principal operators in the district heating networks market

946. The number of operators in the district heating networks market was already small before the transaction. They are, in the order of their market shares as a proportion of the total existing networks, Dalkia (Veolia group), SES-Elyo (Suez group), Soccram (Thion – Ne Varietur group), Cofathec-Coriance (GDF group) and Idex.

947. Besides Idex, the parties have drawn the attention of the Commission's departments to Enerpart/Enertherm[640]. This point will be dealt with in paragraphs 976 and 977 below.

948. For the rest, according to GDF itself, the competition consists only of 'small, regional enterprises'[641].

Existence of close links and disputes between Soccram and the GDF group

949. Besides the small number of usual participants in tenders, account must be taken of a specific factor, namely the existence of close links between the Thion - Ne Varietur group and the GDF group.

950. The Thion group has produced a letter dated 3 August 2000 sent by Cogac, a wholly owned subsidiary of Gaz de France, to the majority and minority shareholders of the Thion - Ne Varietur group and signed for agreement by those shareholders[642].

951. The letter mentions

- a strategic alliance in France and in Europe in the area of district heating networks;
- the development of gas in the networks of which the Thion - Ne Varietur group is the concession holder;

---

procedures being still under way): reply by Idex dated 1 August 2006, No 14303, question 2. Confirmation in Enerpart's reply dated 12 September 2006, No 17119.

639 Reply by Thion – Ne Varietur dated 10 July, No 12972, question 23. An example in Dalkia's reply dated 13 July 2006, No 13172, question 23: unsuccessful participation by RWE and Amec Spie in the 2001 call for tenders for the la Défense district heating network in Paris. Reply by Idex dated 31 July 2006, No 14210, questions 9 ('Bidding undertakings are active at national, sometimes regional, level, and are rarely non-French'), 15 and 23.

640 Form CO, pp. 820-821.

641 Gaz de France, Reference Document 2005, p. 93, included in the letter from Thion - Ne Varietur dated 12 July 2006 to the Commission, No 13323.

642 Letter from Thion - Ne Varietur to the Commission dated 12 July 2006, No 13323, point 1.

- the withdrawal of the Thion - Ne Varietur group from certain activities (wholesaling on behalf of third parties, any activity in the United States);
- the granting by Gaz de France (backed by an undertaking from Cogac) of the best tariffs and payment terms that GDF and its subsidiaries apply to their customers in comparable areas of activity;
- coordination between GDF and Thion - Ne Varietur to avoid any sources of conflicts of interest between them.

952. On 17 August 2000, Cogac acquired a 34% stake in Ne Varietur, the holding company of the Thion group. In addition to acquiring this 34% stake, Cogac granted a [...]*[643].

953. Also on 17 August 2000, Cogac, the other minority shareholders and the majority shareholders of Ne Varietur signed a shareholder agreement conferring on Cogac certain rights and prerogatives in relation to the running of the Thion group[644]:

- the appointment of three directors (out of a total of eight) on the board of the holding company Ne Varietur, and of one director on the boards of the companies Thion and Soccram[645];
- the express assent of at least one of the directors appointed on a proposal from Cogac is needed for the strategic decisions listed in Annex D to the agreement, including:
  - the approval of the annual budget[646]
  - the conclusion of any commercial commitment for an amount in excess of €800 000, of a duration greater than five years or providing for an exclusivity clause[647] – according to the Thion group, these two criteria cover all planned district heating networks in concession[648];
- the holding of a meeting of the holding company's board at least four times a year, and the submission of a quarterly report comprising the trading account, the cash flow situation, and the trend in the Thion group's commercial, financial and industrial prospects[649];

---

643 Letter from Thion - Ne Varietur to the Commission dated 12 July 2006, No 13323, point 2. Confirmed by the parties' reply of 18 September 2006, No 17376.

644 Parties' reply to the Commission's questions of 8 June 2006, question 6, A, p. 6.

645 Article 4.1.a) of the agreement; parties' reply to the Commission's questions of 8 June 2006, question 6, A, p. 6.

646 Annex D, point (v); parties' reply to the Commission questions of 8 June 2006, question 6, A, p. 6.

647 Annex D, point (vii); parties' reply to the Commission's questions of 8 June 2006, question 6, A, p. 6.

648 E-mail dated 8 June 2006 from Thion to the Commission, No 11058, point 2.

649 Article 4.2 of the agreement; parties' reply to the Commission's questions of 8 June 2006, question 6, A, p. 6.

- a right of audit for Cogac, which has, in this respect, unrestricted access to the books … staff, consultants and accountants of the companies of the Thion group[650];

- the setting-up of a 'commercial committee' to examine the concession contracts and operating contracts concluded by the companies of the Thion group and to monitor relations between the Thion group and municipalities, operators and joint grantors of concessions[651].

954. The prerogatives described in the preceding paragraphs go beyond the rights attaching to a mere financial holding.

955. The approval of the annual budget confers on GDF a right of veto on a strategic issue.

956. The agreement needed for commercial commitments lasting more than five years makes it possible for Cogac to block the future commercial conduct of the Thion group if it does not follow the direction desired by Cogac. The fifth point, concerning the 'commercial committee', makes it possible for Cogac to review the past commercial conduct of the Thion group by examining and monitoring relations with customers acquired previously. This is important in a sector where a medium-sized operator like Soccram manages only twenty or so networks.

957. The two factors mentioned in the preceding paragraphs are particularly significant for competition in the market for tenders for securing the management of district heating networks. According to the Commission's decision-making practice, the agreement of 17 August 2000 enables Cogac and hence the GDF group to exercise joint control over the Thion - Ne Varietur group. In its 2003 and 2004 annual accounts, moreover, GDF mentioned its 34% stake in the Thion group as numbering among its 'principal subsidiaries and holdings'[652].

958. The parties respond by saying that the 2000 agreements have not been, or at least are no longer being, implemented.

959. The Thion group and GDF both agree that, since 19 January 2006, there have no longer been any Cogac directors on the board of the holding company Ne Varietur[653]. Opinions differ on the background to and causes of the worsening of relations between the GDF - Cogac group, on the one hand, and the majority shareholders of the Thion - Ne Varietur group, on the other. As relations deteriorated, various disputes were brought before the Paris courts, some of which are still pending.

---

650 Article 4.3 of the agreement; parties' reply to the Commission's questions of 8 June 2006, question 6, A, p. 7.

651 Article 4.4 of the agreement; parties' reply to the Commission's questions of 8 June 2006, question 6, A, p. 6.

652 2003 annual report, p. 38; 2004 annual report, p. 42. Provided by the Thion - Ne Varietur group in a document dated 13 July 2006, No 13242.

653 Parties' reply to the Commission's questions of 8 June 2006, question 6, pp. 7-8.

960. [...]*[654]

961. [...]*

962. Without there being any need to evaluate the merits of the arguments advanced by the various operators before the French courts, it cannot be ruled out that, by the letter of 3 August 2000 and the shareholder agreement of 17 August 2000, implemented via the capital stake and the grant of a convertible loan, Cogac, a wholly owned GDF subsidiary, has acquired, jointly with the majority shareholders, control of the Thion - Ne Varietur group.

963. To this must be added the fact that, under the agreements which the Court of Appeal has just confirmed are in force, Cogac's stake in Thion - Ne Varietur could increase up to a maximum of [40-50]*%[655]. The choice between being repaid in shares rather than in cash is Cogac's[656]. Such an increase in the size of the shareholding would only strengthen the conclusion reached in the preceding paragraph.

964. In 2000, the agreement in question was not notified either to the French or to the European competition authorities owing to the thresholds not being met. It follows that, if the disputes pending between the GDF group and the Thion - Ne Varietur group were to be resolved in the GDF group's favour, and if the 2000 agreement were to be applied once more as planned, notification to a competition authority would probably not be necessary, despite the GDF group then being able to exercise fully its joint control, shared with the majority shareholders, over the Thion - Ne Varietur group.

965. Such joint control would be all the more important as GDF is virtually the only supplier of gas to the Thion – Ne Varietur group, whether for networks that have been managed for some time or for the preparation of bids in response to calls for tenders[657]. This customer-supplier situation is not specific to Thion – Ne Varietur[658] inasmuch as it stems from general factors in the French gas market; it does, however, reinforce the company law factors specific to Thion – Ne Varietur.

966. For the competition analysis that follows, it is therefore not possible to proceed on the assumption that Soccram, a company of the Thion - Ne Varietur group, constitutes an independent competitor of the GDF group to which Cofathec belongs. On the contrary, the assumption must be that the Thion - Ne Varietur group may in future be controlled jointly by its majority shareholders, on the one hand, and the GDF group, on the other. Such joint control, which for the time being is probably on the back burner because of

---

654 […]*.

655 Article 3.1(a) of the convertible loan agreement of 17 August 2000, confirmed by the parties in their replies of 15 September 2006, No 17376, question 3.

656 Parties' replies dated 15 September 2006, No 17376, question 3, and Article 5(d) of the 2000 memorandum of agreement.

657 E-mail from the Thion group dated 24 July, No 13806: despite over 20 requests for tenders from other gas suppliers, GDF was successfully circumvented in the case of only one network.

658 In the case of Dalkia also, GDF is by far the most important supplier of gas to district heating networks: Jones Day memo for Veolia Environnement dated 23 May 2006, No 11413, p. 28, under 4.2.2. A.a.

the disputes between the GDF group and the Thion – Ne Varietur group, would have the effect of reducing the number of independent competitors participating in the calls for tenders that are organised.

Market shares

967. Various criteria have been put forward to determine the market shares of the different suppliers in the market for the management of district heating networks.

968. A first criterion is that of the number of networks managed. The parties consider the criterion of the number of networks to be the most compelling as each network bears witness to the success achieved by each operator in winning contracts following calls for tenders[659]. According to this criterion, Dalkia holds a leading place in the market, with a share of about [50-60]*%[660].

[659] Form CO, p. 818.

[660] Table 1 of Form CO p. 818, table 12 p. 799, as amended to exclude local authority managed networks in the parties' reply of 29 June 2006, and increasing the numbers of networks of Soccram and Idex in accordance with these competitors' replies.

Company	Number of networks	Estimated market share (given the estimatory nature of the total)
Suez	[...]*	[15-20]*%
Gaz de France	[...]*	[0-5]*%
Suez+Gaz de France	[...]*	[20-30]*%
Soccram	[...]*[661]	[5-10]*%
Suez+GDF+Soccram	[...]*	[30-40]*%
Dalkia	[...]*[662]	[50-60]*%
Idex	[...]*[663]	[5-10]*%
Other operators (Enertherm, UEM, etc.)	[...]*[664]	[10-15]*%
Estimated total	[...]*[665]	100%

969. The reasoning based on the number of networks overlooks two factors: firstly, the number of networks managed largely reflects the past success of the different operators; even if new management contracts are concluded for periods of 10-24 years[666], some

[661] Reply by Soccram dated 24 July 2006, No 13806. In the parties' estimate referred to in footnote 660, Soccram was credited with 20 networks. In Soccram's reply of 18 September 2006, No 17497, the group credits itself with 27 networks out of a total of 394 (including local authority managed ones).

[662] According to Dalkia's reply of 22 September 2006, No 17813, that company manages [approximately 180] networks, or [40-50%] of the total number of networks, which is estimated at [approximately 400].

[663] Reply by Idex dated 19 September 2006, No 17526, last table tab.

[664] This number is the difference between the estimated total (348 – see footnote 665) and the numbers of networks of the largest operators mentioned higher up in the table.

[665] In the parties' reply to the statement of objections, paragraph 741, the total of 330 is criticised as being the result of a miscalculation by the Commission, and it is stated that it should be replaced by 348. However, the total of 330 was submitted by the parties on 29 June 2006 as being their best estimate. Be that as it may, a total of 348 would not fundamentally alter the analysis. In view of the fact that no estimate is forthcoming from a neutral body, a total of 348 is used in the table.

[666] Example of a new contract concluded in Metz for a duration of 10 years, extendable to 20 years: reply by UEM dated 25 July, No 13890, to questions of 20 July 2006, question F.

district heating networks are still governed by concession contracts whose duration exceeds the maximum 24 years prescribed by the Sapin Law[667].

970. Secondly, the number of networks might overestimate the importance of small networks, some of which use wood as fuel[668], or reflect a situation in which certain operators confine themselves to the largest networks while other operators are incapable of winning tenders for large networks.

971. The Commission considers, therefore, that it is more appropriate to use the volume (in GWh) and the value (in millions of euros) of networks managed to calculate market shares. According to these criteria, the market shares of the notifying parties, and in particular of the Suez group, are much larger, as is clear from the following table. In view of the divergent estimates of the total volume of heat generated for district heating networks[669], market shares are shown in two columns. What matters are the absolute volumes of heat generated, as communicated by each competitor as far as it is concerned.

972. The data are these:

[667] Cf. the case of Massy, where the company Curma manages the district heating network for the period 1986-2014: response by Massy dated 24 July 2006 to the Commission's investigation, No 13783, question 20. Cf. also the case of Saint-Denis, in which the concession without any call for tenders of 1956 was prolonged by direct consultation (i.e. without any advertising) in 1986, expiring in 2013: reply dated 7 July, No 12891, question 21.

[668] Parties' reply to the statement of objections, paragraph 743.

[669] In the parties' reply of 19 September 2006, No 17567, the market's total volume is put at 30 000 GWh. Competitors Dalkia (reply of 20 September 2006, No 17623, non-confidential version of 22 September) and Soccram (reply of 25 July 2006, No 13850, and reply of 14 September 2006, No 17458) estimate the market's total volume at 24 000 GWh. Idex (reply of 25 September 2006, No 17866) estimates the market's total volume at 23 000 GWh.

Operator	Heat production in 2005 (GWh)[670]	Market share based on a total of 24 000 GWh	Market share based on a total of 30 000 GWh
Elyo (Suez)	[...]*	[40-50]*%	[30-40]*%
Cofathec (Coriance + Services) (GDF)	[...]*	[0-5]*%	[0-5]*%
Total for the parties minus Soccram	[...]*	[40-50]*%	[30-40]*%
Soccram	[...]*	[5-10]*%	[5-10]*%
Total for the parties plus Soccram	[...]*	[50-60]*%	[40-50]*%
Dalkia	[...]*	[20-40]*%	[20-30]*%
Idex	[...]*	[0-5]*%	[0-5]*%
Others (Enerpart, UEM, …)			
Total		24 000 = 100%	30 000 = 100%

973. It follows from these data that, even without Soccram, the parties together achieve a production volume ([...]* GWh) which is a third greater than the volume of the second largest market player, Dalkia ([...]* GWh). If Soccram's volumes are added, the parties achieve a volume which is more than half as big again as Dalkia's. This means that, although it is the leading operator in terms of number of networks, Dalkia manages networks which are on average much smaller than those managed by the parties.

974. It follows from the above description of market shares that the parties, minus Soccram, are comfortably larger in volume terms than the other large market player, Dalkia, and that, if Soccram's networks are added to those of the parties, they exceed [50-60]*%. Apart from the parties (plus Soccram) and Dalkia, only one operator, Idex, has anywhere near [0-5]*% of the market. The other networks are managed by local operators who manage one, or exceptionally two, networks.

Entry barriers

975. In the notification, the parties emphasise the competitive pressure exerted by new entrants. Nevertheless, they identify only two French new entrants, Enertherm and Idex[671].

976. In 2002 Enertherm replaced Dalkia on the district heating network at la Défense, Paris[672]. Nevertheless, Enertherm cannot be described as a credible competitor for other

[670] Operators' replies to the questionnaire of 13 September 2006, No 17495 (parties), No 17623 (Dalkia), No 17526 (Idex), No 17497 (Soccram).

[671] Form CO, p. 821.

[672] http://enertherm.iota-online.com/15.html, accessed on 24 July 2006.

tenders. It is clear from Enertherm's reply to the Commission's questions that the company was set up for the sole purpose of acting as the concession holder for the la Défense network. Enertherm rules out any participation in tenders for the management (or construction) of district heating networks other than that of Paris's la Défense[673]. Enerpart, Enertherm's parent, has taken part in various tenders since 2003, so far unsuccessfully[674]. It has informed the Commission that it has complained to the French competition authorities about the way in which its bid was disallowed in at least one case[675]. It follows from the above that, for the time being, the existence of the Enerpart group, which has succeeded in taking over the management of one network, is not enough to make it a credible competitor in the market.

977. As far as Idex is concerned, the parties acknowledge that it is not a new entrant as it has been present in the market for a number of years now[676]. In fact, according to Idex, it has been active in the market for the past 40 years[677]. The parties nevertheless consider that, following its take-over by investment funds, the company was particularly active during the latest calls for tenders. The market survey confirmed that Idex has won two tenders among those announced since 2003[678]. With a market share estimated (see above) at [5-10]*% in terms of number of networks and at less than [0-5]*% in volume terms, Idex's competitive impact may be described as credible but limited.

978. As regards foreign groups, the parties identify no foreign group as having won a tender for a district heating network in France. According to the market survey, such groups generally submit tenders in conjunction with one of the domestic operators[679]. This indicates that a presence in France and experience in managing French district heating networks is necessary in order to be deemed a credible tenderer and that there are therefore entry barriers for foreign groups.

Competitive effects

979. The notified transaction brings together Suez, the leading operator in the market measured in terms of value and volume, and the third largest operator (GDF + Soccram). The new entity would be the largest operator in the market (in terms of value and volume), ahead of Dalkia (Veolia). Its particularly high market share – more than [50-60]*% - may in itself be evidence of the existence of a dominant market position post-merger[680].

---

673 E-mail from Enerthem dated 28 July 2006, No 14069.

674 Reply by Enerpart dated 19 September 2006, No 17503.

675 Ibid., plus fax from Enerpart Group SEEM dated 19 September 2006, No 17487.

676 Form CO, p. 821.

677 Reply by Idex dated 31 July, No 14210, question 3.

678 See above, footnote 638.

679 Reply by Thion – Ne Varietur dated 10 July, No 12972, question 23.

680 Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings (2004/C31/03), paragraph 17.

980. Post-merger, the only competitor of any size would be Dalkia, with a market share below [30-40]*%. The other competitors occupy only very weak positions, with the biggest of their market shares being less than [0-5]*%.

981. The parties state that, in a tender market, market share does not necessarily reflect the market power of the firm concerned[681]. It is necessary, rather, to examine, invitation to tender by invitation to tender, how many credible tenderers have actually taken part in the procedure, thereby exerting competitive pressure on the parties[682].

982. The market is characterised by a small number of calls for tenders per year – apart from a few new networks each year, the number of calls for tenders per year is estimated at between five and 15 – and by what is normally a very long duration of management contracts (potentially up to 24 years).

983. An analysis of calls for tenders in France between 2003 and 2006 based on data furnished by the parties with respect to 50 calls for tenders shows that Cofathec ([30-40]* participations) and SES-Elyo ([30-40]* participations) were among the three very frequent participants along with Dalkia ([30-40]* participations), ahead of the pair formed by Soccram ([20-30]* participations) and Idex ([20-30]* participations)[683]. Apart from these five, other participants feature only rarely. Besides Enerpart, which was mentioned in paragraph 976 above, the only case of an 'alternative' participant which figured in [0-5]*tenders is CVD, which the parties say won [0-5]*tenders for Vitry-Choisy in 2005[684]. CVD happens to be a wholly owned subsidiary of Elyo[685].

984. It follows that Suez and GDF form part of a closed circle of close competitors exerting strong competitive pressure on each other, which includes Dalkia, Soccram and, to a lesser extent, Idex.

985. In the [30-40]* tenders in which Elyo participated, it competed with Dalkia [20-30]* times, Cofathec [20-30]* times, Soccram [20-30]*times and Idex [15-20]* times[686].

986. In this context, account should be taken of the specific role played by Cofathec (GDF) in this market. With the backing of the gas group to which it belongs, Cofathec has been capable, in a few years, of bringing real and credible competitive pressure to bear. Thus the list of calls for tenders provided by the Thion group (Soccram) for the period 2003-06[687] contains 14 calls for tenders for the management of an existing district heating network. In [5-10]*cases, the outgoing operators, Elyo ([5-10]*) and Dalkia ([0-

---

681 Form CO, p. 819.

682 Form CO, p. 820, with reference to decisions M.3216 *Oracle/Peoplesoft*, M.2139 *Bombardier/Adtranz* and M.2816 *Ernst & Young France/Andersen France*.

683 Table submitted by the parties on 26 July 2006, No 13999.

684 Points 39 and 40 in the table submitted by the parties on 26 July 2006, No 13999.

685 Parties' reply to the request for information of 22 September 2006, question 5.

686 There was also a joint bid by Elyo and Idex.

687 Reply by Thion – Ne Varietur dated 26 July 2006, No 13939.

5]*), won the new tender. In five cases, the new winner was not the outgoing operator. Cofathec was the new winner in [60-70]*% of these cases ([0-5]*), the other winners in this 'non-renewal' scenario being Soccram and the Metz municipal operator in a neighbourhood bordering its old network[688]. Dalkia, Elyo and Idex, for their part, did not win a single one of these non-renewal-type tenders.

987. This analysis shows that Elyo and Dalkia, which manage the largest number of networks, tend not to attack each other's existing networks, whereas Cofathec has played a bigger role in competition than its market share might suggest. Cofathec was a new operator – unlike Dalkia, Elyo, Soccram and Idex it had not chalked up decades of activity in the long-term contracts sector – and an aggressive competitor which sought to replace the incumbent operators by means of highly competitive bids. The French Court of Auditors has commented on this policy as follows: 'The Court finds that, since it was set up, Cofathec has had very low, or negative, profitability … The Court notes that, through its subsidiary Cofathec, the Gaz de France group has pursued in this area a very active policy of conquering market share'[689]. This aggressive strategy was possible partly thanks to GDF's backing for its subsidiary Cofathec. The President of the Court of Auditors noted in this respect that: 'Gaz de France has generously financed its subsidiary both by subscribing to its capital increases and by granting it soft loans. It has also enabled its subsidiary to enter the French and Italian financial markets on terms more favourable than it could have obtained on its own. Gaz de France has also performed services on its subsidiary's behalf free of charge'[690]. The disappearance of Cofathec as a credible independent operator through the merger with SES-Elyo would therefore eliminate a major competitive force.

988. Despite its having won […]* tenders in recent years, Idex cannot be considered a player exerting pressure comparable to that brought to bear by Cofathec. Firstly, Idex's […]* successes concern network creations and not renewals. Unlike GDF, Idex has therefore not succeeded in aggressively replacing the incumbent operators. Secondly, Idex does not enjoy the financial advantages referred to in paragraph 987. The fact that Idex has recently found a new shareholder is not comparable to GDF's backing for its subsidiary Cofathec, driven as that is by the strategic desire to win market share even at the expense of poor profitability. This backing by GDF has enabled Cofathec to play the role of a driver of competition.

989. The elimination of competition between the parties would therefore have a direct effect with likely repercussions on the prices of the services offered by the parties.

990. Such an effect is all the more likely as the new entity resulting from the merger would have such an influence on the supply of the resources needed for generation that it could limit rivals' capacity to compete. Gas is the main primary energy source used to generate heat in networks. Dalkia currently uses primary energy that is made up of [80-

688 See paragraph 941 above.

689 Court of Auditors, Special report on the accounts and management of COFATHEC, 1999-2002 financial years, p. 65, No 14309.

690 Letter from the First President of the Court of Auditors to the Minister for Economic Affairs, Finance and Industry dated 3 December 2004, p. 2, No 14309.

90]*% gas, [5-10]*% fuel oil and [10-15]*% electricity[691]. The figures for Soccram are [60-70]*% gas, [5-10]*% heat from household refuse incineration plants, [5-10]*% heavy fuel oil and [5-10]*% wood. It should also be noted that the percentage of gas is constantly on the increase owing to environmental measures[692]. Idex also considers GDF to be unavoidable[693], among other things because of the price regulations in force in France[694]. While it is true that Elyo (part of the Suez group) has replaced GDF with an alternative supplier in a small number of networks located in the North and East balancing zones[695], the fact remains that, in a larger number of networks, Elyo has, after doing the rounds of the market soliciting bids from various gas suppliers, decided not to become eligible given the advantages of remaining under the regulated price regime[696]. Cofathec Coriance and Cofathec Services (part of the GDF group) recently replaced GDF with an alternative supplier for more than a third of the networks they manage[697]. In almost all cases where an alternative supplier has been found by a district heating network manager, the network in question has been located in the North and East balancing zones, where Distrigaz's presence is more marked than in other zones.

991. In view of its position in the gas markets in France, GDF is therefore the main supplier for all competitors in the district heating networks market. Suez (Distrigaz France) is perceived as being the most active new entrant and that which has conquered most quickly a significant market share[698]. Of the volumes of gas consumed by Dalkia, the chief competitor in the market, and its subsidiaries, for those of their sites which have exercised their eligibility, Dalkia purchases [60-70]*% from GDF and [15-20]*% from Suez (Distrigaz). For those sites which have not exercised their eligibility, GDF accounts for [90-100]*% of supplies[699]. In other words, Dalkia obtains its supplies mainly from GDF, and as an alternative mainly from Distrigaz. Post-merger, the parties would therefore be an unavoidable supplier and would have a major influence on the costs of Dalkia, their main competitor.

992. This analysis would be just as valid for Soccram, if it were to win its court case against GDF, becoming a competitor independent of the parties. Soccram purchases almost [90-100]*% of its gas from GDF. In the past it has had great difficulty obtaining

---

691 Memorandum from Veolia (Jones Day), p. 28, No 11413 (non-confidential version).

692 Reply by Thion – Ne Varietur dated 10 July 2006, No 12972, question 28.

693 Reply by Idex dated 31 July 2006, No 14210, question 38, message from Soccram dated 13 July 2006, elaborated on in a memo from Soccram dated 24 July 2006, No 13806.

694 Reply by Idex dated 31 July 2006, No 14210, question 43.

695 Parties' reply of 18 and 19 September 2006, Nos 17495 and 17567, question 2. Fewer than 10 networks are involved out of a total of 62.

696 Ibid.

697 Parties' reply of 20 September 2006, No 17624, question 6, and the tables concerning Cofathec Coriance and Cofathec Services attached to the parties' reply of 19 September 2006, No 17567 (all the networks concerned by a change of supplier being situated in the North balancing zone).

698 Reply by Dalkia dated 3 August, No 14439, question 61.

699 Letter from Veolia dated 31 July, No 14387.

competitive offers. Despite more than 20 requests for bids from other gas suppliers, Soccram has been able to avoid having to obtain its supplies from GDF only in respect of a single network[700].

993. In these circumstances, the new entity resulting from the merger would have such an influence on the supply of resources necessary for generation that it could limit the capacity of rivals to compete. Competitors, including Dalkia, would be unable to exercise sufficient competitive constraint to prevent the merged entity from increasing its prices.

994. In the light of the above, there is a risk therefore that the notified transaction would significantly impede competition in the district heating networks market in France by uncoordinated effects.

995. On the other hand, it is unlikely that the notified transaction would change the market structure to such an extent that it would be possible for Suez/GDF and Dalkia to create a position of collective dominance.

996. It is improbable that coordination could be a credible long-term strategy owing to the lack of credible punishment mechanisms via calls for tenders where the parties and Dalkia meet recurrently.

997. The heterogeneousness of the various calls for tenders, both in terms of size and in terms of contractors' requirements based on factors other than price, would make deliberate parallel behaviour onerous and hence difficult to monitor reciprocally. As regards the size of tenders, the market survey confirmed the great variety of tender sizes between 2003 and 2006[701]. As regards contractors' requirements based on factors other than price, the market survey confirmed that environmental concerns, as distinct from the price factor alone, play a not insignificant role in contractors' decision-making processes and that contractors enjoy a wide degree of discretion in the final choice[702].

Conclusion

998. In conclusion, the merger as notified would significantly impede effective competition in the district heating networks market in France on the basis of uncoordinated effects.

---

700 E-mail from the Thion group dated 24 July, No 13806.

701 Parties' reply to the statement of objections, paragraph 791. Data received from various suppliers in response to a questionnaire on calls for tenders, references in footnote 638 above.

702 See, apart from the replies from other suppliers referred to in footnote 638, Enerpart's reply of 19 September 2006 and the wording of Article L.1411.5 of the General Local Authorities Code ('the authority empowered to sign the agreement shall freely enter into any appropriate discussions with one or more undertakings that have submitted a bid').

D. Energy services outside district heating networks

999. A number of markets upstream and downstream from the gas and electricity markets are grouped under the term 'energy services'. These markets comprise the design, implementation, sale, operation and/or maintenance of energy production, heating and air-conditioning installations.

1000. These activities include one market in which there is an overlap between the parties which might give rise to an affected market. This is the field of gas boiler maintenance in the private sector in certain French departments. This is discussed first, followed by some comments on the market for ventilation of nuclear sites in France, to which a user drew the Commission's attention.

1. Gas boiler maintenance

Definition of the product market

1001. The parties distinguish a market for the maintenance of gas boilers comprising all the technical services needed to keep boilers in good operating order and prevent breakdowns. This maintenance activity has been identified by the French competition authorities as being a specific market owing to the type of equipment involved[703]. This market relates solely to individual boilers fitted for private customers, to the exclusion of all other types of heating installation. More specifically, according to the French competition authorities, the maintenance of individual boilers can be divided into two separate markets based on the type of customer: private customers (individuals and property managers) and social housing managers (who sign contracts for all the individual boilers corresponding to the occupants of a building)[704].

1002. The market survey confirmed that there are probably two separate markets for individual boiler maintenance: on the one hand the maintenance of individual boilers for private customers (individual customers and property managers), and on the other hand the maintenance of individual boilers for social housing managers. This question can be left open, since it would not affect the result of the analysis.

1003. Since there is no overlap between the parties except in the private customer segment – Suez is not active in the council housing management segment – it is this segment that is considered here.

Definition of the geographic market

1004. As regards the maintenance of individual boilers for private customers (individual customers and property managers), the decision-making practice of the French competition authorities has been to delimit geographic markets along the lines of the French departments[705].

---

[703] See footnote 709.

[704] Ibid.

[705] Letter referred to in footnote 709, point 1.2.

1005. The market survey showed that the largest relevant geographic market for the maintenance of gas boilers for private customers corresponds to the departments[706], owing to the significant percentage of the total cost of the service accounted for by labour and travelling costs[707]. These factors also explain why the services in question may be more expensive in Paris than in areas outside Paris, owing to the greater road traffic congestion in the capital[708].

1006. Since the result of the analysis would be the same in a national geographic market, the definition of the geographic market can be left open.

Impact of the transaction – competition analysis

1007. The GDF group includes the company Savelys, the result of the merger between CGST-Save and Domoservices[709], which is the biggest operator in the individual boiler maintenance market in France, with an estimated market share of [20-30]*% at national level[710]. In the Suez group, the company Maisoning is engaged in the same field, with an estimated market share of [0-5]*% at national level[711]. Based on the definition of national market, the merger would not cause any problems given these market shares and the very slight overlaps.

1008. If the market is taken to be based on departments, there are overlaps between the parties in only 10 departments. In eight of these, the overlap is [0-5]*% or less. In a ninth department, Maisoning (Suez) has a market share of [15-20]*%, to which is added the [5-10]*% share of Savelys (GDF); these shares do not pose any problems. In the Vienne department, the overlap is [5-10]*%. This department is discussed further below.

1009. The parties' combined market share is less than a quarter in 4 of the 10 departments concerned, and between [30-40]*% and [40-50]*% in another 5 departments in which there is an overlap. In only one thinly populated department, Vienne (Poitiers), Savelys's [60-70]*% market share is reinforced by the merger with the [5-10]*% share of Maisoning, bringing the combined share to [60-70]*%.

1010. It is doubtful whether the department of Vienne (under 400 000 inhabitants) constitutes a substantial part of the common market. Furthermore, it is one of the departments most

---

706 Question 12 to operators: Reply No 13200: covers the department from 3 different sites – average trip 15 km; reply No 13044: 7-10 km; non-confidential reply Gazhop, No 12984 : average 15 km; reply No 13088 (single technician) : average 8.5 km; reply No 13087: 15 km.

707 Reply No 13044, question 14: 27-30% of internal costs, 22-30% of billings to the client relate to travelling (transport + technician's salary during transport); reply No 13200 to the same question 14: EUR 23.7 billed to the client; reply No 13087: 13% of expenses, 20% of billings.

708 Form CO, pp. 782-783.

709 Letter of 25 June 2002 authorising the acquisition of Domoservices by CGST-Save, BOCCRF No 2 of 12 March 2004. This authorisation was preceded by a commitment by CGST to transfer 14 branch offices (Caen, Lorient, Rennes, Angers, Montargis, Blois, Bourges, Châteauroux, Poitiers, Niort, Valence, Grenoble, Montluçon and Nevers) with all their tangible and intangible assets in order to restore the balance of competition in the departments affected.

710 Form CO, table 10 on p. 797.

711 Ibid.

affected by the commitments of the GDF group vis-à-vis the French authorities in relation to the CGST-Domoservice merger which resulted in Savelys[712]. One of the 14 branch offices made over by CGST was Poitiers, the departmental capital of Vienne. According to the French authorities, this should 'allow the emergence of a significant player …. established in a homogeneous part of the area (Grand Ouest and Rhône-Alpes)'. Given the limited number of boilers ([0-2 000]*) affected by the overlap in the departmental market as a result of the present transaction, it is reasonable to trust to the effects of the commitments.

1011. The main reason for concluding that the merger has no significant impact on the market in question is the role of the regional, departmental or local suppliers. In the market survey, 'small' service providers (with around 30 technicians, for example) pride themselves on the loyalty of their private customers, their cost-effectiveness, and the fact that the merger would have no impact since they concentrate on the smallest boilers and since Elyo specialises in high-powered boilers[713]. When asked to name the main barriers preventing them from expanding, the smallest suppliers said that the main obstacles to their growth were not the existence of big competitors but the large number of other small competitors, or the administrative charges relating to their independent activity in general[714]. Larger suppliers (40 technicians) claimed that the main barrier to expansion was the difficulty of hiring qualified and motivated staff[715]. Furthermore, the scarcity of boiler engineers and the resulting demand for these engineers could encourage them to set up business as independent operators.

Absence of conglomerate effects reducing competition

1012. Certain third parties have alleged that the parties to the transaction might be able to use their strong positions in the gas markets in France, and have incentives so to do, in order to limit competition in the individual gas boiler maintenance market.

1013. This claim appears to be based on the idea that after the merger, the new entity could offer combined services (gas and gas boiler maintenance services), either by refusing to sell gas to customers who do not contract for maintenance services or by offering a significant reduction in the price of gas to customers who do so contract.

1014. The Commission considers that there is insufficient evidence that this will limit competition.

1015. It seems unlikely that the new entity would have incentives for imposing such combined services on customers. It would not be economically rational for it to risk reducing sales or profits in its core business gas markets, where the volumes sold are much higher, in order to increase its share of local boiler maintenance markets, where margins are lower and where there are a large number of small operators and scant barriers to entry by these operators.

---

712 Footnote 709 above.

713 Replies No 13200, questions 16, 17, 19, 21, 25.

714 Replies Nos 13088, question 17, and 13087, question 19.

715 Replies Nos 12976 and 13115, question 19.

1016. Purely in the alternative, the Commission would add that the remedies offered by the parties will allow a degree of competition to continue to exist in the gas supply markets in France, so that customers who were not interested in purchasing combined services from the new entity would have a possible alternative. Also, it cannot be ruled out that the parties' competitors in the gas markets might ally themselves with maintenance service suppliers to enable them too to offer combined services.

1017. It follows from the above that there are no conglomerate-type risks for competition in relation to the individual gas boiler maintenance market.

Conclusion

1018. It follows from the above that the notified merger would not significantly impede effective competition in a substantial part of the common market with regard to gas boiler maintenance.

2. Nuclear site ventilation systems

Definition of the product market

1019. Ventilation systems on nuclear sites must comply with requirements concerning output, the length of pipes and the very high level of filtration. This could therefore be a separate product market, with only specialised technicians able to maintain or even construct these ventilation systems.

1020. The market survey confirmed that ventilation on nuclear sites is a separate market distinct from the bigger product market for industrial ventilation. However, this question can be left open since an analysis based on a bigger market would lead to the same end result.

1021. The market survey established a clear distinction between the installation and the maintenance of ventilation systems. This is the opinion not only of suppliers[716], who sometimes engage in only one of the two activities[717], but also of users[718], who have confirmed that their experience shows that companies other than those which install the systems are competent to provide maintenance services for these systems[719].

1022. It should be noted that the cost structure for the supplier is very different for installation and maintenance (maintenance requires much more labour)[720] and that installation is a one-off service whereas maintenance is generally contracted for several years[721]. According to different operators, the installation work can be carried out using staff

[716] Replies to question 6, e.g. No 13670 (supplier in Belgium, which considers it could operate in France within 6 months), and the parties, reply to questionnaire of 4 July 2006, question 18.

[717] Reply No 13773, question 6.

[718] Reply No 13599, question 6.

[719] Reply No 14525, question 6 ; Nos 14756 and 13936.

[720] Reply to question 9 in No 13917.

[721] Ibid. Plus, as regards duration of maintenance contracts, all the replies.

brought in from a considerable distance who travel from site to site[722], whereas maintenance staff must be located near the site.

1023. Since Suez does not engage in maintenance[723], the only overlap between the parties is for installation services.

Definition of the geographic market

1024. The parties consider the market to be a national one.

1025. The market survey confirmed the national character of the maintenance market; successful bidders in this market must be able to locate near the site where the maintenance is carried out.

1026. As regards the installation market, there are differences between the indications relating to the national (French) market and the larger market (European, or at any rate encompassing France's neighbouring countries)[724]. Calls for tenders are published Europe-wide, but in some cases the qualification procedures required by users are different, thereby creating barriers for 'new' entrants with experience in a neighbouring country.

1027. The market survey indicates that the relevant geographic market for the installation of ventilation systems on nuclear sites is probably still national.

1028. Since the result of the analysis would be the same for a larger geographic market, the question of the definition of the geographic market can be left open.

Impact of the transaction – competition analysis

1029. The companies Axima, a subsidiary of Suez, and Cofathec Omega, a subsidiary of Gaz de France, are among those specialising in ventilation systems for nuclear sites.

1030. The market survey confirmed that the size of the combined annual market in France both for installation and maintenance is around €20-30 million; the fluctuation is mainly caused by the installation market. Of this total, maintenance represents only one third or one quarter (around €6-7 million), and the remainder (€14-19 million) relates to installation[725].

1031. GDF and Suez overlap only as regards installation. The main installation operators are Cofathec Omega (GDF), which the parties reckon to hold [40-50]*% of the market[726], and Tunzini (Vinci group), which they estimate to hold a market share of [30-40]*%[727].

---

[722] Reply Tunzini, No 13773, question 9. Same reply from NFMC, No 13936, question 18. ('No local personnel is required for installation. … literally personnel can be brought in from all over the world'.)

[723] Additional replies from the parties of 3 July 2006, question 3, (i).

[724] See paragraph 1022 above.

[725] Calculation based on the estimates of the parties and the precise data supplied by the three main users in France and by certain suppliers.

[726] Replies from other players give Cofathec's estimated market share as 35% or 30%.

[727] Replies from the parties to question 19 of 4 July 2006, confirmed by replies Nos 13599 and 12982.

They consider that a number of companies, including Axima (Suez) and Amec Spie, each with an estimated comparable share of [5-10]*%, are in third place[728].

1032. It follows from these market shares that the merger would give rise to a combined market share of almost 50%.

1033. To appreciate the size of this combined market share, regard must be had to (i) the presence of a strong competitor, Tunzini, belonging to the Vinci group, with a comparable market share, (ii) the presence of other players in the market and (iii) the possibility, widely canvassed by users, that other potential suppliers will emerge.

1034. With regard to these last two points, French users (with one exception) and current and potential suppliers replied unanimously in the market survey that the nuclear ventilation installation market is not closed to new entrants. Companies with the required qualifications for supplying these services in neighbouring countries or in France may, once they have obtained certification (which takes 6 months to 2 years), become operators as effective as Axima, which would lose its competitive strength post-merger.

1035. Also, the market survey did not indicate that access to the technical documentation (in particular the design, sizing and implementation studies) held by former contractors would constitute a barrier to entry. It would appear that the owner of the nuclear facility could simply ask to have this documentation well in advance of launching new calls for tenders, where it would not be in the existing contractors' interests to participate without having first satisfied their customer.

Conclusion regarding nuclear ventilation

1036. It follows from the above that the notified merger would not significantly impede effective competition in a substantial part of the common market.

3. Multi-technology management or maintenance

Definition of the product market

1037. The multi-technology management or maintenance market includes maintenance and performance-optimising activities relating to all the technical facilities installed at customers operating buildings who wish to delegate management of these buildings[729]. Depending on the particular building in question, technical installations include heating and air conditioning systems, mechanical installations (piping, boilers, machining), electricity systems and all aspects of industrial process tools[730].

1038. Customers who delegate management may be industrial companies, service companies or individuals (in particular property managers). The parties have proposed segmenting the product market according to 'type of customer'. The product market definition can be left open since the result of the analysis would be the same with a definition encompassing the three segments in a product market.

---

728 Reply No 12982.

729 Notification, p. 777, with reference to decision M.2447 for the distinction between maintenance and installation.

730 Notification, p. 777.

Definition of the geographic market

1039. There is agreement between the parties, previous Commission decisions and the information obtained during the survey that the geographic market should be the national market, since maintenance activities must usually be carried out by a local company or by staff located locally. However, the company may be set up when a contract is obtained[731].

1040. The geographic market is defined as national.

Impact of the transaction – competition analysis

1041. The market shares and resulting overlaps are the same in the three segments: a share of around [10-15]*% for Suez and of a few per cent for GDF, giving a combined market share of less than [15-20]*%.

1042. It follows that the merger does not raise doubts as to the maintenance of effective competition.

1043. Following the concern of a user in heavy industry relating to the fact that in the past the two parties (Endel of the Suez group and Cofathec ADF of the GDF group) participated in the calls for tenders launched by his company, it was considered whether the multi-technology maintenance industrial segment should be further sub-segmented by industrial sector. It was feared, for example, that in heavy industry only certain enterprises, including the parties to the present merger, had the required capacities. The reply was negative, the number of enterprises capable of supplying references and participating in calls for tenders for heavy industry enterprises appearing to be around 10[732].

[731] Reply No 16944, question 19.

[732] Replies to the questionnaire concerning multi-technique maintenance (industrial segment), question 15: Nos 16714, 16791, 16944, 17324, 17494.

E. Water and waste markets

1044. The product markets not affected by the transaction within the meaning of section 6 of form CO annexed to Regulation (EC) No 802/2004, owing to the lack of overlaps, include the water distribution, used water treatment and ordinary and special waste management markets in France. GDF has never operated in these markets, but Suez is a major player.

Market definitions and market shares

1045. With regard to the market definitions and market shares, the definitions of water and waste markets given in the notification, which are based on the distinctions made in the Commission's previous decisions, are substantially accepted by the third parties which participated in the survey. There is also agreement on the national (French) nature of the markets concerned. Since the alternative for the segments most highly specialised in the treatment of hazardous waste is a larger than national market in which the parties' market shares would be diluted, it is not necessary to define the scope of the geographic market; the result of the analysis based on national markets already shows that there are no anticompetitive effects.

1046. As regards market shares in France, the information supplied by the third parties reinforce the information provided in the notification.

1047. Within the water distribution and waste water treatment markets, it is possible to distinguish first of all the delegation of the public service relating to distribution of drinking water. This is a national market in which there are three main operators[733]: Veolia with [50-60]*%, Suez with [30-40]*% and Saur with [10-15]*% [734].

1048. Next, there is the waste water treatment market, in which the relevant product market is the open market (municipal + industrial), i.e. all the water treatment that is not operated by the public authorities. In this national market, Veolia has a market share of [50-60]*%, Suez of [40-50]*% and Saur of [10-15]*%[735].

1049. In these two markets, there is therefore no overlap between Suez and GDF, since GDF is not active in these markets. In addition, Suez's market shares, although solid, are considerably smaller than Veolia's. This is relevant for the conglomerate analysis suggested by the third parties.

1050. As regards waste management, the following six markets can be distinguished, in line with the Commission's previous practice[736].

1051. In household waste collection, Veolia has a market share of [20-30]*% and Suez (SITA) of [15-20]*%. The (various) local authority companies have a [40-50]*% share

[733] Form CO, pp. 808-809, tables 21-22.

[734] Form CO, p. 808, table 21.

[735] Form CO, pp. 808-809, table 22, as corrected in reply to the request for information of 25 August 2006. Adding together the municipal segment (predominant) and the industrial segment (which is less significant).

[736] Form CO, pp. 810-812, tables 25-30.

of this market, in which other private players also participate[737]. In the collection of non-hazardous industrial waste, Veolia has a market share of [15-20]*%, Suez (SITA) has [10-15]*%, and other private players share the remaining [70-80]*% of the market[738].

1052. In the incineration of non-hazardous waste, Suez (SITA) has a market share of [30-40]*%, Veolia of [30-40]*%, Tiru of [20-30]*% and public operators of [10-15]*%[739].

1053. As regards landfill and storage of non-hazardous waste, Suez (SITA) has a market share of [30-40]*%, Veolia of [20-30]*%, local authority companies a total share of [15-20]*%, Séché [5-10]*%, Coved [0-5]*% and other operators [15-20]*%[740].

1054. As regards treatment of hazardous waste, Veolia has a market share of [30-40]*%, other less important players a total share of [20-30]*%, Suez (SITA) [20-30]*% and Séché [20-30]*%[741].

1055. As regards storage of hazardous waste, Suez (SITA) has a market share of [50-60]*%, Veolia of [20-30]*% and Séché of [20-30]*%[742].

1056. It follows that there is therefore no overlap between Suez and GDF, since GDF does not operate in the markets in question. In addition, in the six waste markets defined, Suez is in a comparable position to that of one or more competitors, with higher market shares for hazardous waste, in which local authority companies are less involved.

Suggestions of leverage mechanisms are unconvincing

1057. Certain third parties raised the question of the risk of conglomerate effects on some of these markets in France, claiming that the merged entity might use its positions in the gas markets to produce a leverage effect in order to obtain an advantage detrimental to competition in the water markets.

1058. These third parties referred in particular to GDF's geographic presence based on its near monopoly of natural gas distribution in France, where it is present in practically all French municipalities. It would gain a significant advantage over its competitors by offering combined services (gas plus water distribution, waste water treatment or waste management services). This advantage would consist of the physical presence of the merged entity as a gas operator in all municipalities, the risk of misuse of sensitive commercial information (prohibited by law) and a trademark effect based on the fame of the GDF, Distrigaz and Suez brands.

737 Form CO, pp. 810-812, table 25.

738 Form CO, pp. 810-812, table 26.

739 Form CO, p. 810, table 27.

740 Form CO, p. 811, table 28.

741 Form CO, p. 811, table 29.

742 Form CO, p. 812, table 30.

1059. The Commission considers that there is not enough evidence to support this claim. In particular, it is not clear how the notified merger could give rise to a conglomerate effect that might significantly impede effective competition in the common market.

1060. It must be noted in this connection that contrary to the claims of the third parties, the water services markets cannot be considered as necessarily neighbouring the gas markets.

1061. The French local authorities hold calls for tenders to delegate the public service of water distribution, whereas in most districts GDF has a monopoly of gas distribution services. Furthermore, in the deregulation timetable described above, gas distribution is separated from gas supply, whereas in the water market, calls for tenders by local authorities select the operator who will manage both distribution and supply to end customers. Finally, the public service delegation rules are based on the principle of speciality whereby water distribution and waste water treatment are managed separately. Consequently, a local authority cannot use the same procedure to delegate the two public services of water distribution and gas distribution in its territory.

1062. Secondly, it must be emphasised that in the markets in question, opportunities or incentives for offering combined sales (gas together with water distribution, waste water treatment or waste management services) are very limited or even non-existent.

1063. Some of the services concerned, such as water distribution, household waste collection and most waste water treatment services, are provided to municipalities, which must organise specific calls for tenders and could not accept bids for combined services (e.g. gas and water distribution) from the new entity.

1064. As regards services provided to users under a system of free competition (e.g. hazardous waste treatment), in which combined services (binding or non-binding) could in principle be offered together with gas sales, these do not appear to represent sufficient leverage to significantly restrict competition. In fact, there is insufficient evidence to indicate that all the buyers of hazardous waste treatment services (i.e. enterprises whose production processes produce hazardous waste) are at the same time major buyers of gas, or that they might be prepared to tie their hands in the gas markets in order to obtain better conditions from the merged entity should combined services be offered (i.e. gas together with services relating to the waste produced by these customers). In precisely the waste services markets in which most demand is from private companies, i.e. the hazardous waste markets, the merged entity would face strong competition from Veolia and Séché. Furthermore, a possibility that cannot be ruled out is that Veolia or other competitors in the hazardous waste market might form alliances with alternative gas suppliers in order to offer combined services (gas supply plus treatment of hazardous waste) if they consider that client companies might be interested in these combined services.

1065. In any event, purely in the alternative, the Commission notes that the remedies offered by the parties will allow a degree of competition to continue to exist in the gas supply markets in France, so that customers who were not interested in purchasing combined services from the new entity would have a possible alternative.

1066. It follows from this that there is no indication of a genuine risk of lever mechanisms enabling a post-merger group from impeding competition in the markets in which there is no overlap, such as the water and waste markets in France.

Absence of horizontal effect in the water and waste markets

1067. In so far as the advantages referred to in paragraph 1058 reinforce Suez in the water and/or waste markets, and hence a horizontal effect of the merger, in view of the strong competition from various major players, including (in all the markets mentioned) Veolia, it can be concluded that there is no horizontal risk of reduced competition.

F. Other countries

1. Luxembourg

1068. In the decision taken on 19 June 2006 to initiate an in-depth investigation under Article 6(1)(c) of Regulation (EC) No 139/2004, doubts regarding Luxembourg were raised only in respect of gas markets. The merger has no impact on the electricity markets in Luxembourg, since only the Suez group operates on them. Neither GDF nor SPE operates on those markets, and GDF does not supply gas to Luxembourg electricity producers. Consequently, only the markets for gas are dealt with below.

National framework

1069. Luxembourg has a high-pressure gas network feeding some 50 large consumers and four distribution networks. The high-pressure network is interconnected with the Belgian and German networks and is operated by SOTEG (Société de Transport de Gaz). The distribution networks are operated by four different operators: Luxgaz Distribution S.A., Sudgaz S.A., Ville de Dudelange and Ville de Luxembourg. A medium-pressure pipeline connects the Luxembourg network to the French network.

1070. The Luxembourg natural gas system is based on H gas. There is no significant production or storage in Luxembourg, and the network is not equipped with compressors. Consequently, balancing of the network is necessarily achieved through upstream networks, in particular through flexible supply contracts between SOTEG and Distrigaz and SOTEG and Ruhrgas.

1071. The topology of the network and cross-frontier capacities are set out on SOTEG's website. All injections into and outtakes from the transmission network are accounted for at the notional hub, the balancing point (BAP).

1072. National consumption of natural gas was approximately 15.2 TWh in 2005, of which 4.8 TWh were supplied through the distribution networks. Natural gas is imported into Luxembourg via Germany and Belgium, in roughly equal proportions. The entry points are Bras and Pétange at the Belgian frontier and Remich at the German frontier.

1073. Although Directive 2003/55/EC has not been transposed into national law, all industrial and commercial customers have been able to choose their supplier freely since 1 July 2004 as a result of the direct application of the Directive.

Relevant markets

1074. The parties did not put forward any suggestions as to the definition of the relevant product and geographic markets in Luxembourg.

Product markets

1075. The Luxembourg regulator, the Luxembourg Regulatory Institute, considers that the relevant markets are: (i) the wholesale supply market (national supply), (ii) the

household segment, (iii) the business and medium-scale industry segment, (iv) the industrial segment and (v) electricity producers[743].

1076. The merger does not raise any competition concerns. The precise definition of the relevant product markets may therefore be left open.

Geographic markets

1077. The Luxembourg Regulatory Institute states that wholesale supply is national in scale. The distributors, for example, obtain all of their supplies from SOTEG. The entry of a new importer has not yet altered the historical structure of the sector, since its supplies cover only a small part of the Luxembourg market[744]. The geographic market for supply would therefore be national in scale.

1078. The regulator also confirms that the incumbent distributors still confine themselves to supplying final customers connected up to their respective networks. No competition between distributors has yet been observed. The market survey did not produce any information contrary to the comments of the Luxembourg regulator. The geographic markets for distribution and supply to final customers would therefore correspond to the four distribution networks.

1079. At all events, since the merger does not raise any competition concerns in Luxembourg whatever the definitions of the geographic markets, the precise definitions of those markets may be left open.

Competition analysis

1080. The Luxembourg markets for natural gas are characterised by a low level of competition. Since 2001, only two new suppliers have applied for authorisation to supply natural gas[745]: GDF and a Luxembourg undertaking already operate on the electricity market.

1081. GDF has been supplying gas in Luxembourg since 2001, in competition with SOTEG. GDF's sales accounted for [0-5]*% of the supply of gas to eligible customers in Luxembourg in 2005; GDF is the supplier of [0-5]* industrial customers. If the market were wider, GDF's position would then be even less substantial.

1082. SOTEG obtains its supplies upstream from Distrigaz (>[40-50]*%) and from Ruhrgas and Saar-Ferngas (<50%)[746]. E.ON-Ruhrgas and Saar-Ferngas are shareholders in SOTEG. In 2004, the sales of the incumbent operator, SOTEG, accounted for 98% of total gas sales in Luxembourg. SOTEG is the supplier of the largest final customers.

---

[743] Annual report of the Luxembourg Regulatory Institute, Luxembourg, August 2005, pp. 22 *et seq*., No 12983.

[744] Annual report of the Luxembourg Regulatory Institute, Luxembourg, August 2005, p. 21, No 12983.

[745] Prior authorisation from the minister responsible for energy must be obtained in order to carry out supply: Grand-Ducal Regulation of 19 May 2003 concerning authorisation for the supply of natural gas.

[746] Parties' comments on the decision pursuant to Article 6(1)(c) of the Regulation, p. 54, reply from the Luxembourg Regulatory Institute of 10 July 2006, No 12983, p. 3.

1083. Distrigaz thus operates in Luxembourg only as a supplier/importer of natural gas on the SOTEG network.

1084. Consequently, GDF and Suez do not operate on the same markets in Luxembourg, GDF being present on the downstream retail supply market and Suez being present on the upstream wholesale gas supply market.

1085. The merger does not therefore give rise to any overlap in activities in Luxembourg.

1086. The doubts which were raised in the decision taken pursuant to Article 6(1)(c) of the Merger Regulation related to the possibility of a change in or loss of incentive on the part of GDF to engage in effective competition with SOTEG on the market for the supply of gas in Luxembourg. Such loss of incentive could result from the fact that GDF is virtually the only competitor of SOTEG and that, at the same time, Distrigaz is one of SOTEG's two suppliers.

1087. The market survey did not confirm these doubts.

1088. In the first place, according to the information provided by the Luxembourg Regulatory Institute, import capacities from Germany and Belgium are such that a large majority of current consumers can potentially change their source of supply without causing any constraints in the networks[747]. On the upstream market for the supply of gas, there are therefore sufficient sources of supply that allow SOTEG to obtain its gas from suppliers other than Distrigaz. E.ON-Ruhrgas and Saar-Ferngas, which import gas from Germany, are attractive alternative suppliers for additional volumes because, amongst other things, of their position as shareholders in SOTEG. Furthermore, Ruhrgas already supplies almost [40-50]*% of SOTEG's requirements and is thus in as strong a position as Distrigaz to take over supply of any additional volumes which SOTEG might need.

1089. Secondly, it would not be in GDF's interest to restrict its business in Luxembourg, since SOTEG has been licensed to supply natural gas in France and intends to recover in France market shares lost in Luxembourg. Despite the increase in GDF's market share in 2005/2006 compared with 2004/2005, SOTEG has reserved more capacities on the transmission network, suggesting an increase in its purchased volumes.

Capacity subscription in Nm³	**Gas year 2004/2005**	**Gas year 2005/2006**
SOTEG	233 400 Nm³/h	253 000 Nm³/h
GDF	[…]* Nm³/h	[…]* Nm³/h

1090. Furthermore, the supply markets in Luxembourg seemed to be accessible to alternative suppliers. The report by the Luxembourg Regulatory Institute specifies that 'no potential new supplier indicated any significant network access problems to the regulator'. Moreover, changing supplier does not entail any costs for the final customer.

[747] Luxembourg Regulatory Institute's reply of 10 July 2006, No 12983.

It may therefore be said that there are no barriers that would obstruct the entry of other European suppliers apart from GDF.

1091. The merger does not therefore raise any competition concerns on the Luxembourg markets for natural gas.

2. United Kingdom

1092. In the decision under Article 6(1)(c) of Regulation (EC) No 139/2004, it was suggested that the merger might affect gas markets in the United Kingdom. Electricity markets are not affected, since Suez does not operate on those markets in the United Kingdom and GDF's activities are very limited. GDF has [0-5]*% of UK production capacity and is involved only in the market for the supply of electricity to large industrial and commercial customers.

National framework

1093. The United Kingdom is supplied from a number of sources: offshore gas fields; the Interconnector, between Bacton and Zeebrugge; short, medium and long range storage; and liquefied natural gas (LNG). Gas enters the transmission system at entry terminals which are owned and operated by National Grid Gas Transmission plc, the system operator[748].

1094. In order to be able to ship gas to retailers and final consumers, gas shippers must reserve entry capacities at the entry terminals for the necessary volumes. Gas suppliers and large customers either contract bilaterally with shippers, or buy in the forward market for delivery of gas ranging from one day to several years ahead of time.

1095. The United Kingdom's gas stock in the UK continental shelf is gradually declining, resulting in increased reliance on imported gas. Since 2001, gas extraction from the continental shelf has gradually diminished. It is anticipated that imports from continental Europe will increase from 12 Gm³ in 2005/2006 to 30 Gm³ in 2006/2007, equivalent to some 30% of estimated future consumption. This level of imports will continue in the short term.

1096. The United Kingdom became a net importer of gas in 2004 and is increasingly dependent on gas coming through Europe to meet its supply requirements. For this purpose, the Interconnector linking the United Kingdom and Belgium is of considerable importance.

Relevant markets

1097. The parties did not put forward any suggestions as to the definition of the relevant product and geographic markets in the United Kingdom.

Product markets

1098. Since the doubts raised regarding the gas markets in the United Kingdom relate only to the capacities for the transit of natural gas to the United Kingdom, it is not necessary

748 Ofgem's reply of 2 August, No 14393, p. 7.

to define the relevant product markets upstream. Transit could constitute a separate market that is distinct from transmission or could form part of that market. Since the merger does not raise any competition concerns apart from the definition of the relevant markets, the precise definition of this market may be left open.

Geographic markets

1099. As indicated above, the geographic markets are often a reflection of the transmission/distribution networks. The Interconnector, through which natural gas transits to the United Kingdom, links the Zeebrugge hub and the National Balancing Point (NBP), and could thus form part of a market comprising the Zeebrugge hub and the NBP.

1100. Ofgem (the UK energy regulator) believes it is necessary to 'consider both markets jointly in the assessment of the implications of the proposed merger'[749]. This suggests that these two entry/exit points constitute separate, albeit closely linked, markets. Ofgem mentions the fact that the two points are linked if there are transmission capacities on the Interconnector, but that the points decouple when the Interconnector is full in either direction.

1101. At all events, the merger does not pose any competition problems in the United Kingdom apart from the precise definition of the geographic market for the transit of natural gas to the United Kingdom. The exact definition of the relevant geographic market can therefore be left open.

Competition analysis

1102. There are six main players on the gas markets in the United Kingdom: Centrica ([50-60]*%), E.ON ([10-15]*%), Scottish Power ([5-10]*%), RWE ([5-10]*%), SSE ([5-10]*%) and EDF ([5-10]*%)[750].

1103. The parties have limited activities on the UK markets: GDF produces gas and has some storage reservations. Via one of its subsidiaries, GDF ESS (UK) Ltd, GDF sells gas to industrial and commercial customers. Distrigaz trades in gas, but does not supply any customer in the United Kingdom[751]. Neither GDF nor Suez is engaged in the supply of household customers, and they have no activities on other natural gas markets.

1104. There is therefore no overlap in the parties' activities on the UK markets for natural gas.

1105. However, it was suggested during the market survey that the transaction could have a negative impact on gas prices in the United Kingdom because of the parties' increased capacity to control the flow of gas to the United Kingdom after the merger.

---

749 Ofgem's reply of 2 August 2006, No 14393, p. 15.

750 Ofgem's reply of 2 August 2006, No 14393, p. 11.

751 Parties' comments on the Article 6(1)(c) decision, 7 July 2006, No 12892, p. 48.

1106. It was stressed that, in view of the United Kingdom's dependence on gas imports from Belgium, the United Kingdom's supply of gas would be highly dependent on the Suez/GDF group and on its control of the Belgian transmission network.

1107. As far as the Interconnector itself is concerned, Distrigaz has a shareholding of 16% and capacity rights representing [10-15]*% of total capacity. In addition, GDF has its own rights of access to transport capacity in the Interconnector, representing [10-15]*% of total capacity[752].

1108. The concern was therefore raised that, as a result of consolidation and because of the degree of control which Suez has over entry and transit capacities for gas in Belgium, the parties could have an incentive to withhold gas from the UK markets, thus raising gas prices to their benefit. Entry and transit capacities and the control of such capacities are critical factors in bringing gas to the Bacton-Zeebrugge Interconnector.

1109. Ofgem stated that gas imports to the United Kingdom through the Interconnector have not always reflected market prices, resulting in upward pressure on gas prices in the United Kingdom. Particularly in the winter of 2005/2006, at high and medium demand levels, gas prices at the NBP were determined by the cost of gas flows through the Interconnector[753].

1110. If the merger were to have an effect on gas prices at the Zeebrugge hub, this could also have an impact on prices at the NBP at times in the year when flows of gas from the Zeebrugge hub are the marginal source of gas supply (i.e. are equivalent to the marginal costs of gas in the United Kingdom and thus determine prices)[754].

1111. The possible effect of the merger on the UK markets would thus depend on the probability of higher prices at the NBP and consequently (i) on the possibility and (ii) the incentive for the parties to increase prices, for example, by withholding gas.

Possibility of withholding gas / increasing gas prices

1112. It must be noted firstly that it seems that the possibility of the parties influencing gas prices at the NBP will be greatly reduced in the short term by the United Kingdom's programme of investment in import and storage infrastructure.

1113. The United Kingdom's dependence on the Interconnector and thus on the parties' transport and transit capacities on the Belgian market and the Zeebrugge hub will be reduced by the planned investment. The investment programme amounting to around UKL 10 billion includes the following measures: (i) import capacity upgrades to the Bacton-Zeebrugge Interconnector; (ii) construction of two new import pipelines (one from Norway (Langeled) and the other from the Netherlands (Balgzand Bacton Line - BBL) – both in the winter of 2006/2007); (iii) the construction of several new LNG terminals at Grain (2008), South Hook (2008), Dragon, Canvey, Teesside and

752 Parties' comments on the Article 6(1)(c) decision, 7 July 2006, No 12892, p. 48.

753 Ofgem's reply of 2 August 2006, No 14393, p. 16.

754 Ofgem's reply of 2 August 2006, No 14393, p. 16.

Anglesey. These measures will increase import capacity from Europe from some 29 Gm³ a year to 111.2 Gm³ a year in 2008 (and some 78.5 Gm³ a year in March 2007)[755].

1114. The parties' capacities on the Interconnector (6.5 Gm³ a year) currently represent only some 4.5% of the United Kingdom's total supply capacity in 2007 and some 22% of import capacity from Europe[756]. Investment in import infrastructures will, in all probability, lead to an increase in imports into the United Kingdom.

1115. The Langeled pipeline will have a capacity of 25 Gm³ a year – the same capacity as the Interconnector[757]. Taking account of the reservations which GDF holds on the Grain methane terminal ([5-10]* Gm³ a year), the parties' combined capacity following the investment will represent some [5-10]*% of total supply capacity in 2008, but their position regarding import capacities will decline sharply to [5-10]*% of total import capacities in 2008 ([10-15]*% in 2007)[758].

1116. Furthermore, it is highly improbable that, following the increase in import capacities, the situation referred to by Ofgem will arise: Ofgem specified during the market survey that any increase in prices at Zeebrugge could affect prices at the NBP only at certain times in the year when imports from Zeebrugge are the marginal sources of supply at the NBP. The planned new infrastructures will reduce such occasions. The Interconnector reached its maximum capacity on only two days in the winter of 2005/2006. It is only when its maximum capacity is reached that it is certain that import volumes through the Interconnector are the marginal sources and thus determine the price at the NBP. Consequently, the days on which imports through the Interconnector constituted marginal sources of supply are very few in number.

1117. Given the fact that the end of the winter of 2005/2006 was particularly cold and also taking account of the investment in import capacities, the Interconnector will in all probability not reach its maximum capacity again in the near future. Imports from the Zeebrugge hub will therefore rarely if ever be the marginal sources of supply in the United Kingdom. The parties will not therefore be able to increase the prices at the NBP by withholding gas. It may rather be supposed that any such conduct by the parties would be countered by other importers who have capacity reservations on the Interconnector or on the new pipelines. This is facilitated by the 'use it or lose it' rule which applies to the Interconnector[759]: if the parties tried to withhold capacities, despite

---

755 Parties' comments on the Article 6(1)(c) decision, 7 July 2006, No 12892, p. 48, Ofgem's reply to the Phase II questionnaire of 2 August, No 14393, p. 9, Ofgem, Winter 2006/2007 Consultation Update Document, July 2006, p. 18 for total imports from Europe.

756 Parties' comments on the Article 6(1)(c) decision, 7 July 2006, No 12892, p. 48 (for the parties' reserved capacities), and Ofgem's reply to the Phase II questionnaire of 2 August, p. 8, for the United Kingdom's total supply, Ofgem, Winter 2006/2007 Consultation Update Document, July 2006, p. 18 for total imports from Europe.

757 Ofgem, Winter 2006/2007 Consultation Update Document, July 2006, p. 16, www.ofgem.gov.uk

758 Parties' comments on the Article 6(1)(c) decision, 7 July 2006, No 12892, pp. 48 *et seq.*; Ofgem's reply to the Phase II questionnaire of 2 August, No 14393, p. 9.

759 Standard Licence Condition 13, www.dti.gov.uk/files/fil29820.pdf (concerning the conditions which apply to the Interconnector); Standard Licence Conditions (www.dti.gov.uk).

demand in the United Kingdom, other importers could ask the parties to make those capacities available to them.

1118. The new interconnections created through this investment will be used by importers as soon as this is economically reasonable. Even if the parties were able to increase the price of gas at Zeebrugge and this had an impact at the NBP, such price increase would prompt the other importers to increase their imports into the United Kingdom, thus offsetting the effects of such an increase.

1119. Lastly, there is no evidence that the combining of storage capacities as a result of the merger could increase the parties' capacity to prevent the export, to the UK markets, of the volumes of gas that are not intended to supply the parties' customers. Storage capacities in Belgium are insufficient[760]. Consequently, even if there were surplus volumes in France and/or Belgium, these could be acquired by Belgian suppliers just as much as by UK suppliers.

1120. In conclusion, it is not therefore possible for the parties to increase the price of gas at the NBP in future or to pursue a strategy of withholding gas from the United Kingdom markets.

1121. This is all the more true as in general, the remedies proposed by the parties will eliminate the competition problems caused by the merger on the Belgian and French gas markets. As a consequence, the proposed remedies also resolve the possible negative effects on the UK markets, which are in any case only indirectly affected by a possible weakening of competition in Belgium and France.

Conclusion

1122. The market survey provided information that removes the doubts expressed in the Article 6(1)(c) decision.

3. <u>Hungary</u>

1123. In the decision under Article 6(1)(c) the Commission raised doubts concerning the energy markets in Hungary, given the two parties' activities on those markets and possible vertical relationships.

1124. The definition of the relevant product and geographic markets may be left open since the merger does not raise any competition concerns, whatever the market definitions in the gas and electricity sectors in Hungary.

1125. With regard to the parties' activities in Hungary, GDF controls two regional gas distribution companies: Égaz and Dégaz, which operate on the regulated supply market (‘public service’ segment) and on the market for the supply of gas to eligible customers. Through these companies, GDF has a market share of some [20-30]*% of a potential (narrow) public service market. In addition, GDF gained two customers on the free market in 2006, gaining a volume of [40-50]*million m³, representing a market share of some [0-5]*% on a potential market for eligible customers. GDF is also one of the suppliers of MOL Rt (now E.ON Gas Trade), with a volume of [0-5]* Gm³ a year.

[760] See paragraphs 224 *et seq*. of the statement of objections of 18 August 2006.

GDF also operates in the free market segment, through its subsidiary Edenergia Kft. Lastly, GDF participated in the gas release programme established following the Commission's decision in Case M.3696 - *E.ON/MOL* and purchased a total of [0-5]* Gm³ of gas over two years.

1126. Suez is involved, through Electrabel, in the electricity sector. It controls Dunamenti Erőmű Rt, a gas-fired power station with a capacity of [2 000-3 000]* MW (power in 2005: [1 000-2 000]* MW), the largest electricity supplier for the balancing market in Hungary. Dunamenti's annual consumption is currently [0-5]* Gm³. Dunamenti's gas is currently supplied by E.ON Gas Trade. Electrabel also recently established a trading subsidiary (Electrabel Magyarország Kft), in order to operate in the liberalised segment.

1127. Given these activities by the parties, the merger gives rise to vertical relationships, since GDF is a supplier of gas, the primary material used by Suez to feed the power station. However, the merger is not liable to have any negative impact on the energy markets in Hungary. In the first place, GDF is only a potential actor on the market for the supply of gas to power stations. Secondly, the capacities available to GDF represent only at most [0-5]*% of the requirements of the gas-fired power stations in Hungary and [10-15]*% of Dunamenti's consumption[761]. The parties therefore argue that the merger would not have any negative impact on the energy markets in Hungary, but on the contrary would promote keener competition because of the potential strengthening of GDF's position.

1128. The Hungarian regulator, the Hungarian Energy Office (HEO), confirmed this view and expressed its opinion that the merger would be neutral in its effect on competition in Hungary. The HEO believes that, following the merger, Dunamenti will be in a better position to purchase gas on the free market, since GDF can transport gas to Hungary. GDF is capable at least of supplying the volumes which it purchases under the gas release programme. Furthermore, it is possible that in 2007 a new model of a completely liberalised market will be introduced, which could stimulate competition on the energy markets in Hungary.

1129. The Commission has therefore found that the merger does not raise any competition concerns on the gas and electricity markets in Hungary.

4. The Netherlands

1130. Suez is active in the Netherlands on both electricity and gas markets, through Electrabel Nederland Beheermaatschappij B.V., which has recently absorbed Cogas Energy.[762] GDF is active in the Netherlands on gas markets, through its affiliates Gas de France Supply Trading & Marketing BV and Gas de France Production Nederland B.V.

[761] M.3696 *E.ON/MOL*, paragraph 620.

[762] Decision M.4370 of 29 September 2006.

Relevant markets

Product markets

1131. GDF is only active on the wholesale gas market and on the market of supply of gas to industrial customers in the Netherlands.

1132. According to Commission practice, industrial customers are to be distinguished from residential customers and electricity producers.[763] As the concentration does not raise competition problems under any of the possible alternative definitions, the definition of the product market can be left open.

Geographic markets

1133. Most previous Commission decisions have considered national markets as the relevant geographic markets for the supply of gas.[764]

1134. The definition of the geographic markets can be left open, as the concentration does not raise competition problems under any of the possible alternative definitions.

Competition analysis

1135. No potential market is affected: on all potential markets, the added market shares of Suez (including Cogas) and GDF are below 15%.

Conclusion

1136. It follows from the above that the concentration raises no competition problems on the gas markets in the Netherlands.

[763] Above regarding Belgium and France.

[764] Above regarding Belgium.

G. COMMITMENTS

THE REMEDIES OF 20 SEPTEMBER 2006

1137. On 20 September 2006, the deadline to submit remedies pursuant to Article 19(2) of Regulation (EC) No 802/2004, the parties submitted a package of remedies with the aim of eliminating the competition concerns identified by the Commission.

1138. These remedies, which took form of commitments, were composed of five elements as follows :

a) The creation, followed by divestiture to a third party, of a new company (NewCo) holding the following assets: (i) all the supply contracts concluded by Distrigaz with non-residential clients in Belgium, and all Distrigaz's activity in France; (ii) the supply contracts concluded by Distrigaz and Gaz de France with SPE; (iii) the gradual divestiture of upstream contracts with gas producers representing a volume of 50 TWh/year; (iv) a gas supply contract between the new group and NewCo, covering a period of six to eight years, for an initial volume of 83 TWh per year decreasing up to 33 TWh after the transfer of the contracts; and (v) transmission and storage capacity in Belgium and France which, under the rules in force, will be available to the purchaser of NewCo.

b) The divestiture of Gaz de France's holding in SPE.

c) A temporary gas release programme for a volume of 22 TWh per year for a period of six years for France and Belgium.

d) A number of measures relating to gas infrastructures in Belgium and France, in particular the reorganisation of the activities of Fluxys. The ownership and operation of Belgian gas infrastructures would be split into separate legal structures: (i) Fluxys Asset Owner (FAO), which would have ownership of all the transmission/transit and storage infrastructures, (ii) Fluxys International, which would own the LNG terminal, the Huberator and the other assets outside Belgium (e.g. BBL, etc.), and (iii) Fluxys System Operator (FSO), which would hold the rights to the capacity and would operate all the regulated infrastructures (transmission, transit, storage, Zeebrugge LNG terminal, etc.). The new group would not hold the majority of the shares in FAO. FSO would not be controlled either in fact or in law by the new group.

e) The divestiture of Cofathec Coriance plus the Cofathec Service district heating networks, with the exception of Cofathec Coriance's holding in Climespace and SESAS.

1139. The Commission tested these commitments with market players. The replies to this market test expressed serious doubts as to the adequacy of the proposed remedies to resolve all the competition concerns identified by the Commission.

1140. Firstly, the vast majority of the third parties questioned, including customers as well as the competitors and the regulators, pointed out the uncertainties regarding the economic

viability of the new company (NewCo), which was not yet active on the market. These uncertainties, according to the third parties, were based on a number of factors, such as the lack of gas resources and of sufficient flexibility to develop effectively on all the markets concerned; the fact that NewCo would be dependent on the parties for approximately 40% of its supply needs and would have very limited access to upstream contracts with producers, with the risk that NewCo would become no more than an intermediary, selling gas provided by the parties; the fact that the terms and conditions of the supply contract between NewCo and the Parties were not clearly set out; the duration of that contract, which would be insufficient to enable NewCo to undertake long-term planning; and the absence of opportunities for NewCo to gain access to the gas infrastructures necessary to operate effectively in the markets concerned.

1141. Secondly, regarding the gas release programme proposed by the parties, a large number of the third parties expressed doubts as to whether – given its inadequate size, its duration and the uncertainties surrounding the arrangements for its implementation – it would inject sufficient liquidity into the markets concerned and hence stimulate competition.

1142. Thirdly, as regards the remedies for the gas infrastructures in Belgium and France, the third parties acknowledged that the measures were a step in the right direction but generally felt that they were insufficient to guarantee Fluxys's independence from the merged entity and ensure that the market operated correctly.

1143. The divestiture of Gaz de France's holding in SPE was generally considered to be an essential condition for rectifying the competition concerns raised by the merger. Some of those asked, however, said that this measure was not sufficient to create an effective competitor for Electrabel in the Belgian electricity markets.

1144. Finally, as regards the market for district heating networks, the third parties questioned generally felt, with one or two exceptions, that the divestiture of Cofathec Coriance and Cofathec Service's district heating networks was a sufficient remedy to eliminate the competition concern identified by the Commission in this market.

1145. The Commission notified the parties of the result of the market survey without delay and gave them access to the non-confidential versions of the replies received by the Commission.

ASSESSMENT OF COMMITMENTS SUBMITTED ON 13 OCTOBER 2006

1146. On 13 October 2006 the parties submitted an amended package of remedies with the aim of overcoming the competition concerns identified by the Commission. These remedies, which take the form of commitments and replace the commitments proposed on 20 September 2006, are attached as Annex II and form an integral part of this Decision.

I. General description of the commitments

1147. The commitments submitted by the parties on 13 October 2006 are made up of five main parts:

i) divestiture to a third party of the Suez group's holding in Distrigaz;

ii) divestiture to a third party of GDF's holding (via Segebel) in SPE;

iii) restructuring of the activities of Fluxys s.a. and relinquishing of all control over the company[765];

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

v) divestiture to a third party of Cofathec Coriance and the district heating networks operated by Cofathec Services.

Divestiture of Distrigaz

1148. Suez will divest its holding in Distrigaz to a third party. Before this, the following three assets held by Distrigaz will be transferred to a company forming part of the merged entity: a 16.41% shareholding in Interconnector UK Ltd, the gas tanker Methania, and a 49% shareholding in the gas tanker Berge Boston.

1149. Prior to the divestiture of its stake in Distrigaz, the merged entity will conclude one or more supply contracts with Distrigaz, intended to cover part of the requirements of the electric power stations belonging to Electrabel and ECS, which will start to run on the date on which Distrigaz is divested.

1150. These supply contracts will be back-to-back contracts, and a downstream contract will be concluded for each upstream contract. The contractual volumes will correspond to:

- [...]* TWh, i.e. [90-100]*% of the contracts concerned, for the supply of electric power stations (C1 contracts);

- fractions of Distrigaz's import futures contracts already concluded on the date of this Decision and serving to supply the needs of ECS (C2 contracts). In the first year the total volume of these back-to-back contracts will be [...]* TWh (H gas: [...]* TWh; B gas: [...]* TWh), which will decrease in the coming years.

1151. The parties undertake that in the coming years, the volumes provided by Distrigaz to the merged entity under the contracts back to ,back with the C2 contracts will fall in line with (i) the gradual expiry of the C2 contracts that Distrigaz has in its portfolio on the date of this Decision (and therefore the natural decrease of the corresponding volumes) and, moreover, (ii) every fall in ECS's sales on the gas supply market to public gas suppliers.

[765] This restructuring operation is described in more detail below.

1152. The merged entity will be able to call on Distrigaz or its buyer to take all necessary steps to facilitate the transfer of the C1 contracts, with a total volume of [...]* TWh, since these contracts are intended to supply Electrabel's power stations. As these contracts will be transferred, the volumes of the C1 supply contract will decrease in parallel.

1153. The duration of the downstream contracts back to back with C1 contracts will be equal to the duration of these C1 contracts. The duration of the downstream contracts back to back with C2 contracts will be [...]* years at the most.

1154. Lastly, the parties undertake to transfer to Distrigaz, at any time, the storage capacity in Belgium and the corresponding volumes being stored, relating to any existing ECS public supply customer in Belgium which might be acquired by Distrigaz or by one of the dealers supplied by ECS.

Divestiture of SPE

1155. The parties undertake that GDF will relinquish its 50% shareholding in the capital of Segebel, a company which itself has a 51% shareholding in SPE's capital.

Reorganisation of Fluxys's activities and relinquishing of control of Fluxys as regards regulated activities

1156. Fluxys's activities will be reorganised into two entities, Fluxys s.a. and Fluxys International s.a. One of these, Fluxys International s.a., originating with the present Fluxys LNG s.a., will own the Zeebrugge LNG terminal and the non-regulated Belgian and international assets (BBL, Huberator, Gas Management Services Limited, Belgian Pipe Control, C4Gas and Endex). The other entity, Fluxys s.a., will own the entire Belgian gas transmission/transit system and all the Belgian gas storage infrastructure. To this end, GDF will transfer to it its 25% holding in Segeo (natural gas transmission/transit operator) and Suez will transfer to it Distrigaz & Co (which markets transit capacity on the Troll and rTr routes).

1157. Fluxys s.a. will operate all the infrastructure regulated under Belgian law (transmission/transit system, storage, LNG terminal).

1158. The parties undertake not to control Fluxys s.a., either in law or in fact or by a shareholders' agreement. In order to guarantee this commitment, the parties enter into the following undertakings.

1159. In the case of Fluxys s.a., the parties undertake:

- not to hold more than 45% of Fluxys s.a.'s capital; Publigaz holds 45% of this capital;

- not to have more than seven representatives out of 21 on the board, in parity with Publigaz, and not to make proposals for the nomination of the seven independent directors who will also be members of the board;

- that no Fluxys s.a. director will exercise any responsibility in gas supply activities;

- to set up a management committee within Fluxys s.a. with exclusive powers as regards (i) the management (including commercial strategy) of the regulated

infrastructures and (ii) the overall investment plan for regulated infrastructures in Belgium. The board will not be able to reject the overall investment plan except on the grounds of the impact any such investment would have on the company (in order to protect the financial interests of the shareholders as investors in the company). In this latter case the parties will vote to allow the investments to be financed by a third party and if necessary to allow the capital of Fluxys s.a. to be opened up to third parties with the specific objective of financing such investments;

- not to control the management committee, either in law or in fact or by a shareholders' agreement.

1160. In the case of Fluxys International s.a, the parties make the following commitments:

- the merged entity will hold not more than 60% of the company's capital;

- the Fluxys s.a. management committee, referred to above, will draw up an overall investment plan for the LNG terminal and the Zeebrugge hub, which the board of Fluxys International will be unable to reject except on grounds of its financial impact on the company (in order to protect the financial interests of the shareholders as investors in the company). On its own initiative, the management committee of Fluxys s.a. will also be able to propose additional investment in the regulated and unregulated assets owned by Fluxys International or its subsidiaries. Should these investments be rejected by the board of Fluxys International, the representatives of the merged entity will vote to allow the investments to be financed by a third party and if necessary to allow the capital of Fluxys International s.a. to be opened up to third parties with the specific objective of financing such investments.

Additional measures relating to gas infrastructures in Belgium and France

Belgium

1161. The parties undertake, in particular, to create a single point of entry at Zeebrugge bringing together the hub, the LNG terminal, the point of arrival of the Interconnector Zeebrugge Terminal (IZT) and the point of arrival of the Zeepipe Terminal (ZPT).

France

LNG storage and terminals

1162. The parties undertake in particular to develop new storage capacities (80 million m^3 at the Trois Fontaines site, available at the end of 2009, and 60 million m^3 at the Alsace site, available at the latest in 2018) and new capacity at the Montoir terminal (available as from 2007), and to offer this new capacity on the market before it becomes available and in part before the end of 2007. Concerning access to the Fos Cavaou terminal, as soon as it is commissioned, a transparent and non-discriminatory mode of commercialisation of the capacities which are not under long-term reservation will be established in coordination with the CRE.

Corrective mechanisms on the GRTgaz network

1163. The parties undertake to adopt a variety of measures designed to improve the operation of the 'use it or lose it' mechanisms and the returnable capacities.

Investment in deodorisation

1164. The parties undertake that GRTgaz will install a deodorisation plant at the Taisnières H entry point which will be able to provide a physical flow towards Belgium of 300 000 m3/h.

Governance and transparency

1165. The parties undertake in particular:

- to increase the independence of GRTgaz in the field of communication and to strengthen guarantees in connection with the protection of sensitive information;

- to transfer the activities of the LNG tanker-terminal operator to subsidiaries in accordance with rules on independence aligned on those of GRTgaz.

District heating networks

1166. The parties undertake to relinquish (i) Cofathec Coriance and all the elements which go to make up its stock-in-trade, including all its staff and all its contracts but excluding its holding in district cooling networks (i.e. Climespace, which operates the district cooling network in Paris, and SESAS, which operates the district cooling at the Stade de France) and (ii) the five district heating networks operated by Cofathec Services, as well as the staff associated with the operation of these networks.

II. Assessment of commitments

Introduction

1167. Where a concentration raises competition concerns in that effective competition in the common market or in a substantial part of it would be significantly impeded, in particular as a result of the creation or strengthening of a dominant position, the Commission may decide to declare a concentration compatible with the common market only following modification by the parties[766]. Where the modified commitments are proposed after expiry of the deadline set in Article 19(2) of Regulation (EC) No 802/2004, the Commission may only accept these modified commitments where it can clearly determine that such commitments, once implemented, resolve the competition problems identified and allow sufficient time for proper consultation of Member States[767].

1168. The Commission assesses the compatibility of a notified concentration with the common market on the basis of its effect on the structure of competition on the markets concerned. In assessing whether or not a remedy will restore effective competition the Commission considers all relevant factors relating to the remedy itself, including inter

[766] See first subparagraph of Article 8(2) of the Merger Regulation and paragraph 1 of the Commission Notice on remedies acceptable under Council Regulation (EEC) No 4064/89 and under Commission Regulation (EC) No 447/98, OJ C 68, 2.3.2001, p. 3.

[767] Paragraph 43 of the above Notice.

alia the type, scale and scope of the remedy proposed, together with the likelihood of its successful, full and timely implementation by the parties[768].

1169. According to the Commission Notice on remedies, divestiture is the most effective means of creating the conditions necessary for the emergence of a new competitive entity. The divested activities must consist of a viable business that, if operated by a suitable purchaser, can compete effectively with the merged entity on a lasting basis.

1170. Normally a viable business is an existing one that can operate on a stand-alone basis, which means independently of the merging parties as regards the supply of input materials or other forms of cooperation other than during a transitory period[769]. The parties must take into account the uncertainties and risks related to the transfer of a business to a new owner. These risks may limit the competitive impact of the divested business, and, therefore, may lead to a market situation where the competition concerns of the Commission will not necessarily be eliminated[770].

1171. As explained below, on the basis of its assessment of the information already received in the course of the investigation, including the results of prior market testing, the Commission considers that it can clearly determine, without the need for another market test, that the modified commitments proposed by the parties on 13 October 2006 are sufficient to resolve the competition problems raised by the notified concentration[771].

A) Competitiveness and viability of Distrigaz

1172. Suez's divestiture of its majority holding in Distrigaz constitutes an appropriate remedy to the loss of competitive pressure on the French and Belgian gas markets and the foreclosure problems on the Belgian electricity markets resulting from the notified merger. Distrigaz is a going concern which possesses all the requisite assets, and in particular supply contracts with producers, gas infrastructure reservations and an existing customer base. It is currently viable and well established on the Belgian and French gas markets and will therefore be able to compete effectively with the merged Suez/GDF entity in both countries.

Gas supply

1173. Distrigaz's viability is not jeopardised by the supply contracts with Electrabel and ECS (paragraph 16 of the commitments). These contracts concern the supply of only [...]* TWh to Electrabel and […]* TWh to ECS. The volumes covered by the supply contracts therefore amount to about [...]* of the total volume supplied by Distrigaz in 2005 and less than [...]*% of its current supplies under contracts, i.e. excluding spot

768 Paragraph 7 of the above Notice.

769 Paragraph 14 of the above Notice.

770 Paragraph 15 of the above Notice.

771 Paragraph 43 of the above Notice.

purchases. These supply contracts do not jeopardise Distrigaz's financial viability since they stipulate a margin of at least EUR [...]*/MWh for Distrigaz.

1174. The volumes of H and L gas under contracts which remain available to Distrigaz after having supplied the parties, are sufficient to supply all its existing customers in Luxembourg, France and Belgium, including SPE. Distrigaz will supply only […]* of Electrabel's power stations; the others will be supplied by the parties.

1175. The volumes of gas available to Distrigaz, after having supplied the parties, are sufficient to enable it to meet rising demand. Rising demand could initially come from rising consumption by existing customers. Subsequently, additional demand from SPE could increase as SPE will be able to take advantage of competition between Distrigaz and GDF/Suez to meet its needs for gas, currently covered by GDF, for supply to final customers. Lastly, Distrigaz will be able to start selling gas to household customers, a market on which it is not yet active in Flanders and which will be accessible to Distrigaz in Wallonia and Brussels only after its opening to competition on 1 January 2007. Distrigaz will be able to meet such additional demand through its existing contracts and through purchases on the Zeebrugge hub, as it does today. The buyer of Distrigaz must possess proven experience in the energy sectors and therefore be capable of extending existing contracts or concluding new ones with producers.

1176. Furthermore, the volume of the supply contracts (downstream contracts back to back with C2 contracts) is gradually falling owing to the expiry of Distrigaz's upstream contracts and ECS's projected loss of household customers in the wake of the liberalisation in Brussels and Wallonia.

1177. Moreover, the downstream contract back to back with C2 contracts concerning the supply of ECS run for at most [...]* years, whereas most of Distrigaz's upstream supply contracts are for longer periods. This means that Distrigaz's viability is also guaranteed in the long term since it will have even greater volumes at its disposal after [...]*, when the supply contracts with Electrabel and ECS expire.

1178. This analysis will not be affected by the parties' option of demanding the transfer of contracts for a volume of [...]* TWh for the supply of Electrabel's power stations (C1 contract). Firstly, [...]* TWh represents less than [...]*% of the total volume of Distrigaz's futures contracts. Secondly, these volumes are already covered by a supply contract between Distrigaz and Electrabel the volume of which will be reduced in proportion to the volumes of transferred contracts. The exercise of this option by the parties will not therefore reduce the volumes available to Distrigaz.

1179. The Commission also considers that the transfer to a company of the merged entity of Distrigaz' shareholding in Interconnector UK Ltd, of the LNG tanker Methania and of the 49% shareholding in the LNG tanker Berge Boston endangers neither the viability of Distrigaz nor its ability to compete effectively with the merged entity. These assets are not essential to ensure the economical viability and the competitiveness of Distrigaz on the affected markets.

Structure of the customer base and flexibility

1180. It is true that most of Distrigaz's current customers are industrial customers. Distrigaz will, however, keep its contracts for the supply of dealers such as [...]* and [...]* and continue to cover part of the gas needs of [...]* and [...]* power stations under back-to-back contracts. Moreover, Distrigaz will also be able to compete on the markets for gas supply to household customers and small industrial and commercial customers. This will be facilitated by the 'Distrigaz' brand, which is well known in Belgium and France. As explained above, Distrigaz will have access to the requisite volumes of gas. Distrigaz will therefore be able to put together a balanced customer portfolio.

1181. Distrigaz enjoys the total flexibility offered by its upstream supply contracts. This flexibility is sufficient to serve its existing customers and even, to a certain extent, to meet the flexibility needs of other categories of customer, e.g. power stations and household customers. Though the regulatory situation in Belgium means that Distrigaz's access to storage is currently rather limited, this situation could change quickly as Distrigaz acquires new customers connected to the distribution networks, especially household customers but also small industrial and commercial customers. In this event, the commitments provide for the immediate transfer of the relevant storage capacity and volumes to Distrigaz. Compared to the regulatory situation currently in force, this commitment considerably speeds up access to storage in the event of the acquisition of new customers.

Conclusions on Distrigaz's competitiveness and viability

1182. In the light of the above, the Commission concludes that Distrigaz will remain a viable business and be able to compete effectively with the new GDF/Suez entity in Belgium and France. Its competitiveness will be enhanced by the proven expertise in the energy sector required of the purchaser of Suez's majority holding in Distrigaz (paragraph 46 of the commitments). Moreover, the commitments relating to access to infrastructure will lower the barriers to entry and thereby allow Distrigaz to operate in a viable and competitive matter.

B) Divestment of SPE

1183. The parties undertake to divest GDF's 50% shareholding in Segebel, a company which in turn owns a controlling stake of 51% of SPE's shares.

1184. The Commission considers that the divestment of GDF's holding in SPE is necessary to eliminate the problems identified in the Belgian gas and electricity markets, as it would eliminate the current horizontal overlaps in those markets.

1185. However, as also highlighted by the market test, the Commission considers that the effectiveness of the divestment of SPE, in restoring competition to the electricity sector and to the supply of gas to small customers - by eliminating the current horizontal overlaps - must be assessed not in isolation, but in conjunction with the other remedies in the other affected gas markets in Belgium.

1186. SPE will be able to compete effectively with the parties in the Belgian electricity markets as effectively as it did prior to the transaction because it will have access to gas on competitive terms. The same applies to SPE's competitive position as a dealer in L and H gas.

1187. The divestment of Distrigaz, which has access to important quantities of L and H gas and to sources with considerable flexibility, means that the merged entity will have a viable competitor in the gas markets, including supply to electricity producers and dealers (see also above). The proposed remedies with regard to access to infrastructure will further enhance the viability of Distrigaz, by increasing the contestability of the market for the supply of gas to electricity producers.

1188. As a result, thanks to the implementation of the commitments, SPE will be able to benefit from the competition between the merged entity and Distrigaz so as to obtain supplies of gas for its gas-fired power plants and its own customers at competitive prices.

C) Remedies - Fluxys

1189. The Commission considers that the commitments given by the parties on 13 October concerning Fluxys s.a. and Fluxys International will lower the barriers to entry to the Belgian gas markets, barriers which were very high already before the merger and some of which would have been exacerbated by it, as demonstrated by the Commission in the course of the proceedings.

1190. The restructuring of Fluxys in line with the commitments, and the parties' commitment not to control Fluxys s.a. and its management committee, either in law or in fact or by shareholder agreement, will contribute to ensuring the independent management of the regulated gas infrastructure. Moreover, the divestment of Distrigaz will lead to the effective decoupling of the transport operator (Fluxys) from the main gas supplier (Distrigaz). The remedies will therefore lower the barriers to entry and will contribute to creating a level playing field for all competitors as regards access to infrastructure.

Independence of Fluxys

1191. The merged entity and Publigaz will each hold an identical stake in the capital of Fluxys s.a., consisting of no more than 45% of its shares, with the remainder (except the 'golden share' held by the Belgian government) being quoted on the stock exchange. Rather than holding a majority of voting rights in Fluxys s.a., therefore, the merged entity will have the same rights as Publigaz, i.e. 45%. Joint control by the merged entity and Publigaz by means of shareholders' agreement would be in breach of the commitments.

1192. The merged entity will not have a majority on the board of directors of Fluxys s.a., but will provide one third of its directors (7 out of 21). This opens up the possibility of shifting majorities.

1193. As a further guarantee of their commitment not to control Fluxys s.a. either in law or in fact or by shareholder agreement, the parties have offered to set up a management

committee (*comité de direction*) within the meaning of Article 524*bis* of the Belgian Company Code[772] (paragraph 58 of the commitments).

1194. It is provided that the management committee will have exclusive powers to manage all aspects of the company's activities in Belgium regarding transport/transit infrastructure, storage and the LNG terminal. As already pointed out above, the management committee will also draw up the investment plan.

1195. The system proposed by the parties for appointing members of the management committee (paragraph 59 of the commitments) will guarantee its independence from the board of directors. The appointment procedure will contain four successive safeguards to ensure the committee's independence from the parties: proposal by the remuneration committee; opinion from the corporate governance committee; approval by the CREG; and abstention of the merged entity in the vote.

1196. This system of governance in Fluxys will in practice remove from the board of directors any powers over matters entrusted to the management committee. As a result, the merged entity will have no right of veto over the commercial strategy of Fluxys s.a. and no decisive influence in matters that fall within the responsibility of the management committee.

1197. As regards the board of directors, a commitment has been given (paragraph 56) that the merged entity will waive the right to nominate independent directors for the board. This will also ensure the genuine independence (before and after nomination) of the seven independent directors. It is also provided that the CREG will certify the independence of candidates for the post of independent director. Consequently, only one third of the directors will represent the merged entity on the board of directors, opening the way to shifting majorities and preventing any possibility of the merged entity exercising a veto.

---

772 'The board of directors may be authorised by the articles of association to delegate its management powers to a management committee, but such delegation may not concern the company's general policy or any acts that are reserved for the board of directors by other provisions of the law. Where a management committee is set up, it shall be supervised by the board of directors.

The management committee shall consist of several persons, who may or may not be directors. The conditions for the appointment, dismissal, remuneration and term of office of members of the management committee and the committee's operating procedures shall be laid down by the articles of association or, failing such a clause in the articles of association, by the board of directors.

The articles of association may empower one or more members of the management committee to represent the company, either alone or together.

The establishment of a management committee and the clause in the articles of association referred to in the third paragraph may be enforced against third parties under the terms laid down by Article 76. Publication shall contain a specific reference to this Article.

The articles of association or a decision by the board of directors may impose restrictions on the management powers which may be delegated pursuant to the first paragraph. These restrictions and any allocation of tasks which is agreed by the members of the management committee may not be enforced against third parties, even if they have been published'.

1198. Lastly, the parties' commitment (paragraph 52) to propose to the Federal Minister for Energy[773] that Fluxys s.a. be designated sole manager of gas infrastructure in Belgium[774] should have the effect of making Fluxys subject to the Gas Law.

1199. To conclude, the Commission considers that the set of measures described above will guarantee that the merged entity will not control Fluxys s.a.

Fluxys International and the Zeebrugge Hub

1200. The merged entity will own no more than 60% of Fluxys International s.a., formed from the present Fluxys LNG s.a., which will own the LNG terminal in Zeebrugge and the unregulated Belgian and international assets.

1201. Nevertheless, according to the commitments, Fluxys International s.a will grant Fluxys s.a. all the requisite rights to use installations and equipment regulated under Belgian law and delegate to Fluxys s.a. all the tasks necessary for it to perform its role as manager of the LNG terminal in Zeebrugge (paragraph 61 of the commitments). The system of governance proposed for Fluxys s.a. will therefore also apply to Fluxys International, which will in practice be managed independently of the parties, as decisions by Fluxys concerning the management of Fluxys International on the above-mentioned issues, which are the sole responsibility of the management committee of Fluxys s.a., will escape the control of the merged entity.

Investment incentives for Fluxys s.a. and Fluxys International

1202. Moreover, the parties will not be able to block investment decisions relating to infrastructure controlled by Fluxys and Fluxys International. The commitments provide that decisions on investments concerning the infrastructures owned by Fluxys s.a. and Fluxys International be delegated to the management committee of Fluxys s.a. (paragraphs 60 and 63). The commitments also provide a further procedure whereby any investments deemed necessary can be financed by opening up the capital of Fluxys s.a. and Fluxys International to third parties.

Commitments relating to transit

1203. Finally, the commitments relating to transit (paragraphs 70 and 71) will serve to strengthen the legal framework for the transit of gas in Belgium (the importance of this aspect was stressed by many third parties throughout the proceedings) through the transfer to Fluxys s.a. of Distrigaz &Co and of GDF's stake in Segeo and the commitment by Fluxys s.a. to apply the code of conduct (currently applicable to transmission) to new transit contracts.

---

773 In accordance with Article 8(2) of the Law of 12 April 1965 on the transport of gas and other products by pipeline.

774 This will also cover the management of capacities currently in the hands of Distrigaz & Co and Segeo.

D) Commitments on investments

1204. The parties undertake to make a series of investments to increase Belgian and French gas infrastructure capacity (paragraphs 62 to 80 of the commitments).

1205. These include the creation in Zeebrugge of a single entry point, thereby making it possible to link up the hub, the LNG terminal, the arrival point of the Interconnector Zeebrugge Terminal ('IZT) and the arrival point of the Zeepipe Terminal ('ZPT'). This will help solve the difficulties resulting from the lack of access capacity at the hub. The single entry point will make it possible to transfer volumes within this area from any point bordering the Zeebrugge zone, at a primarily 'commodity' tariff and without having to reserve capacity. This new service will contribute to the development of the Zeebrugge zone and strengthen the hub's liquidity. This type of connection will improve liquidity at the hub, since all operators active on the other terminals will be able to negotiate on the hub without having to overcome existing barriers to entry.

1206. The parties also propose to launch a 'market consultation' as regards a second extension of the Zeebrugge LNG terminal, which would improve capacity and increase the gas volume available in Belgium and for trading on the Zeebrugge hub.

1207. In addition, Fluxys has committed to making the necessary investments to improve the interconnection of the three terminals (Interconnector Zeebrugge Terminal, Zeepipe Terminal and LNG terminal) by October 2010 at the latest. Such interconnection will increase liquidity on the Belgian and French markets.

E) Effects of the commitments on the Belgian gas markets

1208. Given the above, the parties' commitments (divestment of their majority holding in Distrigaz, referred to below as 'Distrigaz transfer'), divestment of their controlling stake in SPE, abandonment of control over Fluxys, commitments regarding infrastructure) will restore competitive conditions comparable to those existing prior to the merger on Belgian gas markets and will compensate for the elimination of the actual and potential competition exercised by GDF on Suez in Belgium. Furthermore, the lowering of barriers to entry on the Belgian markets by means of the effective unbundling of Fluxys s.a. will facilitate new entries on these markets.

Supply of gas to electricity producers in Belgium

1209. The disappearance of GDF as a potential competitor in the market for supplying gas to electricity producers in Belgium will be compensated for by the Distrigaz divestment. Further to the implementation of the commitments, there will be three effective suppliers to electricity plants, namely Distrigaz, the merged entity and, to a lesser extent (see above) Wingas, as there were before the merger. Furthermore, the lowering of barriers to entry to the Belgian markets by means of the effective unbundling of Fluxys s.a. will facilitate SPE's and other electricity producers' gas procurement from other suppliers.

Supply of gas to dealers in Belgium

1210. In the markets for the supply of H gas and L gas to dealers in Belgium, the remedies correct the negative effects of the notified transaction, namely the merger of the two

sole current suppliers, GDF and Distrigaz. Once the remedies have been implemented, there will be two viable and independent players with sufficient quantities of H gas and L gas, i.e. Distrigaz and the merged entity, as is currently the case.

Gas supply to large industrial customers in Belgium

1211. In the markets for the supply of H gas and L gas to large industrial customers in Belgium, the commitments compensate for the negative effects of the concentration because GDF and Distrigaz remain independent of one another.

Gas supply to small industrial customers and household customers in Belgium

1212. In the markets for the supply of H gas and L gas to small industrial and commercial customers and to household customers in Belgium, the commitments will ensure SPE's independence vis-à-vis the merged entity, notably via the divestment of GDF's stake in SPE. SPE will be able to play off GDF/Suez and Distrigaz against one another, thereby obtaining supplies under competitive conditions. In addition, Distrigaz itself will be able to enter these markets, especially as the commitments facilitate access to storage, immediately in Flanders and from 1 January 2007 onwards in Brussels and Wallonia, thereby further stimulating competition. Thanks to its expertise and brand recognition in Belgium, Distrigaz will be able to enter the markets for the supply of gas to household customers.

Conclusion regarding gas markets in Belgium

1213. The Commission therefore concludes that the remedies proposed by the parties are sufficient to prevent the notified concentration from significantly impeding effective competition in the Belgian gas markets, without the necessity of additional measures such as a gas release programme.

F) Effects of the commitments on the gas markets in France

1214. As explained above (see section A.3.4.2), Suez is one of the competitors best placed to compete with GDF in France.

1215. Following the merger, as demonstrated above, Distrigaz will remain viable and able to exert significant competitive pressure on the newly merged entity comparable to that exercised by Distrigaz before the merger. In addition, the other remedies regarding gas infrastructures in France will contribute to lowering the entry barriers to the French gas supply markets, facilitating the emergence of new players on these markets.

Markets for the supply of H gas to large industrial customers which have exercised their eligibility in the North, East, West and South zones

1216. In the markets for the supply of H gas to large industrial customers which have exercised their eligibility in the North, East, West and South zones, where Distrigaz was one of GDF's main competitors, the commitments will serve to restore the competitive pressure that was exerted by Distrigaz, in particular on GDF.

Markets for the supply of H gas to small industrial customers which have exercised their eligibility in the North, East, West, South and South-West zones

1217. In the markets for the supply of H gas to small industrial customers which have exercised their eligibility in the North, East, West, South and South-West zones, where Distrigaz was one of the few alternative suppliers, the commitments will serve to restore the competitive situation that existed before the merger and will give Distrigaz the chance to develop in these markets.

Markets for the supply of L gas to (i) large industrial customers which have exercised their eligibility and (ii) small industrial customers which have exercised their eligibility in the North zone

1218. In the markets for the supply of L gas to (i) large industrial customers which have exercised their eligibility and (ii) small industrial customers in the North zone, where the merger would result in the disappearance of one of the three alternative suppliers of L gas, the commitments will serve to restore the competitive situation that existed before the merger and will give Distrigaz the chance to develop in these markets.

Markets for the supply of H gas to dealers in the North and East zones and the market for the supply of L gas to dealers in the North zone

1219. In the markets for the supply of H gas to dealers in the North and East zones and the market for the supply of L gas to dealers in the North zone, the commitments will serve to restore the potential competition exerted before the merger by Distrigaz, as one of the operators best placed to compete against GDF.

Markets for the supply of (i) H gas to household customers from 1 July 2007 in the North, East, West, South and South-West zones and (ii) L gas to household customers from 1 July 2007 in the North zone

1220. In the markets for the supply of (i) H gas to household customers from 1 July 2007 in the North, East, West, South and South-West zones and (ii) L gas to household customers from 1 July 2007 in the North zone, the commitments will serve to restore the potential competition exerted before the merger by Distrigaz, as one of the operators best placed to compete against GDF.

Markets for the supply of (i) H gas to electricity producers in the North and East zones and (ii) L gas to electricity producers in the North zone

1221. In the markets for the supply of (i) H gas to electricity producers in the North and East zones and (ii) L gas to electricity producers in the North zone, the commitments will serve to restore the potential competition exerted before the merger by Distrigaz, as one of the operators best placed to compete against GDF. Since Distrigaz will remain a viable company that will be able to compete effectively against the new merged entity, it will have the necessary gas resources to guarantee a long-term supply to electricity producers, as the latter require.

Conclusion regarding gas markets in France

1222. The Commission therefore concludes that the remedies proposed by the parties are sufficient to prevent the notified concentration from significantly impeding effective

competition in the French gas markets, without the necessity of additional measures such as a gas release programme.

G) Effects of the commitments in the electricity markets in Belgium

1223. The divestment of GDF's stake in SPE (considered in conjunction with the other remedies proposed for the gas markets) is sufficient to restore competitive conditions.

1224. The divestment of SPE would remove the current horizontal overlaps in the electricity markets. The divestment of Distrigaz, which has access to important volumes of gas and sources with substantial flexibility, restores a viable competitor for the merged entity in the gas markets, including the supply of gas to electricity producers (see also above). The proposed remedies regarding access to infrastructure reinforce the contestability of the market for supplies to electricity producers. The proposed remedies would therefore eliminate the vertical problems created by the merger in relation to foreclosure. The competitive conditions for the supply of gas to electricity producers, including SPE and future new producers, are thus re-established.

1225. The remedies proposed for the gas markets, including supply to dealers, re-establish the possibilities for electricity suppliers to make dual-fuel offers.

Conclusion regarding electricity markets in Belgium

1226. The Commission therefore concludes that the remedies proposed by the parties are sufficient to prevent the notified concentration from significantly impeding effective competition in the Belgian electricity markets.

H) Effects of the divestment of Cofathec Coriance on the market for district heating in France

1227. The commitment proposed for eliminating the problems identified in the market for district heating in France (by hiving off GDF's subsidiary, Cofathec Coriance) would remove the horizontal overlap created by the transaction. Given the number of networks ([...]*) and the volume of heat production ([...]* GWh) divested, significant in comparison to those of Idex ([...]* networks, [...]* GWh) and Soccram ([...]* networks, [...]* GWh), the viability of the divested entity is guaranteed. The divested entity will therefore be able to play a credible role in tendering procedures and hence encourage competition, even in the hypothetical scenario described above where Soccram cannot be regarded as a competitor independent of the parties.

1228. Since this commitment entirely eliminates the horizontal overlap in a structural and well defined manner, the Commission considers that it is sufficient to eliminate the concerns identified in this Decision as regards the market in question.

F. CONCLUSION

1229. In view of the foregoing, and subject to full compliance with the commitments submitted by the parties on 13 October 2006, the Commission considers that the notified merger will not significantly impede effective competition in the common market or a substantial part of it. Subject to full compliance with all the commitments contained in Annex II to this Decision, the merger should therefore be declared compatible with the common market and the EEA Agreement in accordance with Articles 2(2) and 8(2) of the Merger Regulation and with Article 57 of the EEA Agreement,

HAS ADOPTED THIS DECISION:

Article 1

The notified operation whereby Gaz de France and Suez merge within the meaning of Article 3(1)(a) of Regulation (EC) No 139/2004 is hereby declared compatible with the common market and the functioning of the EEA Agreement.

Article 2

Article 1 is subject to compliance with the conditions set out in paragraphs 1 to 4, 6 to 11, 13, 19, 20 fifth indent, 21, 22, 28, 31, 34, 51 to 54, 56, 58, 61, 62, 64, 65 and 70 of Annex II.

Article 3

Article 1 is subject to compliance with the obligations deriving from the commitments set out in the remaining paragraphs of Annex II.

Article 4

This Decision is addressed to:

GAZ DE FRANCE
23, rue Philibert Delorme
75008 Paris
France

SUEZ
16, rue de la Ville l'Eveque
75008 Paris
France

Done at Brussels, 14 November 2006

For the Commission

Neelie Kroes
Member of the Commission

Annex 1: Electricity trading market

These tables summarise the replies to question 25(f) of the '(Potential) Competitors Electricity' questionnaire

R(1) = RWE (No 14744)
R(2) = EDF (No 15074)
R(3) = SPE (No 13997)
R (4) = Nuon (No 13797)
R (5) = Shell (No 13184)
R (6) = Vattenfall (No 13541)
R (7) = Centrica (No 13872)

Bid/offer spread for spot (€/MWh)

Country	R(1)	R(2)	R(3)	R(4)	R(5)	R(6)	R(7)
Belgium		1.00-4.00	1.00	3.00-4.00		0.5-1.00	
Germany		0.2.-0.5				0.00-0.50	
France		0.30-1.5	1.00	1.00-2.00		0.1-0.50	
Netherlands		0.50-2.00	0.25	1.00-2.00		0.25-0.75	
United Kingdom		0.30-2.00					

Bid/offer spread for futures

Country	R(1)	R(2)	R(3)	R(4)	R(5)	R(6)	R(7)
Belgium		1.0-2.0 (month and quarter) 0.25-0.75 (cal 07)	0.50 (month, quarter and years)	Rarely two-way market		0.5-2.00 (depending on product)	
Germany		0.05-0.4				0.15-1.00 (depending on product)	
France		0.10-0.65	0.50 (month, quarter and years)	0.10-0.60		0.25-2 (depending on product)	
Netherlands		50-100 (month, quarter) 0.2-0.3 (cal 07)	0.25 month 0.50 quarter and year	0.10-0.60		0.25-2 (depending on product)	
United Kingdom		0.15-0.3					

Availability and prices of base-load and peak-load products

Pays	R(1)	R(2)	R(3)	R(4)	R(5)	R(6)	R(7)
Belgium	Almost no peak trading	Only base. No peak	Base available but not always at	Base and peak market inactive	Limited	Insufficient all products	

			reasonable prices, almost no peak				
Germany	Different types available	Base, peak and off-peak		German price but lower volumes		Sufficient all products except for front quarter peak	Base and peak liquid
France	Shortage of peak at present	Base, peak and off-peak	OK	Base and peak market active		Sufficient except for front quarter base and peak	Base and peak not liquid
Netherlands	Shortage of peak	Especially base and off-peak	OK	Base and peak market active		Sufficient all products except for front quarter base and peak	
United Kingdom	Various contracts available. Shortage of peak at present	Base, peak, off-peak					Liquid for certain short-term base and peak contracts, not liquid for peak futures

Availability of contracts for different durations and delivery periods

Country	R(1)	R(2)	R(3)	R(4)	R(5)	R(6)	R(7)
Belgium	Available	spot, first 2 months, 2 quarters 2 years. No long-term (y+3 and beyond)	Spot, month M+1 available Most favourable cases: 2 months and 2 years	spot, month (M+1) and year (Y+1) in base. No market other quarters and months	Limited	Insufficient all products	
Germany	Available	Short-term, 6 months, 7 quarters, 4 years		Market liquid all products		Sufficient all products except for front quarter peak	Days, weeks, months and years liquid
France	Available	Short-term, 6 months, 7 quarters, 4 years	Spot, 3 months 2-3 quarters, 3 years	M+1 and Y+1 liquid, other futures not		Sufficient except for front quarter base and	Days, weeks, months and years not

				liquid		peak	liquid
Netherlands	Available	Spot, 2 weeks, 3 months, 6 quarters, 4 years	Spot 2 or 3 months ahead, 3-4 quarters, 3 years			Sufficient all products except for front quarter base and peak	
United Kingdom	Available	Spot 3 weeks, 3 month, 2 quarters, 6 seasons					Days, weeks and months (m+1) liquid, not liquid on futures

Number of bids and offers at a given time (in number of bids/offers)

Country	R(1)	R(2)	R(3)	R(4)	R(5)	R(6)	R(7)
Belgium		0/2	1/1	5-10	1/1	5	
Germany		Very liquid		200		20	
France		A little less liquid than the German market	2/2	50-100		10	
Netherlands		2-5	3/3	50-100		10	
United Kingdom		1/5					

Number of participants on the supply side

Country	R(1)	R(2)	R(3)	R(4)	R(5)	R(6)	R(7)
Belgium	5	2 generators	1	<5	7	5	
Germany	34	4 generators and hundreds at municipal level		>50		50	
France	10	3	2	>10		10	
Netherlands	18	6 generators	3	>10		10	
United Kingdom		10 generators					

Number of participants on the demand side

Country	R(1)	R(2)	R(3)	R(4)	R(5)	R(6)	R(7)
Belgium	5	>10	1	>10	12	5	
Germany	34	>15		>100		100	
France	10	>5	2	>20		10	
Netherlands	18	>15	3	>20		10	

United Kingdom		>10					

Type of participants (physical ('P')/financial ('F'))

Country	R(1)	R(2)	R(3)	R(4)	R(5)	R(6)	R(7)
Belgium	F and P	P	P		Especially P	P and F = 90/10%	
Germany	F and P	F and P				P and F = 80/20%	F and P
France	F and P	P	P and F				F and P
Netherlands	F and P	P	P and F			P and F = 90/10%	
United Kingdom		F and P					F and P

Volume of bids and offers at a given time (bids/offers in MW)

Country	R(1)	R(2)	R(3)	R(4)	R(5)	R(6)	R(7)
Belgium			Spot 75, futures 10 or nothing	25-50		50	
Germany				>1000		200	
France			Spot 200, futures 25	>500		100	
Netherlands			spot 150, futures 50	>500		100	
United Kingdom		A little less liquid than the German market					

ANNEX 2

The full original text of the conditions and obligations referred to in Articles 2 and 3 may be consulted on the following Commission website:
http://ec.europa.eu/comm/competition/index_en.html

EUROPEAN COMMISSION

The Hearing Officer

FINAL REPORT OF THE HEARING OFFICER IN CASE COMP/M.4180 – Gaz de France / Suez

(pursuant to Articles 15 and 16 of Commission Decision (2001/462/EC, ECSC) of 23 May 2001 on the terms of reference of Hearing Officers in certain competition proceedings – OJ L162, 19.06.2001, p.21)

On 10 May 2006 the Commission received a notification of a proposed concentration pursuant to Article 4 of Council Regulation (EC) No 139/2004 (the Merger Regulation) according to which the undertakings Gaz de France and Suez would merge, within the meaning of Article 3.1 (a) of the Merger Regulation, via an exchange of shares.

By decision dated 19 June 2006 the Commission found that the transaction raised serious doubts as to its compatibility with the common market and the functioning with the EEA Agreement. Accordingly, the Commission initiated proceedings in accordance with Article 6.1(c) of the Merger Regulation.

A statement of objections was sent to the parties on 18 August 2006 to which they were asked to reply by 1 September 2006. On the same day, the parties were granted access to the file, which was completed on 21 August. The parties replied to the Statement of Objections within the deadline.

The Parties were given additional access to the file on 9 October and on 20 October 2006, which allowed them the opportunity of making their views known on the objections against them, within the meaning of Article 18.1 of the Merger Regulation.

The parties did not request the opportunity to develop their arguments at an oral hearing.

Several competitors and clients of the merging parties were admitted to the proceedings as interested third parties according to Article 18.4 of the Merger Regulation. They were informed of the nature and subject matter of the case in the form of non-confidential versions of the Statement of objections. However, I rejected a request from the European Federation of Public Service Unions' (EPSU) to receive a non confidential version of the Statement f Objections. In particular, I took note of the fact that EPSU is neither the recognised representative of the employees of the undertakings concerned, nor a consumer association within the meaning of Article 11 (c) of Commission Regulation (EC) 802/2004[775] and had not demonstrated a sufficient interest in the proceedings.

[775] Commission Regulation (EC) 802/2004 of 7 April 2004 implementing Council regulation (EC) 139/2004 on the control of concentrations between undertakings, *Implementing Regulation,* OJ L 133, 30.4.2004, p.1.

On 20 September 2006 the parties offered commitments in order to resolve the competition concerns identified in the Statement of Objections. A market test of the commitments was carried out and the result of the market inquiry indicated that the commitments were not sufficient to remove the competition concerns identified by the Commission. The Parties were immediately given access to all non-confidential replies by participants to the market test. I have not been asked to verify the objectivity of the market inquiry.

On 10 October 2006, the Commission decided, in agreement with the parties, to extend the procedure with 5 working days pursuant to Article 10.3, second paragraph of the Merger Regulation.

Subsequently, on 13 October 2006, the parties submitted new modified commitments in order to resolve the remaining competition concerns. The Parties have indicated that these commitments would replace the commitments submitted on 20 September.

Subject to full compliance with the commitments submitted on 13 October 2006 the draft decision concludes that the proposed concentration will not significantly impede effective competition and is hence compatible with the common market and the EEA Agreement.

I consider that the rights to be heard of all participants to the present proceedings have been respected.

Brussels, 30 October 2006

(signed)
Serge DURANDE

EUROPEAN COMMISSION
Competition DG

Policy and Strategic Support
Enforcement Priorities and Decision Scrutiny

OPINION

of the ADVISORY COMMITTEE on CONCENTRATIONS

given at its 144th meeting on 25 October 2006

concerning a draft decision relating to

Case COMP/M.4180 – Gaz de France/Suez

Rapporteur : SWEDEN

---

1. The Advisory Committee agrees with the Commission that the notified operation is a concentration within the meaning of Article 3(1)(a) of the EC Merger Regulation [132/2004].

2. The Advisory Committee agrees with the Commission that for the purpose of assessing the present operation the definitions of the relevant **product markets, as concerns gas in Belgium**, are:

   (a) The product markets for supply of gas shall each be divided into two separate product markets for L gas and H gas.
   (b) Supply of gas to intermediary resellers.
   (c) Supply of gas to electricity producers/gas fired power plants.
   (d) Supply of gas to large industrial customers.
   (e) Supply of gas to small and industrial and commercial customers.
   (f) Supply of gas to household customers.
   (g) Trading of natural gas on a hub.

3. The Advisory Committee agrees with the Commission that for the purpose of assessing the present operation the definitions of the relevant **geographic markets, as concerns gas in Belgium**, are:

   (a) Supply of gas to intermediary resellers – national geographic market.
   (b) Supply of gas to electricity producers – national geographic market.
   (c) Supply of gas to large industrial customers – national geographic market.
   (d) Supply of gas to small and industrial and commercial customers – national geographic market.
   (e) Supply of gas to household customers – national or regional geographic market. If these markets were to be considered regional, the relevant product market would include only L gas in the Brussels Capital Region.
   (f) Trading of natural gas on a hub – Belgian hub and UK hub.

   The majority of the Member States agrees, a minority disagrees concerning point (f).

4. The Advisory Committee agrees with the Commission that for the purpose of assessing the present operation the definitions of the relevant **product markets, as concerns gas in France**, are:

   (a) The product markets, as concerns supply of gas in the North zone, shall be divided into two separate product markets for L gas and H gas.
   (b) Supply of gas to intermediary resellers.
   (c) Supply of gas to electricity producers/gas fired power plants.
   (d) Supply of gas to large industrial and commercial customers (who have exercised their eligibility).
   (e) Supply of gas to small industrial customers (who have exercised their eligibility).
   (f) Supply of gas to household customers (eligible from 1 July 2007).

5. The Advisory Committee agrees with the Commission that for the purpose of assessing the present operation **as concerns gas in France**, the definitions of the relevant **geographic markets,** are based on the regional balancing zones and that each of them constitutes a relevant geographic market for all product markets as identified in question 4.

6. The Advisory Committee agrees with the Commission that for the purpose of assessing the present operation the definitions of the relevant **product markets, as concerns electricity in Belgium**, are:

   (a) Electricity generation and wholesale supply.
   (b) Electricity trading market.
   (c) Balancing power and ancillary services.
   (d) Supply to large commercial and industrial customers (›70kV).
   (e) Supply to small commercial and industrial customers (‹70kV).
   (f) Supply to household customers.

7. The Advisory Committee agrees with the Commission that for the purpose of assessing the present operation the definitions of the relevant **geographic markets, as concerns electricity in Belgium**, are:

   (a) Electricity generation and wholesale supply – national geographic market.
   (b) Electricity trading market – national geographic market.
   (c) Balancing power and ancillary services – national geographic market.
   (d) Supply to large commercial and industrial customers – national geographic market.
   (e) Supply to small industrial and commercial customers – national geographic market.
   (f) Supply to eligible household customers – regional geographic or national markets (left open).

8. The Advisory Committee agrees with the Commission that for the purpose of assessing the present operation the definition of the relevant **product market, as concerns district heating in France**, is:

    - Market for the delegated management of district heating networks.

9. a. The Advisory Committee agrees with the Commission that for the purpose of assessing the present operation the definition of the relevant **geographic market, as concerns district heating in France**, is:

    - Market for the delegated management of district heating networks – national geographic market.

9. b. The Advisory Committee agrees with the Commission that for the purposes of assessing the present operation, it is not necessary to come to a conclusion on the definition of the relevant product and geographic markets in respect of any horizontal overlaps or vertical relationship between the parties in Luxembourg, the UK, the Netherlands and Hungary.

10. The Advisory Committee agrees with the Commission that the proposed concentration is likely to result in a **significant impediment to effective competition** in the common market or in a substantial part of it and the EEA for the following markets:

    Belgium:

    (a) Supply of gas to intermediary resellers;

    (b) Supply of gas to electricity producers;

    (c) Supply of gas to large industrial customers;

    (d) Supply of gas to small industrial customers;

    (e) Supply of gas to household customers;

    (f) Generation and Wholesale of electricity;

    (g) Balancing power and ancillary services;

    (h) Supply of electricity to large industrial customers;

    (i) Supply of electricity to small industrial customers;

    (j) Supply of electricity to residential customers.

France:

(a) Markets for the supply of H gas to intermediary resellers in the North and East zones and the market for the supply of L gas to intermediary resellers in the North zone;

(b) Markets for the supply of (i) H gas to electricity producers in the North and East zones and (ii) L gas to electricity producers in the North zone;

(c) Markets for the supply of H gas to large industrial customers which have exercised their eligibility in the North, East, West and South zones;

(d) Markets for the supply of H gas to small industrial customers which have exercised their eligibility in the North, East, West, South and South-West zones;

(e) Markets for the supply of L gas to (i) large industrial customers which have exercised their eligibility and (ii) small industrial customers which have exercised their eligibility in the North zone;

(f) Markets for the supply of (i) H gas to household customers from 1 July 2007 in the North, East, West, South and South-West zones and (ii) L gas to household customers from 1 July 2007 in the North zone;

(g) Market for delegated management of district heating networks.

11. The Advisory Committee agrees with the Commission that the **commitments** are **sufficient** to remove the significant impediments to competition in the markets identified in Question 10. The majority of the Member States agrees, a minority disagrees.

12. The Advisory Committee agrees with the Commission that, subject to full compliance with the commitments offered by the parties, and considered all commitments together, the proposed concentration does **not significantly impede effective competition** in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, within the meaning of Article 2(2) and 8(2) of the Merger Regulation and Article 57 of the EEA Agreement. The majority of the Member States agrees, a minority disagrees.

13. The Advisory Committee asks the Commission to take into account all the other points raised during the discussion

BELGIË/BELGIQUE	**ČESKÁ REPUBLIKA**	**DANMARK**	**DEUTSCHLAND**	**EESTI**
K. BOEYKENS	---	---	M. HERBERT	---
ELLADA	**ESPAÑA**	**FRANCE**	**IRELAND**	**ITALIA**
---	J. FORNELLS DE FRUTOS	E. CUZIAT	---	A. VENANZETTI
KYPROS/KIBRIS	**LATVIJA**	**LIETUVA**	**LUXEMBOURG**	**MAGYARORSZÁG**
---	---	---	---	---
MALTA	**NEDERLAND**	**ÖSTERREICH**	**POLSKA**	**PORTUGAL**
---	J. DE MAA	I. SCHNEIDER	A. ZAWŁOCKA	J. LOPES
SLOVENIJA	**SLOVENSKO**	**SUOMI-FINLAND**	**SVERIGE**	**UNITED KINGDOM**
---	---	K. KOIVUNEN	C. BERGER	F. PEÑA