



EUROPEAN COMMISSION
DG Competition

PUBLIC VERSION

Case M.8870 – E.ON / INNOGY

(Only the English text is authentic)

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

Article 8(2) Regulation (EC) 139/2004
Date: 17/09/2019

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Parts of this text have been edited to ensure that confidential information is not disclosed; those parts are enclosed in square brackets.



EUROPEAN
COMMISSION

Brussels, 17.9.2019
C(2019) 6530 final

COMMISSION DECISION

of 17.9.2019

**declaring a concentration to be compatible with the internal market and the EEA
agreement**

Case M.8870 – E.ON/Innogy

(Only the English text is authentic)

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COMMISSION DECISION

of 17.9.2019

declaring a concentration to be compatible with the internal market and the EEA agreement

Case M.8870 – E.ON/Innogy

(Only the English text is authentic)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

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 20.1.2004 on the control of concentrations between undertakings¹, and in particular Article 8(2) thereof,

Having regard to the Commission's decision of 7 March 2019 to initiate proceedings in this case,

Having regard to the opinion of the Advisory Committee on Concentrations,

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

Whereas:

1. INTRODUCTION

- (1) On 31 January 2019, the European Commission received notification of an intended concentration, pursuant to Article 4 of the Regulation (EC) No 139/2004 ('the Merger Regulation'), by which E.ON SE ("E.ON", Germany) would acquire, within the meaning of Article 3(1)(b) of the Merger Regulation, sole control over the distribution and consumer solutions business and certain electricity generation assets of Innogy SE ("Innogy", Germany) ("the Concentration").
- (2) The proposed acquisition consists of two steps. As a first step, E.ON would acquire the whole of Innogy. As a second step, E.ON would carve-out the majority of Innogy's renewable electricity generation business, its gas storage business and its minority participation in Kärntner Energieholding Beteiligungs GmbH and would transfer those assets ("Re-Transfer-Assets") back to RWE AG ("RWE"), the current sole owner of Innogy.
- (3) E.ON is sometimes hereinafter referred to in this Decision as "The Notifying Party" and together with Innogy as "the Parties".

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

2. THE PARTIES

- (4) E.ON is an energy company active across the supply chain, including generation, wholesale supply, transmission, distribution, retail supply and energy-related activities (such as metering, e-mobility, etc.). E.ON is active in several Member States, including Denmark, Czechia, Germany, Hungary, Italy, Poland, Romania, Slovakia, Sweden, United Kingdom.
- (5) Innogy, a majority-owned subsidiary of RWE, is an energy company active across the supply chain, including generation, distribution, retail supply and energy-related activities such as metering, e-mobility, etc.. Innogy is active in several Member States, including Belgium, Czechia, Croatia, France, Germany, Hungary, Italy, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, the Netherlands, and the United Kingdom.

3. THE CONCENTRATION

- (6) The Concentration consists in the acquisition of sole control of Innogy by E.ON. The Concentration is to be accomplished by way of a purchase of shares. The Concentration is part of an extensive asset swap between E.ON and RWE as the result of which E.ON will be primarily active in the operation of electricity and gas distribution networks as well as retail supply in various European countries. RWE will focus on the generation and wholesale activities. E.ON and RWE entered into a definitive agreement on 12 March 2018.
- (7) E.ON would acquire the energy distribution network and customer solutions operations of RWE's subsidiary, Innogy, as well as certain minor electricity generation assets, mainly combined heat and power (CHP) plants held by Innogy ("the Reverse Carve-Out Assets"). RWE would acquire most of E.ON's electricity generation business from renewable energy sources and minority stakes in two already RWE-operated nuclear power plants. In addition, RWE would retain (a) Innogy's renewable generation assets (with the exception the Reverse Carve-Out Assets), (b) Innogy's 49% stake in Kärntner Energieholding Beteiligungs GmbH and (c) eleven gas storage facilities operated by Innogy in Germany and Czechia (all these assets together make up the Re-Transfer-Assets). RWE would also acquire a pure financial minority shareholding in E.ON. The acquisition of the E.ON Assets by RWE was cleared by the Commission by decision of 26 February 2019, COMP/M.8871 – *RWE/E.ON Transfer Assets*.
- (8) The two parts of the asset swap give rise two separate concentrations.² This Decision concerns the concentration that would arise from E.ON's acquisition of control of Innogy.
- (9) The Concentration falls within the definition of a concentration as defined in Article 3(1)(b) of the Merger Regulation.

4. UNION DIMENSION

- (10) The undertakings concerned have a combined aggregate world-wide turnover of more than EUR 5 000 million (E.ON: EUR [...]; Innogy: EUR [...]).³ Each of them

² Commission Consolidated Jurisdictional Notice [2008] O.J. C95/1, para. 41: "...several transactions, even if linked by condition upon each other, can only be treated as a single concentration, if control is acquired ultimately by the same undertaking(s). ... This excludes...assets swaps".

has an EU-wide turnover in excess of EUR 250 million (E.ON: EUR [...]; Innogy: EUR [...]), but they do not achieve more than two-thirds of their aggregate EU-wide turnover within one and the same Member State. The notified operation therefore has an EU dimension.⁴

5. THE PROCEDURE

- (11) On 31 January 2019, the Commission received formal notification of the Concentration pursuant to Article 4 of the Merger Regulation.
- (12) During the Phase I market investigation the Commission reached out to a large number of market participants (customers of the Parties and competitors), by requesting information through e-Questionnaires, telephone calls and written requests for information pursuant to Article 11 of the Merger Regulation.
- (13) In addition, the Commission also sent numerous written requests for information to the Parties and reviewed internal documents of the Parties submitted at this stage.
- (14) On 22 February 2019, the Commission informed the Parties of the serious doubts arising from the preliminary assessment of the Concentration during a "State of Play" meeting.
- (15) On 7 March 2019, the Commission found that the Concentration raised serious doubts as to its compatibility with the internal market and the EEA Agreement and adopted a decision to initiate proceedings pursuant to Article 6(1)(c) of the Merger Regulation (the "Article 6(1)(c) decision").
- (16) On 8 March 2019, the Commission provided a number of key documents to the Notifying Party. Additional key documents were provided by the Commission to the Notifying Party on 12 March 2019. The Notifying Party submitted its written response to the Article 6(1)(c) decision on 20 March 2019 (the "Response to the Article 6(1)(c) decision").
- (17) On 25 March 2019, at a State of Play meeting, the Commission provided the Parties with the opportunity to discuss the main issues raised in their Response to the Article 6(1)(c) decision, and indicated the matters on which it planned to focus its further investigative efforts during the Phase II investigation. During the Phase II investigation, the Commission sent numerous further requests for information to the Parties.
- (18) On 25 March 2019, the Commission adopted a decision pursuant to Article 11(3) of the Merger Regulation suspending the merger review time limit for initiating proceedings and for decisions due to the failure of the Parties to provide certain requested documents. The suspension lasted from 22 March 2019 until 11 April 2019, when the requested documents were provided.
- (19) On 29 March 2019, the Commission adopted a decision pursuant to Article 11(3) of the Merger Regulation suspending the merger review time limit for initiating proceedings and for decisions due to the failure of the Parties to provide certain requested documents. The suspension lasted from 26 March 2019 until 11 April 2019, when the requested documents were provided.

³ Turnover calculated in accordance with Article 5 of the Merger Regulation and the Commission Consolidated Jurisdictional Notice (OJ C 95, 16.4.2008, p.1).

⁴ The Parties' turnover is based on 2018 figures.

- (20) On 30 April 2019, the Commission adopted a decision pursuant to Article 11(3) of the Merger Regulation suspending the merger review time limit for initiating proceedings and for decisions due to the failure of the Parties to provide certain requested documents. The suspension lasted from 29 April 2019 until 8 May 2019, when the requested documents were provided.
- (21) The Commission also held several calls with market participants, and sent requests for information in the form of questionnaires. The Commission also sent request for information in the form of a EU Survey to small company customers in the retail markets of electricity, gas and heating electricity in Germany, the retail markets of electricity and gas in Czechia, and the retail electricity markets in Hungary and Slovakia.
- (22) The Parties indicated in the early days of the Phase II investigation, and in particular during the State of Play meeting held on 25 March 2019, that they would be interested in obtaining feedback from the market investigation as soon as possible after the Commission had obtained results from the investigation. In the spirit of providing the Parties with an opportunity to remedy any preliminary competition concerns prior to adopting a Statement of Objections, following the results of the Phase II market investigation a State of Play meeting was held on 27 May 2019. During the meeting, the Commission informed the Parties of the preliminary results of the Phase II market investigation and the scope of the preliminary concerns of the Commission.
- (23) On 7 June 2019, the merger review time period was extended by 20 working days by the Commission with the agreement of the Notifying Party pursuant to Article 10(3) of the Merger Regulation.
- (24) In order to address the preliminary competition concerns identified by the Commission at the State of Play meeting held on 27 May 2019, E.ON submitted commitments on 20 June 2019. The Commission launched a market test of those commitments on 21 June 2019.
- (25) E.ON submitted final commitments on 3 July 2019.
- (26) The meeting of the Advisory Committee took place on 20 August 2019 and issued a favourable opinion on the draft Decision on the same day.

6. THE ACTIVITIES OF THE PARTIES

- (27) The Proposed Concentration leads to significant overlaps in the following countries⁵:
- (28) In Germany, both E.ON and Innogy are active in the generation and wholesale supply of electricity, in the distribution of electricity and gas, in transformer services and management/maintenance of substations, in the sales of materials, in the retail supply of electricity and gas, in energy consulting, in the sale of miscellaneous materials, in drinking water supply and related services, in the district heating supply, in metering (heat, water, electricity and gas), in wholesale and retail telecommunication services, in the provision of street lighting, in e-mobility services, in photovoltaic (“PV”) systems, in the sale and installation of smart home products and services and in demand side response and flexibility services.

⁵ There are also minor overlaps in Austria, Belgium, Denmark, France, Italy, the Netherlands, Poland, Romania and Sweden.

- (29) In Czechia, both E.ON and Innogy are active in the generation and wholesale supply of electricity, in the wholesale supply of gas (downstream), in the distribution of gas, in the retail supply of electricity and gas, in heat generation (including district heating and heat and electricity cogeneration units), in the maintenance and repair of technology equipment in the energy sector, in e-mobility services, in the sale of motor fuels, in PV systems, in home insurance services, in energy consulting and auditing, in street lighting and other lighting services, in heating/refrigeration systems and facilities, in and home assistance services.
- (30) In Hungary, both E.ON and Innogy are active in the generation and wholesale supply of electricity, in the distribution of electricity, in the retail supply of electricity and gas, in the provision of street lighting and other lighting services, in transformers, in services provided to other networks, in gas pressure regulators, in e-mobility services, in photovoltaic (“PV”) systems, in energy auditing and in the sales of materials.
- (31) In Slovakia, both E.ON and Innogy are active in the generation and wholesale supply of electricity, in the wholesale supply of gas (downstream), in the distribution of electricity, in the retail supply of electricity and gas, in the leasing of dark fibre lines, in e-mobility services, in the management and maintenance of substations, in PV systems, smart homes, in energy consulting, in lighting solutions and in insurance.
- (32) In the United Kingdom, both E.ON and Innogy are active in the generation and wholesale supply of electricity, in the retail supply of electricity and gas, in e-mobility services, in the provision of metering services, in energy consulting, and in demand-side response and flexibility services.

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- (33) In Germany, both E.ON and Innogy are active in the generation and wholesale supply of electricity, in the distribution of electricity and gas, in transformer services and management/maintenance of substations,⁶ in the sale of materials, in the retail supply of electricity and gas, in energy consulting,⁷ in the sale of miscellaneous materials,⁸ in drinking water supply and related services,⁹ in the district heating supply, in metering (heat, water, electricity and gas), in wholesale and retail telecommunication services,¹⁰ in the provision of street lighting,¹¹ in e-mobility

⁶ E.ON’s and Innogy’s distribution network operating entities are active to a minor extent in services related to transformers/substations in Germany. The combined market share of the Parties is below 20% under any plausible market definition, resulting in no horizontally or vertically affected markets. The Commission therefore has not consider this potential market any further.

⁷ The Parties’ combined market share is below 10% under any plausible market definition, resulting in no horizontally or vertically affected markets.

⁸ E.ON and Innogy are both active to a minor extent in relation to the sales of miscellaneous materials used in electricity and gas works. The combined market share of the Parties is below 20% under any plausible market definition, resulting in no horizontally or vertically affected market.

⁹ COMP/M.916 – *Lyonnaise des Eaux/Suez*, para 16; COMP/M.1633 – *RWE Umwelt/Vivendi/Berliner Wasserbetriebe*, para 22 et seq. and COMP/M.3550 – *Midewa/Stadtwerke Halle/Fernwasser Sachsen-Anhalt*, para. 10, the Commission considered separate local markets for drinking water supply and raw water supply. The Parties’ activities do not overlap on the local markets.

¹⁰ The combined market share of the Parties remains below 5% under the narrowest plausible market definition concerning all the Parties’ activities in telecommunication, resulting in no horizontally or vertically affected markets.

¹¹ In COMP/M.5467 – *RWE/Essent*, paras. 429 et seq, the Commission left open whether street lighting forms a separate (national) product market. The Parties would have a combined market share of less than [10-20]%, resulting in no horizontally or vertically affected markets.

services, in PV systems,¹² in the sale and installation of smart home products and services,¹³ and in demand side response and flexibility services^{14 15}

7.1. Market Definition

- (34) The main purpose of market definition, both concerning the relevant product and the relevant geographic market, in the Commission's assessment of mergers is to identify in a systematic way the immediate competitive constraints facing the merged entity.¹⁶ The relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use.¹⁷ The relevant geographic market comprises the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those areas.¹⁸ Such a product and geographic market definition makes it possible *inter alia* to calculate market shares and concentration levels, which provide useful first indications of the market structure and of the competitive importance of both the merging parties and their competitors.¹⁹

7.1.1. Generation and wholesale supply of electricity

- (35) The Commission has a consolidated case practice of defining the market for the generation and wholesale supply of electricity as encompassing the trading of the generated electricity on the wholesale market within a certain geographic market, including electricity that is physically imported into that this geographic market via interconnectors and irrespective of the source of generated electricity (e.g. wind or nuclear).²⁰ In the past the Commission has also considered a segmentation between wholesale supply on the one hand and balancing and ancillary services²¹ on the other

¹² The Parties' combined market share is below 10% under any plausible market definition, resulting in no horizontally or vertically affected markets.

¹³ The Parties' combined market share is below 10% under any plausible market definition, resulting in no horizontally or vertically affected markets.

¹⁴ E.ON and Innogy are both active to a minor extent in to the provision of demand side response and flexibility services, although E.ON only conducts some research based projects with respect to flexibility markets. The combined market share of the Parties is below 20% under any plausible market definition, resulting in no horizontally or vertically affected market. The Commission therefore has not considered this potential market any further.

¹⁵ The Parties also overlap to a minor extent in the provision of distribution network services and other distribution network related services (for example operation, maintenance and operation for existing renewable energy facilities, the integration of renewable generation systems connected to the distribution grid). The Parties combined market share is in any case below 20% under any plausible market segmentation.

¹⁶ Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings (2004/C 31/03), para. 10.

¹⁷ COMMISSION NOTICE on the definition of relevant market for the purposes of Community competition law (97/C 372/03), para. 7.

¹⁸ COMMISSION NOTICE on the definition of relevant market for the purposes of Community competition law (97/C 372/03), para. 8.

¹⁹ Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings (2004/C 31/03), para. 14.

²⁰ See e.g. COMP/M.8687 – *Prisko/OKD Nastupnicka*, paras. 55 seq; COMP/M.7850 – *EDF/CGN/NNB Group of Companies*, para. 54; COMP/M.8660 – *Fortum/Uniper*, paras 18 and 26.

²¹ Balancing power is needed to maintain the appropriate tension level in the grid; on this market TSOs typically purchase electricity in order to cover deviations between production and consumption within their relevant control areas.

hand.²² The Commission notes that the German Bundeskartellamt (Federal Cartel Office or “FCO”) has typically considered a separate market for renewables-based generation that benefits from public subsidies under the German Renewable Energies Act (*Erneuerbare Energien Gesetz* or “EEG”).²³ The Commission considers, however, that the market definition can ultimately be left open in this case as no competition concerns would arise even if a separate market were defined for balancing and ancillary services or separate markets were defined for conventional generation (including renewables not covered by the EEG-scheme) on the one hand and renewable generation covered by the EEG-scheme.

- (36) The Commission has generally defined the geographic market for the generation and wholesale supply of electricity as national in scope,²⁴ but has also recognised in some instances that the presence of a sufficiently large interconnection capacity between Member States may justify broadening the geographic scope of the market.²⁵ This could also be the case if two Member States belong to the same bidding area. For the purpose of this Decision, however, the question whether, with respect to Germany, the geographic market for the generation and wholesale supply of electricity should be defined as wider than the German territory due to the interconnection and existence of a common bidding zone with Luxembourg can ultimately be left open as no competition concerns would arise even if the geographic market were limited to Germany alone.
- (37) A geographic market for the generation and wholesale supply of electricity in Germany would not be affected by the Concentration, as the combined market share of the Parties post-merger would amount to less than [5-10]% with an increment, as a result of the merger, of no more than [0-5]%²⁶ ([...] by renewable generation assets).²⁷ When the phase-out of nuclear power is taken into account, E.ON’s market share will be (gradually and) significantly reduced to less than [0-5]%, due to the decommissioning of the three nuclear power stations currently operated by E.ON (Grohnde and Brokdorf in 2021 and Isar 2 in 2022).²⁸
- (38) Even if a separate market for balancing power and ancillary services were to be considered, the combined market share of the Parties post-merger would remain well below 20%. In view of the above, the Commission considers that the national

²² COMP/M.6225 – *Molaris/Commerz Real/RWE/Amprion*, para. 25; COMP/M.5467 – *RWE/Essent*, paras. 21 et seq.; COMP/M.3268 – *Sydskraft/Grange*. The Commission has also considered possible narrower segmentations of the balancing market depending on the nature and purpose of the balancing services COMP/M.5978 – *GDF Suez/International Power Reserve*, paras. 37 et seq.

²³ See e.g. FCO, B4-80/17 – *EnBW/MVV*, para. 93.

²⁴ See COMP/M.5979 – *KGHM/TAURON Wytwarzanie/JV*, para. 24; COMP/M.5711 – *RWE/Ensys*, para. 21; COMP/M.4180 – *GDF/Suez*, para. 726.

²⁵ See e.g. COMP/M.3268 – *Sydskraft/Grange*, para. 27; COMP/M.3868 – *DONG/Elsam/Energi E2*, paras. 258-260.

²⁶ Based on 2017 data. This is true regardless of whether capacity or production volume is considered and regardless of whether renewable generation and non-renewable generation are considered jointly or separately, and it would hold true even if the Re-Transfer Assets that will go back to RWE would be included. Form CO, para. 223.

²⁷ E.ON’s electricity generation business (in particular from coal, lignite, gas and water as well as Swedish nuclear power plants) and E.ON’s global commodities trading business was spun off into Uniper SE (Uniper), which was subsequently acquired by Fortum. The Commission cleared that acquisition by decision of 15 June 2018 (COMP/M.8660 – *Fortum/Uniper*). Most of E.ON’s renewable energy generation business and its minority stakes in nuclear power plants of Gundremmingen C and Emsland (majority owned by RWE) were acquired by RWE. The Commission cleared that acquisition by decision of 26 February 2019 (COMP/M.8871 – *RWE/E.ON Transfer Assets*).

²⁸ Form CO, paras. 223 et seq.

German market for the generation and wholesale supply of electricity would therefore not be affected by the Concentration.

7.1.2. *Distribution of electricity [Electricity networks]*

- (39) Electricity is transported via the transmission network for long distances and via networks with lower voltage level networks at regional and local level. Networks are connected with each other and different voltage levels are connected through transformers.²⁹
- (40) In Germany, the electricity grid is divided into four voltage levels, i.e. the (i) extra-high (220-380 kV), (ii) high (72.5-125 kV), (iii) medium (1-72.5 kV) and (iv) low (< 1 kV). The high, medium and low voltage grids (“lower voltage networks”) are operated by approximately 890 Distribution System Operators (“DSOs”). The extra high voltage transmission grid is operated by four electricity Transmission System Operators (“TSOs”). Each TSO operates a separate transmission system, and each TSO covers part of Germany.³⁰ Neither E.ON nor Innogy is active as a TSO.³¹

7.1.2.1. Product and geographic market definition

The Commission's decisional practice

- (41) In previous decisions, the Commission has identified two separate markets for the transportation of electricity: transmission and distribution.³²
- (42) In relation to distribution networks, the Commission has found the operation and management of lower voltage (distribution) networks to be a relevant product market.³³
- (43) The Commission has previously considered the relevant geographic market for the operation of electricity distribution networks to be limited to the geographic area of the network in question (grid wide scope), with each grid constituting a relevant geographic market.³⁴

The Notifying Party's view

- (44) The Notifying Party agrees with the Commission's previous decisional practice as regards the product definition and the geographic scope of the market for electricity distribution via lower voltage networks operated by DSOs.³⁵

The Commission's assessment

- (45) No evidence gathered by the Commission in the course of the market investigation in this case provided any indication to suggest that the Commission's past decisional practice is not appropriate in this case.

7.1.2.2. Conclusion on market definition

- (46) For the purposes of this Decision, electricity distribution via lower voltage networks operated by DSOs is regarded as a distinct product market with the region covered

²⁹ Form CO, para. 363.

³⁰ Form CO, paras 364 and 365.

³¹ The four TSOs are Amprion, 50Hertz, Transnet BW and TenneT. RWE holds a minority shareholding (25.1%) in Amprion. Commerz Real AG is the majority shareholder with 74.9% (Form CO, para. 365).

³² COMP/M.7927 – *EPH/ENEL/SE*, para. 21; COMP/M.5467 – *RWE/EssentEssent*, para. 179; COMP/M.4238 – *E.ON/Pražská plynárenská*, para. 18.

³³ COMP/M.5827 – *Elia/IFM/50Hertz*, para. 18; COMP/M.5467 – *RWE/Essent*, para. 179.

³⁴ COMP/M.5827 – *Elia/IFM/50Hertz*, para. 23; COMP/M.4238 – *E.ON/Pražská plynárenská*, para. 19; COMP/M.3440 – *ENID/EDP/GDP*, para. 75.

³⁵ Form CO, paras. 435 et seq.

by each such network operated by DSOs ("DSO area") in Germany constituting a separate relevant market.

7.1.3. Retail supply of electricity

7.1.3.1. Background

- (47) For historical reasons, prior to the liberalisation of the energy market in Germany in 1998 when the Energy Industry Act (*Gesetz über die Elektrizitäts- und Gasversorgung*, "EnWG") entered into force, the German market for electricity was characterised by a large number of energy suppliers, mostly *Stadtwerke* active at local level only. In 1958, when the German Act against Restraints of Competition (*Gesetz gegen Wettbewerbsbeschränkungen*) entered into force in Germany, territorial protection clauses in the electricity sector were exempted from the general cartel prohibition and as a result, many households in Germany had been served only by one local supplier for years. With the liberalisation, customers started moving away from their historical supplier and switching to alternative providers.
- (48) Nonetheless, energy markets have traditionally witnessed considerable customer inertia (especially for households and small businesses) and despite the availability of more competitive offers, a significant proportion of customers stayed with the historical supplier. This "incumbency effect" is common to many or even most of the European retail energy markets (see also recital (59)) and it is still very apparent in Germany, too, where local incumbents still account for a considerable part of the demand in their own area (approximately 70%).
- (49) From a competition perspective, due to this inertia, some customers will stick to their historical supplier largely irrespective of the offers of alternative suppliers. In other terms, customers' inertia may produce monopoly-like situations where, for those customers who are 'disengaged', the historical incumbents face little competition from alternative suppliers. On this group of customers, structural changes in the market (e.g. mergers involving the historical incumbent and/or other players) are likely to have only a limited or no immediate material impact.
- (50) The customer inertia issue is particularly pronounced for customers who are still supplied under basic ('default') supply contracts (see recital (49)). Despite material price differences between basic supply contracts and special contracts, a considerable portion of customers does not engage in searching or switching supplier and remain with the more expensive basic supply tariffs offered by the incumbent. While the percentage is steadily decreasing, still about 28% of all household customers were supplied under basic supply tariffs in 2017 (in 2016: approximately 31%; in 2012: approximately 37%; in 2007: approximately 59%).³⁶
- (51) In Germany, the law establishes that there can only be one basic supplier per area and which company shall act as basic supplier has to be determined every three years by the relevant DSO.³⁷ Basic supply is subject to specific regulation. There is a legal obligation on the basic supplier to conclude basic supply contracts and the basic supplier can only terminate a basic supply contract in exceptional circumstances.³⁸

³⁶ FNA/FCO, Monitoringbericht 2018, p. 29; FNA/FCO, Monitoringbericht 2013, p. 21 FNA/FCO, Monitoringbericht 2008, p. 14.

³⁷ According to section 36 para.2 of the EnWG the basic supplier is determined every three years by the DSO and is the energy supplier that has the most household customers in the area. "The area" is not legally defined, but in practice typically based on the network/DSO area or on concession areas within the DSO area.

³⁸ Form CO, para. 745.

Basic suppliers also have the legal obligation to pass on decreases in statutory provisions (i.e. taxes, concession fees, surcharges and levies except network charges) and face limitations on price increases (in that profit margin increases are not allowed).³⁹ Further, a different regulatory regime applies to basic supply, e.g. basic supply contracts do not require an express agreement entered into by the basic supplier and a household customer (*de jure* contract) and basic supply contracts can be terminated at any time by the customer with a notice period of only two weeks.⁴⁰

7.1.3.2. Product market definition

The Commission's decisional practice

- (52) In previous cases, the Commission has defined the relevant market for retail supply of electricity in Germany as a separate market. The Commission has further distinguished further between (i) individually metered (15 or 30 minutes intervals) large industrial customers (“large/industrial customers”); and (ii) small commercial and household customers that are not individually metered, without any further subdivision.⁴¹
- (53) While the Commission has not in the past taken any firm view as to whether special contracts and basic supply tariffs are in separate markets, recently (2015) in the case *COMP/M.7778 – Vattenfall/ENGIE/GASAG*, it assessed the impact of the merger on the entirety of the SLP (standard load profile) customers (including basic supply and special contracts) as well as on special contract customers only (both also at the national level).⁴²
- (54) The FCO's decisional practice, similarly to the Commission, distinguishes between RLM (load measured) and SLP customers (i.e. households and small commercial customers). However, for the latter customer group, the FCO distinguishes further in SLP customers under (i) basic supply; (ii) special contracts and (iii) heating electricity contracts.⁴³ The FCO (as well as the competition authorities of Federal States) has been consistently adopting this market definition since 2009 in competition cases and sector inquiries⁴⁴ and it also forms the framework under which the FCO and the FNA assess the electricity markets in their annual joint monitoring reports on the energy markets.

The Notifying Party's view

- (55) The Notifying Party submits that the product market definition could ultimately be left open but it nonetheless considers that a distinction between basic supply and

³⁹ Form CO, para. 763; see also BGH, Case VIII ZR 56/08, BGHZ 182, 41-58; BGH, Cases VIII ZR 13/12 and VIII ZR 158/11.

⁴⁰ Compare section 2 and section 20 para. 1 of the ordinance regulating the provision of basic supply for electricity (Stromgrundversorgungsverordnung, “StromGVV”).

⁴¹ *COMP/M.7778 – Vattenfall/ENGIE/GASAG*, para. 30; *COMP/M.8758 – BayWa/Clean Energy Trading* (Request for derogation from the suspension obligation), para. 26; *COMP/M.5467 – RWE/Essent*, para. 280; *COMP/M.5496 – Vattenfall/Nuon*, para. 11.

⁴² *COMP/M.7778 – Vattenfall/ENGIE/GASAG*, para. 40.

⁴³ See FCO, B4-80/17 – *EnBW/MVV*, para. 176; FCO, B8-94/11 – *RWE/Stadtwerke Unna*, paras. 22 and 32 et seq.; B8-107/09 – *Integra/Thüga*, paras. 32-38.

⁴⁴ See FCO, B4-80/17 – *EnBW/MVV*, para. 176; FCO, B8-94/11 – *RWE/Stadtwerke Unna*, paras. 22 and 32 et seq.; FCO, Sektoruntersuchung Heizstrom, <https://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Sektoruntersuchungen/Sektoruntersuchung%20Heizstrom%20-%20Marktueberblick%20und%20Verfahren.html?nn=4143254>; Landeskartellbehörde Niedersachsen, <https://www.mw.niedersachsen.de/startseite/aktuelles/presseinformationen/zu-hohe-grundversorgungspreise-bei-strom-und-gas-preissenkungen-erforderlich-164684.html>.

special contract customers would no longer be appropriate⁴⁵ because, since the FCO's decision in 2009⁴⁶, the share of basic supply customers has been steadily decreasing with customers progressively switching to special contracts. In the ten years period from 2007 to 2016, the percentage of customers on a basic supply contract has halved, from 61% to 31%, a fact that, according to the Notifying Party, is evidence of the pressure on basic suppliers "*stemming from price competition in the liberalised retail markets*".⁴⁷

The Commission's assessment

- (56) In this case, and in line with the FCO's precedents, the Commission considers that the retail supply of electricity to households and small commercial customers ("household customers")⁴⁸ should be segmented (i) between electricity for heating purposes ("heating electricity") and electricity for other purposes ("regular electricity") and (ii) within regular electricity, between basic supply contracts and special contracts.
- (57) The reasons for distinguishing between regular electricity and heating electricity is further discussed in Section 7.1.4. The distinction between basic supply contracts and special supply contracts is further discussed in this Section.
- (58) First, the Commission notes that there still exists a significant price gap between basic supply tariffs and special contract tariffs. In their joint annual Monitoring Report on the energy markets, the FNA/FCO indicate that special contract tariffs are consistently cheaper than basic supply tariffs.⁴⁹ The FNA/FCO estimate that the net price (i.e. the price net of the non-controllable costs, such as, for instance, network charges and taxes) for special contracts with a supplier other than the basic supplier is approximately 30% to 50% cheaper than the net basic supply tariff and 20% to 40% cheaper than the average net price for special contracts charged by the basic supplier.⁵⁰ The Notifying Party itself estimates that "*Basic Supply tariffs of E.ON are on average [...] more expensive than [...] Special Contract tariffs in electricity*".⁵¹ This is also confirmed by the respondents to the Commission's investigation, many of whom indicated that basic supply and special contract tariffs differed by more than 5-10%.⁵²
- (59) Despite the significant saving they could make if they switched to a special contract, about a quarter of customers are still on basic supply contracts. In the Commission's view, this is largely explained by customer inertia. Customers' lack of engagement with the choice of energy supplier has historically been a major obstacle, which has

⁴⁵ Form CO, paras. 906, 895 et seq.

⁴⁶ FCO, B8-107/09 – *Integra/Thüga*.

⁴⁷ Form CO, paras. 898 et seq.

⁴⁸ The German the Energy Industry Act ("EnWG") defines customers with a consumption of up to 10.000 kWh/a as "household customers", see section 3 point 22 EnWG. Most households consume between 2.500 and 5.000 kWh/a, on price comparison websites the default setting is typically 3.500.

⁴⁹ FNA/FCO, Monitoringbericht 2018, p. 284-292.

⁵⁰ The ranges are based on different categories (Eurostat band) of levels of consumption. See FNA/FCO, Monitoring Report 2018, p. 262 et seq.

⁵¹ Form CO, para. 900.

⁵² Replies to questionnaire Q1 – Competitors (Germany), question 8. The questionnaire had 161 respondents, including the large competitors EnBW and Vattenfall, over 50 Stadtwerke of different sizes, cooperatives of Stadtwerke, companies in which only cities/communes and/or their Stadtwerke hold shares, companies in which Stadtwerke and independent suppliers hold shares, companies in which only independent suppliers hold shares, independent suppliers as well as new market entrants, including from other industries. Replies to questionnaire Q1 – Competitors (Germany), question 8.

slowed down the effects of the liberalisation and deprived customers of the advantages/benefits (in terms of lower prices, greater variety, etc.) of competition. A recent report by ACER⁵³ found that consumer inertia, deriving from the lack of consumer interest in the market and from consumer loyalty to existing suppliers, is a key determinant of the low switching rates in European energy retail markets. The perceived smallness of the monetary gain that could result from switching, the lack of trust in new suppliers, the perceived complexity of the switching process and the level of satisfaction with their current supplier were identified as the factors that were most influential in inhibiting consumer switching behaviour. The switching process may be perceived by customers as too complex or too burdensome relative to the benefit that switching could bring. The report argued that a number of cognitive biases (social proof, status quo and loss-aversion bias) explain, at least to some extent, why customers stick to their historical supplier despite the availability of cheaper offers.

- (60) Many competitors responding to the Commission's questionnaire also noted that basic supply and special contract supply do not always necessarily follow a similar dynamic.⁵⁴ First, basic suppliers have the legal obligation to pass on decreases in statutory charges (i.e. taxes, concession fees, surcharges and levies and other than network charges) and they are subject to limits on price increases (in the sense that margin increases are not allowed). Second, price fluctuation in the wholesale markets can only be reflected to a limited extent in the retail prices of basic supply. Third, while a number of respondents indicated that a 5-10% increase in the price of basic supply contracts available on the market offers could trigger an increase in the level of switching from basic supply offers to special contracts, the majority of the competitors who responded to the Commission's investigation⁵⁵ (almost 70%) considered that the increase in switching would probably be small or negligible.⁵⁶ In this vein, one competitor noted that "*Basic supply is not challenged by active competition and therefore not price sensitive.*"⁵⁷
- (61) Finally, the distinction between basic supply tariffs and special contract tariffs is also evident from the fact that the Parties adopt different pricing and price adjustment policies for the two types of tariff.⁵⁸
- (62) The Commission therefore considers that basic supply tariffs are not materially constrained by special contract tariffs, and as a result the two types of contract constitute two separate relevant product markets.

7.1.3.3. Geographic market definition

The Commission's decisional practice

- (63) The Commission has typically defined the geographic markets for the retail supply of electricity to end-customers as national in scope.⁵⁹ For Germany, however, in COMP/M.5496- *Vattenfall/Nuon Energy* the Commission also considered the

⁵³ ACER/CEER, Annual report on the Results of Monitoring the Internal Electricity and Natural Gas Markets in 2015.

⁵⁴ Replies to questionnaire Q1 – Competitors (Germany), question 9.

⁵⁵ Respondents include a large variety of suppliers (see footnote 44) which are active as both (or either) basic supplier and special contract supplier.

⁵⁶ Replies to questionnaire Q1 – Competitors (Germany), question 10.

⁵⁷ Replies to questionnaire Q1 – Competitors (Germany), question 9 (ID3799).

⁵⁸ See e.g. Internal Documents of the Parties, (ID4268-58982) for an analysis of E.ON of switching after price adjustments, separated for basic supply and special contracts.

⁵⁹ See e.g. COMP/M.7778 – *Vattenfall/ENGIE/GASAG*, para. 33.

possibility of a narrower geographic market definition (at distribution network level) for the retail supply of electricity to small (i.e. non-load measured) customers, also a narrower definition (at the distribution network level) although it ultimately left the market definition open in that case.⁶⁰

- (64) Since 2009, the retail electricity supply market in Germany has significantly evolved and the geographic scope of competition has become increasingly broad. Although this trends towards nationwide competition had not yet fully materialised by the time of the COMP/M.5496 investigation, it was nonetheless already in existence in 2009 and was expected to lead ultimately to a broader geographic market: “*competition in Germany is progressively expanding and that this could likely lead to broadening the geographic scope of the market for retail supply of electricity to small customers in the future*”.⁶¹
- (65) This trend has been already reflected to some extent in the more recent practice of the Commission. In 2015, in *COMP/M.7778 – Vattenfall/ENGIE/GASAG* of 2015, while the geographic market definition was left open, the Commission also considered national market shares for the retail supply of electricity to household customers in general and for special contract customers only.⁶²

The FCO's decisional practice

- (66) In its recent cases the FCO has consistently considered that the market for special contracts to be national in scope, whereas it has considered the market for basic supply tariffs to have an inherently local dimension and to be restricted to the geographic scope of the network area, in which, under Section 36(2) EnWG, the supplier acts as basic supplier.⁶³
- (67) In its decision B8-107/09 - *Integra/Thüga* taken at the end of 2009, the FCO introduced the distinction between basic supply and special contract customers and defined the market for special contract customers as national in scope. The FCO noted in particular in that decision that the competitive conditions for special contract customers had changed compared with the situation when previous decisions have been taken. This was because special contract customers now had a wide choice of electricity suppliers offering special contracts in any area of Germany. Market conditions had also changed from the perspective of the electricity supplier since electricity suppliers now orientated themselves more and more outside their own incumbency areas and offered electricity also in other network areas (stating that in 2008, 31 companies were active in more than 300 network areas). These companies included in particular also energy utilities without regional ties, but that position themselves strategically as nationwide energy suppliers.⁶⁴

The Notifying Party's view

- (68) The Notifying Party agrees with the geographic market definition adopted by the FCO for separate product markets (i.e. basic supply and special contracts).⁶⁵

⁶⁰ COMP/M.5496 – *Vattenfall/Nuon Energy*, paras. 40 et seq.; COMP/M.5467 – *RWE/Essent*, para. 291.

⁶¹ COMP/M.5496 – *Vattenfall/Nuon Energy*, paras. 40 et seq.; COMP/M.5467 – *RWE/Essent*, para. 291.

⁶² COMP/M.7778 – *Vattenfall/ENGIE/GASAG*, para. 40. However, the Commission did not discuss this distinction as a potential separate product market definition, as the precise market definition could be left open for that case, *ibid* paras. 30 et seq.

⁶³ See e.g. FCO, B4-80/17 – *EnBW/MVV*, para. 177; FCO, B8-94/11 – *RWE/Stadtwerke Unna*, paras. 37-40; FCO, B8-107/09 – *Integra/Thüga*, paras. 39-41.

⁶⁴ FCO, B8-107/09 – *Integra/Thüga*, para. 40.

⁶⁵ Form CO, paras. 962 and 963.

The Commission's assessment

- (69) The Commission considers that the reasoning whereby the Commission still considered a narrower geographic market (albeit already stating that “*competition in Germany is progressively expanding and that this could likely lead to broadening the geographic scope of the market for retail supply of electricity to small customers in the future*”)⁶⁶ in COMP/M.5496 of June 2009 no longer reflects market reality. Rather, the market investigation shows that the market definition adopted by the FCO is more appropriate.
- (70) For large/industrial customers, in line with Commission’s precedents, the Commission considers that the geographic market is national.
- (71) As discussed above, the Commissions considers that basic supply and special contracts are separate product markets.
- (72) The market for customers under basic supply is local because for each local area, only one company is entitled to serve basic supply customers and there cannot be competition between basic suppliers active in different areas.
- (73) While there are local elements of competition, the Commission considers that on balance the market for special contracts is national in scope with local elements of competition.
- (74) First, the Commission notes that the trend of an increasing number of suppliers active across multiple areas, which the FCO observed in its 2009 decision (see recital (67) above), has continued. Compared to 2008 where ‘only’ 31 companies were active in more than 300 network areas, in 2017 there were 88 companies active in more than 500 (of approximately 900) network areas and 61 companies active in 251-500 network areas.⁶⁷ In 89% of the network areas, more than 50 suppliers were active, whilst in 2007 this was true for only less than 25% of the network areas.⁶⁸
- (75) Second, suppliers tend to pursue similar sales strategies across areas. In response to the Commission’s investigation, the majority of the competitors indicated that they do not significantly differentiate their sales strategy by areas in terms of sales channel used, size of sales force or type and intensity of advertising.⁶⁹ One competitor noted that it does not see “*big local differences in the B2C segment. Competition is rather uniform across Germany...*”.⁷⁰
- (76) Third, national pricing has become common. Of the suppliers responding to the Commission’s investigation, 65% either have the same net-price across the country⁷¹

⁶⁶ COMP/M.5496 – *Vattenfall/Nuon Energy*, para. 39.

⁶⁷ The Commission’s view is corroborated by the Commission’s investigation. The majority of competitors responding to the Commission’s investigation (56%) indicated that they are active across the whole or most of Germany (replies to questionnaire Q1 – Competitors (Germany), question 11). The Parties themselves are active nationwide and the majority of respondents to the Commission investigation do not see them as competing particularly closely in any geographic area, which points to the lack of any material difference in the competitive dynamic between the Parties locally. See replies to questionnaire Q1 – Competitors (Germany), question 38. Competitors indicate that the Parties compete across Germany, for example “*because of their nationwide focus*”.

⁶⁸ FNA/FCO, Monitoringbericht 2018, p. 252.

⁶⁹ Replies to questionnaire Q1 – Competitors (Germany), question 16.

⁷⁰ Minutes of a conference call with a competitor, 2 April 2019 (ID5012), para. 3.

⁷¹ The Commission considered net-prices to eliminate the effects of price-parts that are not under the control of the suppliers (e.g. charges, taxes and levy), which in Germany count for the large majority of the total price to end-customers.

or have in general the same net price across the country but may occasionally differentiate between areas.⁷²

- (77) Fourth, there is considerable supply-side substitution as expansion across local areas appears to be relatively easy and common.
- (78) The Notifying Party estimates that 60% of switches take place via price-comparison websites⁷³ (which would be more for the internet in total, including homepages) and the importance of this channel is likely to increase further going forward. As a consequence, companies need limited physical infrastructure to offer retail of electricity and can easily serve customers across multiple areas.
- (79) Suppliers (incl. small Stadtwerke/local players) regularly try to expand and drive competition outside their own ‘original’ area. For example, one competitor said that *“In recent years, [it] won a considerable amount of private customers outside its home market.”*⁷⁴ Another indicated that, while it has traditionally focused on a region in Southern Bavaria, it has expanded into *“Bavaria and in the South of Germany.”*⁷⁵ In the last 2-3 years the Commission estimates that on average two new players entered any given local area (post-code) and have quickly gained non-negligible shares of supply.⁷⁶
- (80) There are currently well over 1000 players in Germany and the average number of suppliers per area increased from 46 in 2008 to 124 in 2017.⁷⁷ The majority of suppliers (even small ones) are active at least at DSO-area level (on average about 12 municipalities each) up to even Federal State level (on average approximately 700 municipalities each).⁷⁸
- (81) Some competitors argued that the retail supply of electricity is local in scope in view of the fact that net prices charged by the Parties (and other competitors) vary locally and that suppliers typically charge higher margins in areas where they are basic supplier.⁷⁹ The Commission has carefully considered the analysis submitted by these companies (hereafter, the “Pricing Analysis”)⁸⁰ but maintained its view that the geographic market is nationwide.

⁷² Replies to questionnaire Q1 – Competitors (Germany), question 12.

⁷³ Form CO, para. 853.

⁷⁴ Minutes of a meeting with a competitor on 28 August 2018 (ID880), para. 3.

⁷⁵ Minutes of a conference call with a competitor on 20 May 2019 (ID4954), para. 2.

⁷⁶ On average two new players have gained more than 1% of the supply share at local level which is non-negligible compared to the merger increment (between [0-5]-[0-5]% on average), especially considering that the Parties have been active across the nation since the beginning of the liberalisation. This analysis of market shares includes basic supply contracts, so that looking at special contracts only, the number can be even larger.

⁷⁷ FNA/FCO, Monitoringbericht 2018, p. 252; FNA/FCO, Monitoringbericht 2015, p. 173.

⁷⁸ Replies to questionnaire Q1 – Competitors (Germany), question 11.

⁷⁹ See e.g. convenience translation of 10 May submission (ID4841); convenience translation of 10 May submission (ID4948).

⁸⁰ See e.g. convenience translation of 10 May submission (ID4841); convenience translation of 10 May submission (ID4948). In the Pricing Analysis, for each day, the five providers with the lowest prices (including any bonuses apportioned over the first twelve months) were identified in the areas covered by the submitted analysis (=Top 5) and the prices offered by the Parties to the merger and their group companies were extracted. The prices were then adjusted for elements that are the same for all competitors, e.g. taxes. The procurement costs were adjusted on a “mark-to market perspective”, as, as was submitted, the specific procurement costs depend on the respective company and are not publicly known. The value resulting from these adjustments then were taken as the “margin”, comprising the marketing and general administrative costs and ultimately the profit of the supplier.

- (82) The Commission preliminary notes that the incumbents typically charge the highest price for the basic supply tariff⁸¹ but, as discussed above, the Commission considers that basic supply is not part of the same relevant market as special contracts and that the geographic market for basic supply is local in scope.
- (83) On the other hand, pricing analyses show that the local basic supplier can typically charge substantially higher prices also to their special contract customers⁸², i.e. customers which have a special contract with the legal entity that has basic supplier status (as it has the highest share of customers in the local area)⁸³.
- (84) One important thing to notice is that the Pricing Analysis submitted by the competitors (and referred to in recital (81)) treats different subsidiaries of the Parties as independent entities. For example, the analysis only considers contracts branded “Innogy” as tariffs of Innogy, whereas contracts of other Innogy’s subsidiaries (e.g., “eprimo”) are considered as contracts of separate entities. This can have an important effect on the results, if e.g. margins or pricing strategies are analysed in a region where one group company is the basic supplier, and only the margins or prices of that entity in that region are taken into account, not the ones of the other group companies. The complainants themselves acknowledge in their analysis that the Parties have different price strategies by brand, e.g. they note that E Wie Einfach acts far more erratically than E.ON, sometimes pricing higher, sometimes lower than E.ON,⁸⁴ and that for some brands they do not flex the prices locally: for example, in relation to eprimo’s pricing strategy these third parties notes that “*the behaviour shown by eprimo, Innogy discount subsidiary, did not differ in regard to the basic supply area (of E.ON).*”⁸⁵
- (85) The Commission considers the relatively high price for special contract that the local basic suppliers can charge (see recital (83)) is due to the incumbency advantage. Special contract customers who are addressed by these relatively expensive offers are likely to be customers who have showed some signs/willingness of engaging but were not able to take full advantage of the competitive offers available on the market. The outcome of the Commission’s short Phase II questionnaire to SME and micro-business customers in Germany provides support to these findings:⁸⁶ of those customers who have changed contract without changing supplier (which include customers who moved from basic supply to special contract with the incumbent), 20-25% did not look around/compare offers before selecting the new contract. And even among those who changed contract, almost 40% admitted that, absent any offer from their incumbent supplier, they would have stayed with the same supplier.⁸⁷ This suggests that a significant number of customers under special contracts are not

⁸¹ FNA/FCO, Monitoringbericht 2018, p. 30.

⁸² Cf. FNA/FCO, Monitoringbericht 2018, p. 287-292 which indicates - depending on consumption levels - a spread of 16-44% in the controllable part of the price between the special contract tariffs charged by the basic supplier and the tariffs charged by retailers other than the basic supplier. The controllable part of the price includes: procurement costs, cost of supply and the margins.

⁸³ In their own DSO areas, the share of customers that have a special contract with the Parties' basic supply entity amounts to [30-40]-[50-60]% for E.ON and [50-60]-[60-70]% for Innogy.

⁸⁴ See e.g. convenience translation of 10 May submission (ID4841), p.5; convenience translation of 10 May submission (ID4948), p. 5.

⁸⁵ See e.g. convenience translation of 10 May submission (ID4841), p.6; convenience translation of 10 May submission (ID4948), p. 6.

⁸⁶ The Commission acknowledges that the number of customers responding to the questionnaire is limited and therefore the results may not be statistically robust but nonetheless they provide some support to this finding.

⁸⁷ Response to SME/micro-business questionnaire.

receptive to the existing price differences and stick to their incumbent supplier irrespective of substantially cheaper offers that are available on the market. This is further supported by the FCO's findings in the *Integra/Thüga* decision according to which small customers is heterogeneous in terms of price sensitivity. This heterogeneity is illustrated in particular by the fact that customers who in the past have already switched the electricity supplier, tend to switch suppliers more readily than customers who have always been with the established electricity suppliers.⁸⁸

- (86) In the Commission's view, most of the special contract customers who are with the basic supplier's most expensive tariffs are in many respects similar to basic supplier customers: this segment of the demand is characterised by considerable demand stickiness (due to, e.g., inertia or loyalty to the local incumbent or municipal utility, etc.) as despite the availability of cheaper offers these customers stay with the local incumbent.⁸⁹ For this reason the local element of competition is more pronounced for these customers compared to the other customers under special contracts for whom, as discussed above, the national dimension of competition prevails. This is also confirmed by the pricing analysis that shows that for the more contestable customers, the Parties – outside special contracts with their basic supply entity - tend to price as (and sometimes) more competitively than other suppliers even in their own incumbency areas.
- (87) It is worth noting that the complainants do not dispute that the market is competitive, rather, to the contrary, they state that the *“German electricity sales market for end customers is subject to a high-level of competition. In addition to E.ON and Innogy and their respective group of companies, a large number of competitors is active in each of the examined supply areas”*.⁹⁰ Also, importantly, third parties are mostly concerned that *“over time a profitable and sustainable operation is, however, only possible for those companies who that are basic suppliers”*⁹¹ because they can compensate the *“low competitive prices by profits generated from their large base of customers (in basic supply) and the grid business”*⁹². This suggests that the local incumbent may only have market power vis-a-vis default/basic supply customers and customers having a special contract with the basic supplier but faces strong

⁸⁸ FCO, B8-107/09 – *Integra/Thüga*, para. 37.

⁸⁹ In theory, one might argue that these customers together with the customers under basic supply contracts form part of the same relevant market which encompasses all customers, who irrespective of substantially cheaper offers available on the market are still served by some relatively expensive tariffs of the historical local incumbent. However, unlike basic supply customers who are clearly identifiable due to their particular contractual relationship, customers under special contracts with the basic supplier cannot be distinguished/separated from the other customers under special contract on the basis of some objective parameters. For practical purposes, the Commission considers it appropriate to include these customers in the special contract market but it acknowledges that the incumbent has a substantial competitive advantage in keeping these customers. However, the merger does not affect this. Incidentally, the Commission notes that while acknowledging that there is a substantial gap in the special contract price charged in special contracts by the basic supplier and that charged by other suppliers (section 4.2.2. of the monitoring report 2018), the FCO has nonetheless maintained that the geographic market for the retail supply of (all) special contracts for electricity in Germany is national in scope.

⁹⁰ See e.g. convenience translation of 10 May submission (ID4841), page 3; convenience translation of 10 May submission (ID4948), page 3.

⁹¹ See e.g. convenience translation of 10 May submission (ID4841), p. 3 ; convenience translation of 10 May submission (ID4948), p. 3.

⁹² See e.g. convenience translation of 10 May submission (ID4841), p.4; convenience translation of 10 May submission (ID4948), p. 4.

competition for the more engaged customers which further points to a broader-in-scope market.

- (88) The highly competitive offers available to those customers who are engaged and are willing to switch the supplier are further illustrated by the analysis carried out by the Commission which shows that there is no systematic link between margins for this customer group and the incumbent's share of supply at local level. The Commission has analysed the tariffs that the Parties charged to newly acquired customers⁹³ and plotted against the incumbent share of supply in local areas (e.g. E.ON in its DSO areas). For example, the following graph shows E.ON's margin on the 'OptimalStrom'⁹⁴ tariff and the entire E.ON group share of supply in local areas^{95, 96}.

Figure 2 - E.ON's margin on the "OptimalStrom" tariff and the entire E.ON group share of supply in local areas

[analysis of margins of an E.ON-tariff]

Source: Commission's analysis on the Parties' data

- (89) The lack of a systematic link between margins and shares of supply as regards the group of customers who do not have a special contract with the basic supplier suggests that the current competition and threat of entry constrains local incumbents at least with regard to that customer group (see recital (289) below for further discussion on the analysis undertaken by the Commission).
- (90) In light of the above, the Commission concludes that, for the purposes of this Decision, the retail supply of regular electricity to household customers under special contracts is national, although there are local elements of competition. Even if (*quod non*) the market were to be defined as local in scope, in the competitive assessment the Commission has also considered the effects of the Concentration on a local level and concluded that even on a local basis the Concentration does not raise competition concerns.

7.1.3.4. Conclusion on market definition

- (91) For the purposes of this Decision, the market for retail supply of electricity to large industrial customers will be regarded as national in scope. The retail supply of regular electricity to household under basic supply will be regarded as a separate product market and the market will be regarded as local in scope, restricted to the relevant basic supply area. The retail supply of regular electricity to household under special contracts will be regarded as a separate product market and the market will be regarded as national in scope with local elements.

⁹³ These customers were previously with other suppliers with a competitive tariff and are therefore very likely to have switched back to one of the competitive tariffs of the incumbent.

⁹⁴ Offered by E.ON subsidiary EDG.

⁹⁵ E.ON's share includes all special contract sales of E.ON group (i.e. encompassing sales from all E.ON subsidiaries). The share is reported on the horizontal axis with a minimum bound at approximately 20% and a maximum bound at approximately 70%.

⁹⁶ The Commission has replicated the analysis by using a number of E.ON's and Innogy's tariffs and the results are qualitatively very similar. For E.ON, the tariffs analysed were: KlassikStrom and KlassikStrom 24; OptimalStrom, OptimalStrom 24 and OptimalStrom 36; Strom, Strom 24 and Strom PUR; LifeStrom Premium. For Innogy's retail entities, the tariffs analysed were: SV Strom Stabil A and Strom Stabil & Natur; eprimoStrom grau.

7.1.4. Retail supply of heating electricity

7.1.4.1. Product market definition

- (92) One of the main differences between regular electricity and heating electricity is the customer's different pattern of consumption. While heating electricity is supplied for the purpose of room heating – mainly through two technologies: electric night storage heaters (*Nachtspeicheröfen*) or electric heat pumps (*Wärmepumpen*) – regular electricity is supplied for the operation of household appliances and lamps.
- (93) Regular and heating electricity are typically metered through separate metering systems compared to regular electricity. If a customer uses heating electricity, he either has a single “two-tariff” meter for both regular and heating electricity tariffs that can switch between the two tariffs, or he has two separate meters, one for heating electricity and one for regular electricity. In the Notifying Party's view, “single meter customers” are rather the exception and account for only approximately [20-30]% of the Notifying Party's overall customer portfolio in heating electricity. For customers, the use of double meters provides more flexibility as they can choose between different electricity suppliers for each metering system.⁹⁷
- (94) For the reasons explained below in recitals (95) to (110), the Commission considers that the retail supply of electricity for heating purposes (“heating electricity”) constitutes a separate product market, distinct from electricity used for other purposes (“regular electricity”).

The Commission's decisional practice

- (95) The Commission has not previously considered or assessed the retail supply of heating electricity.

The FCO's decisional practice

- (96) The FCO has previously assessed the retail supply of heating electricity in several decisions and a sector inquiry into heating electricity and has concluded that heating electricity constitutes distinct market, separate from regular electricity.⁹⁸ It has based its findings mainly on the following arguments.
- (97) First, heating electricity customers have a different demand profile than regular electricity customers both across days and within the same day. Since heating electricity is used for heating purposes, the consumption varies depending on the outside temperature and is typically high on days when the outside temperature is low. Also, the times at which heating electricity and regular electricity are typically consumed are different. In fact, heating electricity can be consumed particularly at off-peak hours thanks to the interruptible consumption devices (i.e. in mainly heating technology).⁹⁹
- (98) Second, prices for heating electricity supply tend to be lower than prices for regular electricity. The reason is essentially twofold: (i) heating electricity is subject to lower

⁹⁷ Form CO, paras. 930 et seq.

⁹⁸ FCO B8-107/09 – *Integra/Thüga*, para. 28; B8-94/11 – *RWE/Stadtwerke Unna*, para. 32; B8-69/14 – *EWE/VNG*, para. 249; FCO, Sektoruntersuchung Heizstrom 2010; FNA/FCO, Monitoring Report 2017, p. 45.

⁹⁹ Having a so-called “interruptible” or controllable device (which still are almost exclusively heating devices) is a prerequisite to be able to benefit from lower network and concession fee charges, which therefore apply to heating electricity contracts. See FNA/FCO Monitoringbericht 2018, p. 1769 et seq.

network charges and fees,¹⁰⁰ and (ii) heating systems, especially night-storage technologies, consume electricity in particular in off-peak hours, when the wholesale price of electricity is typically lower than in peak hours.

The Notifying Party's view

- (99) The Notifying Party submits that a distinction by electricity purpose (regular vs heating) is not warranted and that the arguments, whereby the FCO identified a separate market for heating electricity in 2009,¹⁰¹ no longer reflect today's competitive conditions.
- (100) The Notifying Party submits that night storage heaters are no longer installed in new buildings and are increasingly replaced by more efficient technologies, in particular heat pumps.¹⁰² Heat pumps, unlike night-storage heating, do not require charging cycles and thus can be operated also at daytime. The Notifying Party expects that dedicated heating electricity tariffs will gradually disappear and be substituted by regular electricity tariffs which are equally suitable for the operation of heat pumps as consumption levels with heat pumps are more comparable to regular electricity and will no longer justify different tariffs.¹⁰³ All suppliers offering regular electricity will eventually be able to compete for customers' demand for electricity that is used for heating purposes.¹⁰⁴

The Commission's assessment

- (101) The Commission considers that a distinction between heating electricity and regular electricity is appropriate.
- (102) First, the market investigation has confirmed that load profiles for heating electricity are still significantly different from the customer load profile for regular electricity (75% of the respondents to the market investigation indicated that the load profiles of regular electricity customers and heating electricity customers differ).¹⁰⁵
- (103) Second, in respect of the Notifying Party's argument that (i) night storage heaters are increasingly replaced by more efficient technologies, in particular by more efficient heat pumps and (ii) as a result, the load profile for electricity for heat pumps will not considerably differ from the standard load profile for regular electricity so that

¹⁰⁰ According to Section 14a para. 1 of the EnWG, DSOs can "control" the consumption of night storage heaters and heat pumps (interruptible devices) and, if required, interrupt transmission in return for a reduced network charge. The use of interruptible consumption devices enable DSOs to coordinate a balanced network utilisation. In this way, the efficiency of network operations can be increased, and network overload prevented. Reduced network charges for heating electricity directly translate in cheaper tariffs compared to regular electricity. The average reduction in the network charge is 57%, which corresponds to a discount of approximately 3.53 ct/kWh. Moreover, according to Section 2 para. 3 no 1 of the Concession Fee Ordinance, the concession fee for special contracts is set at 0.11 ct/kWh. As heating electricity contracts are legally considered to be special contracts *sui generis*, they generally also benefit from these lower concession fees.

¹⁰¹ The Notifying Party refers to B8-107/09 – *Integra/Thüga*. See also B8-94/11 – *RWE/Stadtwerke Unna*, para. 26; FNA/FCO, Monitoring Bericht 2018, p. 45 et seq.

¹⁰² Night storage heaters and heat pumps differ particularly in terms of electricity consumption and tariff structure: the Notifying Party estimates that heat pumps only require approximately one-third of the electricity required by night storage heaters to provide the same heating performance. Moreover, customers using night storage heaters are almost exclusively supplied with electricity overnight (under specific heating electricity tariffs) whereas customers using heat pumps are more flexible and could also be supplied (under regular electricity tariffs) during the daytime.

¹⁰³ Form CO, paras. 298-299 and 911-912.

¹⁰⁴ Response to the 6(1)(c) Decision with respect to Germany, paras. 98-99.

¹⁰⁵ Replies to questionnaire Q1 – Competitors (Germany), question 52.

special heating electricity tariffs will disappear, the Commission notes that the replacement of night storage heaters by other technologies is slow. While the number of night storage heaters is being reduced over time, the shift towards new technologies appears to take place gradually. According to the Notifying Party, 2.4 million night storage heaters were in operation in 2000 in Germany and 1.6 million of these devices were still used in 2017.¹⁰⁶ Thus, in seventeen years the number of night storage heaters has been reduced by only 33%.

- (104) Third, the large majority (87%) of the competitors responding to the market investigation indicated that they offer different commercial conditions for the retail supply of heating electricity compared to regular electricity.¹⁰⁷ The main reasons for this include the different demand profiles and metering systems, the necessity for consumers to have a controllable consumption/interruptible load device, the different load profiles determined by the DSO, as well as the lower network charges and concession fees applied to heating electricity.¹⁰⁸
- (105) Fourth, the investigation also confirmed that there still exists a significant price gap between heating and regular electricity (typically heating electricity is considerably cheaper than regular electricity, i.a. due to lower network charges and concession fees). In this vein, the majority of competitors indicated that there are different price levels for consumers of heating electricity with regards to consumers of regular electricity.¹⁰⁹ In addition, heating electricity (for night storage heaters, which still account for more than two-thirds of all interruptible consumption devices)¹¹⁰ is predominantly consumed when electricity can be procured for off-peak times when electricity is typically cheaper to procure on the wholesale market than at peak times. Consequently, heating electricity suppliers can also benefit from lower procurement costs.¹¹¹ Overall, as a consequence, the Commission considers that heating customers would unlikely consider regular electricity as a viable alternative because switching to regular electricity would entail significant additional costs.
- (106) Fifth, there are indications that margins for heating electricity are typically higher than margins for regular electricity, which suggests the competitive landscape between regular and heating electricity differs. In this vein, one competitor explains that *“margins on the market for heating electricity are twice as much as the margins on the market for regular electricity because competition is less intense”*.¹¹² As explained in recitals (104) and (105), the market investigation indicated that the competitive conditions in the two markets (heating and regular electricity) are not homogenous. The identity and relative strength of the suppliers differ: there are much fewer suppliers offering heating electricity than regular electricity and some suppliers who are particularly active and effective competitors for regular electricity have a much weaker presence in heating electricity.¹¹³
- (107) Sixth, the Commission has also considered whether heating and regular electricity could be considered as part of the same relevant market on the basis of supply-side arguments. However, for the reasons explained in recitals (318) to (325) below, there

¹⁰⁶ Form CO, para. 919.

¹⁰⁷ Replies to questionnaire Q1 – Competitors (Germany), question 52.

¹⁰⁸ Replies to questionnaire Q1 – Competitors (Germany), question 52.

¹⁰⁹ Replies to questionnaire Q1 – Competitors (Germany), question 52.

¹¹⁰ FNA/FCO, Monitoring Report 2018, p. 171.

¹¹¹ Form CO, para. 925.

¹¹² Minutes of a conference call with a competitor, 7 May 2019 (ID4973), para. 15.

¹¹³ Replies to questionnaire Q1 – Competitors (Germany), question 53.

are significant barriers for a new supplier to enter the heating electricity market or for local suppliers to extend their activities across regions and therefore suppliers active in regular electricity would not be able to start offering heating electricity quickly and without significant costs. Barriers to entry are considerably higher for heating than for regular electricity. Barriers to entry relate to managing different load profiles, which vary by customers and network areas, specific know-how, different procurement, difficulties to identify heating customers or higher risk in the procurement of electricity. Each network area has a different load profile, different network charges and different concession fees. These differences require considerable extra work to assess tariffs for each area compared to regular electricity if a supplier intends to be active at supra-regional or national scope. Offering a standardised product is therefore much more difficult for heating electricity, also in view of a generally smaller potential customer base and the difficulty to identify these customers. Also procurement (purchasing and prognosis of temperature-dependent demand) and IT-systems (for processing and billing) place higher demands on potential suppliers with regard to know-how and necessary investments. Therefore, heating and regular electricity cannot be considered as substitutable products from a supply-side perspective. In this vein, a competitor explains *“although the German Federal Cartel Office has done some important work on leveling the playing field, the supply of electricity for heating purposes is still a very demanding business with lots of barriers to entry. Not every local DSO does offer the necessary information when using the business processes for electricity (GPKE) and in general the business processes lack some detail. Furthermore, there are still conflicting views on how the network fees and concession fees have to be determined in regard to the relevant uses cases, e.g. heat pump and night storage heaters. As a result, a supplier faces uncertainty if he has calculated the tariffs correctly. A supplier faces more than 870 DSO areas in Germany and thus has to deal with up to 870 conflicting views on appropriate concession fees for electricity for heating.”*¹¹⁴ Therefore, heating and regular electricity cannot be considered as substitutable product from a supply side perspective.

- (108) Seventh, not all suppliers who are active in the provision of regular electricity offer heating electricity and vice versa.¹¹⁵ There are much fewer competitors in heating electricity, as discounters, a significant competitive force in regular electricity, are not active in this market and small municipal utilities (“Stadtwerke”) and other local suppliers have limited presence in this market (including a more limited geographical reach, see also recital (317)).
- (109) Finally, most competitors internally differentiate between regular and heating electricity, including the Parties. Significant differences relate also to marketing strategies, invoicing, investment in IT systems, logistic or sales structure, which are more demanding for the supply of heating electricity. For example, a competitor considers that *“there are a lot of differences in calculating the tariffs”*¹¹⁶. In the same vein, another competitor considers that *“the complexity in processing and billing is higher”*¹¹⁷. Another competitor submits that *“a retailer would need a capable legal department and a well trained customer service due to a high number of special situations/problem cases. Whereas the usual number of problem cases is around 3 -*

¹¹⁴ Replies to questionnaire Q1 – Competitors (Germany), question 53 (ID3840).

¹¹⁵ Replies to questionnaire Q1 – Competitors (Germany), question 53.

¹¹⁶ Replies to questionnaire Q1 – Competitors (Germany), question 53 (ID1788).

¹¹⁷ Replies to questionnaire Q1 – Competitors (Germany), question 53 (ID2593).

*5% in the retail market (supply to households and SMEs), we see 50 - 60% of problem cases in the supply of electricity for heating purposes”.*¹¹⁸

- (110) In view of the above and for the purposes of this Decision, the retail supply of heating electricity to household customers in Germany will be regarded as a separate product market.

7.1.4.2. Geographic market definition

The Commission’s and FCO’s decisional practice

- (111) As indicated above, the Commission has not previously considered the supply of heating electricity in Germany.
- (112) The FCO has, in respect of heating electricity, considered regional markets based on the “established supply areas” of the respective incumbent supplier. In its sector inquiry on heating electricity in 2010¹¹⁹ and in the case B8-94/11 – *RWE/SW Unna*, the FCO considered that the market for supplying Standard Low Profile (SLP) customers with heating power is defined regionally. The delimitation takes place according to the established supply area of the electricity distribution undertaking offering heating electricity, i.e. practically according to the network area of the network operator connected to the undertaking concerned, in which the distributor has the position of the basic supplier¹²⁰ within the meaning of Section 36 EnWG and offers heating power. In this case, these markets were defined as corresponding to the grid areas of SWU and RWE. This same market definition was used again in inter alia B4-80/17 – *EnBW/MVV*.¹²¹
- (113) The FCO found that the competitive conditions between local incumbent areas are fundamentally different, with very high local market shares and customers only having very limited options to switch supplier as basically only the local basic supplier of regular electricity¹²² offered heating electricity within a network area and there were hardly competitors present.¹²³

The Notifying Party’s view

- (114) As regards electricity for heating purposes, the Notifying Party submits that, if a separate market were to be considered, it would be appropriate to define local markets (limited to the respective network areas), mainly because (i) a very large proportion (around 90%) of customers are still being supplied by the local incumbent supplier, (ii) load profiles differ locally and this limits the extent of any supply-side substitution (as it creates a challenge for retail suppliers to expand their offering quickly in other areas) and (iii) prices differ significantly from regular electricity

¹¹⁸ Replies to questionnaire Q1 – Competitors (Germany), question 54 (ID3840).

¹¹⁹ FCO, Sektoruntersuchung Heizstrom, 2010.

¹²⁰ While E.ON and certain other competitors have voluntarily launched “basic supply” heating electricity tariffs, this is a decision taken by E.ON and such other suppliers but there is no legal or other requirement for a basic supplier to offer such dedicated heating electricity basic supply contracts.

¹²¹ As in other cases, such as FCO, B 10 – 16/09, Entega, para. 23 and 25 and the following decisions of the Higher Regional Court Düsseldorf upholding the FCOs findings in this regard.

¹²² The basic supplier has the general obligation to offer all of the required energy to every household in that basic supply area (as a “default” supplier, if no special contract is concluded) on largely regulated and to be publicised terms and conditions. The DSO establishes every three years- usually based on municipality/concession areas- who is the basic supplier, based on the entity having the largest customer base in that area

¹²³ See i.a. FCO, B 10 – 16/09, Entega, para 24.

prices due to the significant rebates on network charges and concession fees, which differ by area to area.¹²⁴

The Commission's assessment

- (115) The Commission considers that for the purposes of this Decision, the exact geographic market definition for the retail supply of heating electricity to household customers in Germany can be left open, as the Commission considers that the Concentration significantly impedes effective competition irrespective of whether the market is considered to be national in scope with local elements of competition or local at the network area level.
- (116) On the one hand, some elements point towards a national market: first, whilst the FCO has traditionally defined the market for heating electricity as regional, there are signs that the market is moving towards a national market in a similar manner that has happened to the competitive supply of regular electricity, although this trend is less pronounced and progressing more slowly. According to the FNA/FCO monitoring report 2018, *“there has been a steady increase in switching activity among electric heating customers, albeit at a low level, following many years with hardly any customers switching. This increase in the switching rate indicates a higher degree of competition. Yet at the same time, the switching rates are still far below those for household electricity and non-household customers.”*¹²⁵
- (117) The Commission also notes that, according the 2018 monitoring report “There is a steady increase in the share of electricity provided for heating purposes and electric heating meter points provided by a supplier other than the local default supplier, now standing at around 12%”¹²⁶. As shown in the graph below, the demand of heating customers captured by suppliers other than the local incumbent has increased by more than 5 times in the last four years (from 2.3% to 11.9%). This suggests, similarly to regular electricity, that the market for heating electricity is becoming increasingly competitive (although more slowly than regular electricity) and the role of the local incumbent has been eroding over time.

Figure 3 – Heating electricity supply by non-default supplier

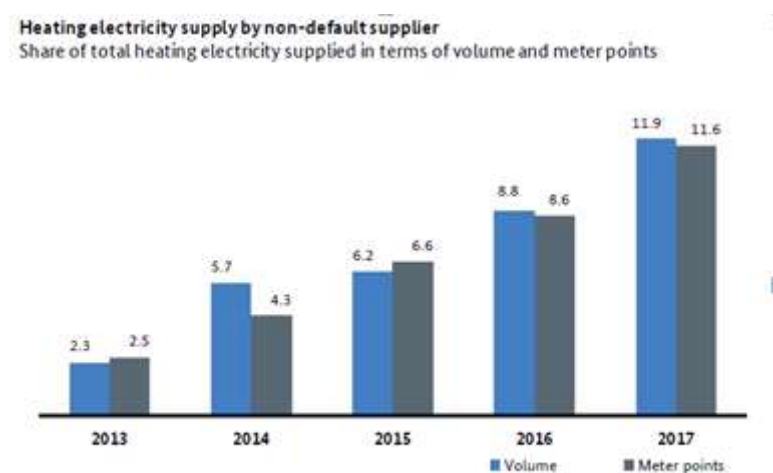


Figure 126: Percentage of heating electricity volume and meter points supplied by a supplier other than the regional default supplier

Source: FNA/FCO Monitoring Report 2018, p. 282.

¹²⁴ Form CO, para. 966.

¹²⁵ FNA/FCO, Monitoring report 2018, page 10.

¹²⁶ FNA/FCO, Monitoring report 2018, page 10.

- (118) Second, a number of suppliers are active on a supra-regional or even national level, offering heating electricity across Germany¹²⁷ and almost half of the respondents indicated that they offer similar commercial conditions in all the areas where they operate and do not differentiate by local area.¹²⁸ Most importantly, the largest suppliers, which are the main drivers of competition for the engaged customers in the retail supply of heating electricity as explained in Section 7.2.3 (e.g. the Parties and EnBW), are active across the country or at least have a supra-regional focus.
- (119) On the other hand, some elements support a local market definition. First, the majority of the respondents to the questionnaire are only active in certain areas and not across Germany¹²⁹ and some competitors face barriers to expanding beyond their traditional region. For example, one competitor considers that “[p]roviding electricity for heating purposes outside our traditional area of [...] would require extra marketing efforts for product (tariff) design, promotion and implementation (additional meter). Given this substantial effort in combination with the rather small number of potential clients, we have decided for the time being to not sell this product beyond the [...] region”¹³⁰. This is in contrast with the same competitor’s strategy in the supply of regular electricity, where it states that it is active in regular electricity supply across Germany and uniformly present across the country (not targeting some specific areas).¹³¹ This highlights the difference in entry barriers between heating electricity and regular electricity.

7.1.4.3. Conclusion on market definition

- (120) For the purposes of this Decision, the Commission is of the view that the exact geographic market definition for the retail supply of heating electricity to household customers in Germany can be left open, as the Commission considers that the Concentration significantly impedes effective competition irrespective of whether the market is considered to be national in scope with local elements of competition or local at the network area level.

7.1.5. Distribution of gas [Gas networks]

- (121) Gas transmission is the transport of natural gas through a network, which mainly contains high pressure pipelines, with a view to its delivery to (intermediate) customers for distribution. Gas distribution is the transport of natural gas through local or regional pipeline networks with a view its delivery to customers, but not including supply.¹³²
- (122) The transmission system is operated by gas Transmission System Operators (“TSOs”) which in Germany includes 16 supra-regional gas TSOs. Innogy does not currently operate a gas TSO.¹³³ The distribution system is operated by approximately 718 gas DSOs.¹³⁴

¹²⁷ Replies to questionnaire Q1 – Competitors (Germany), question 55.

¹²⁸ Replies to questionnaire Q1 – Competitors (Germany), question 56.

¹²⁹ Replies to questionnaire Q1 – Competitors (Germany), question 55.

¹³⁰ Replies to questionnaire Q1 – Competitors (Germany), question 57, (ID2772).

¹³¹ Replies to questionnaire Q1 – Competitors (Germany), question 11, (ID2772).

¹³² Form CO, para. 145.

¹³³ E.ON also has a non-controlling minority stake (15.5%) in Nord Stream. The stake has been transferred into E.ON’s pension fund in 2017.

¹³⁴ Form CO, para. 385.

7.1.5.1. Product and geographic market definition

The Commission's decisional practice

- (123) In previous Decisions, the Commission has generally distinguished between (i) gas transmission (via high pressure systems) and (ii) gas distribution (via medium/low pressure systems).¹³⁵
- (124) In previous Decisions, the Commission found that the geographic market for gas distribution networks is regional within the limits of the area covered by the respective grid, inter alia because the DSO operates a natural monopoly with a market share of 100%.¹³⁶

The Notifying Party's view

- (125) The Notifying Party concurs with the Commission's decisional practice as regards the product definition and the geographic scope of the market for lower pressure gas distribution networks operated by DSOs.

The Commission's assessment

- (126) The Commission did not receive any indication suggesting that the Commission's decisional practice is no longer appropriate.
- (127) For the purposes of this Decision, lower pressure (low and medium) gas distribution networks operated by DSOs will be regarded as a separate product market with a geographic scope in line with the gas distribution network regions, such that the region for each gas distribution network constitutes a distinct relevant geographic market.

7.1.5.2. Conclusion on market definition

- (128) For the purposes of this Decision, lower pressure (low and medium) gas distribution networks operated by DSOs will be regarded as a separate product market and the market will be regarded sub-national in scope in line with the electricity distribution network regions, such that the region for each electricity distribution network constitutes a distinct relevant geographic market.

7.1.6. *Retail supply of gas*

- (129) The Commission considers, based on its assessment, that the structure and functioning of the market for the retail supply of gas is very similar to the market for the retail supply of electricity.¹³⁷

7.1.6.1. Product market definition

The Commission's decisional practice

- (130) In previous decisions concerning Germany, the Commission defined a separate market for retail supply of gas, considering a further segmentation of that market into: (i) the supply of gas to large customers (potentially divided into industrial

¹³⁵ COMP/M.7927 – *EPH/ENEL/SE*, para. 29; COMP/M.7778 – *Vattenfall/Engie/Gasag*, para. 46; COMP/M.5467 – *RWE/Essent*, para. 322.

¹³⁶ COMP/M.7778 – *Vattenfall/Engie/Gasag*, para. 47.

¹³⁷ The Notifying Parties as well as Vattenfall, EnBW and usually Stadtwerke, but also newcomers like Shell (see <https://www.shellprivatenergie.de/startseite>) offer both gas and electricity. The Notifying Parties also stated *expressis verbis* that in relation to the market for the retail supply of gas to small commercial/household customers, basically the same considerations apply as described for the corresponding electricity markets (see Form CO, para. 1344).

customers and gas-fired power plants) and (ii) the supply of gas to small customers (commercial customers and households).¹³⁸

- (131) The FCO followed a similar distinction into (i) load metered customers (Kunden mit registrierender Leistungsmessung, "LM-customers", i.e. large/industrial customers); and (ii) non-load metered or standard load profile customers (nicht-leistungsgemessene oder Standardlastprofil-Kunden, "NLM-customers", i.e. small commercial and household customers). In addition, the FCO since 2014 has further separated the NLM-customers segment into (i) basic supply customers and (ii) special contract customers.¹³⁹

The Notifying Party's view

- (132) The Notifying Party considers it appropriate to distinguish between large/industrial customers on the one hand and small commercial/household on the other, but does not consider it appropriate to distinguish between large/industrial customers and power plants, nor to make a distinction between basic-supply¹⁴⁰ and special contract Customers.¹⁴¹

The Commission's assessment

- (133) In line with the Commissions' precedents and the Notifying Party's submission, the Commission considers it appropriate for the purposes of this Decision to distinguish between (i) small commercial/household customers ("household customers")¹⁴² and large industrial customers¹⁴³. However, with respect household customers, the Commission considers that a further distinction should be made also between (i) basic supply and (ii) special contracts, in line with the FCO's findings. The same or similar issues regarding the distinction between basic supply tariffs and special contracts that apply to retail of regular electricity apply to also the retail supply of gas.¹⁴⁴

7.1.6.2. Geographic market definition

The Commission's decisional practice

- (134) In previous decisions the Commission considered that the market for the retail supply of gas to households and SMEs can be national, regional or local (restricted to the distribution network area) in scope depending on the market characteristics.¹⁴⁵

¹³⁸ COMP/M.7778 – *Vattenfall/ENGIE/GASAG*, paras. 17-19; COMP/M.4180 – *Gaz de France/Suez*, paras. 362-367.

¹³⁹ FCO, B8-69/14 – *EWE/VNG*, paras. 132, 167-189. Geographically, the FCO considers the market for NLM-customers under basic supply to be local (the relevant DSO-area for which the supplier is the basic supplier), for NLM-customers under special contract and LM-customers to be national (*ibid.*, paras. 161; 190-206).

¹⁴⁰ As for electricity, a gas basic supplier is defined for each local area.

¹⁴¹ Form CO, paras. 1309-1316.

¹⁴² Section 3 point 22 of the EnWG, defines customers with a consumption of up to 10.000 kWh/a as "household customers" also for gas.

¹⁴³ A potential separate market for supply of gas to gas power plants would not be affected, as E.ON has no and Innogy only negligible activities on such a market, Form CO, para. 1311.

¹⁴⁴ Gas basic supply is regulated largely the same way as electricity basic supply, inter alia the section 2 of the German Concession Levy Ordinance applies also to gas, as do the regulations concerning basic supply in the EnWG and like for electricity, there is an ordinance regulating the provision of basic supply for gas, the Gasgrundversorgungsverordnung ("GasGVV").

¹⁴⁵ COMP/M.7778 – *Vattenfall/ENGIE/GASAG*, para. 20; COMP/M.6068 – *ENI/Acegasaps/JV*, para. 36; COMP/M.4180 – *Gaz de France/Suez*, paras. 100-105.

- (135) For the market for the retail supply of gas to large/industrial customers, the Commission previously indicated that can be national or regional in scope as well, but ultimately left it open.¹⁴⁶ In the market investigation carried out in Case COMP/M.6910 – *Gazprom/Wintershall/Target Companies*, however, the large majority of competitors and customers active on the upstream and downstream wholesale gas supply markets as well as the competitors and customers active on the retail gas supply market considered the geographic scope of the retail gas supply market to at least encompass the entire German territory.¹⁴⁷
- (136) In 2014, deviating from its previous decisional practice¹⁴⁸, the FCO investigated in depth and concluded that for the supply of LM-customers and for the supply of NLM-customers under special contracts, that there is no longer a need to consider regional supply markets as market penetration by various suppliers across different supply areas on a national level had increased considerably. The FCO therefore considered the relevant markets for the retail supply of gas to LM-customers and NLM-customers under special contracts to be national, the market for the retail supply of gas to NLM customers under basic supply as local, the relevant DSO-area for which the supplier is the basic supplier.¹⁴⁹

The Notifying Party's view

- (137) The Notifying Party submits that the geographic market for the retail supply of gas to large/industrial customers as well as for a market for retail supply to small commercial/household customers is national in scope.¹⁵⁰ However, the Notifying Party submits that a potential market for retail supply of gas to basic supply customer would be local in scope (the respective basic supply area).¹⁵¹

The Commission's assessment

- (138) For the market for retail supply of gas to large/industrial customers the Commission considers it, in line with the Parties and FCO's precedents, to be national in scope. The market investigation showed that the majority of respondents price in general the same across the country but occasionally differ between areas and only the minority stated that their net prices differ by area for all or the majority of products. Many respondents elaborated, that for large/industrial customers, prices differ per customer as customer specific offers are made.¹⁵² Also, the majority of respondents indicated that their sales strategy does not differ by area.¹⁵³
- (139) Concerning household customers, the market investigation conducted by the Commission suggests that the market definition adopted by the FCO is appropriate.

¹⁴⁶ COMP/M.7778 – *Vattenfall/ENGIE/GASAG*, paras. 20, 23; COMP/M.6910 – *Gazprom/Wintershall/Target Companies*, paras. 103-106, referring to COMP/M.6068 *ENI/ACEGASAPS/JV*; COMP/M.5740 – *Gazprom/A2A/JV*; COMP/M.5496 – *Vattenfall/Nuon Energy*; COMP/M.4672 – *E.ON/Endesa Europa/Viesgo*; COMP/M.4110 – *E.ON/Endesa*; COMP/M.3230 *Statoil/BP/Sonatrach/In Salah JV*; COMP/M.3007 – *E.ON/TXU Europe Group*; COMP/M.5467 *RWE/Essent*; COMP/M.4890 – *Arcelor/Ferngas*.

¹⁴⁷ COMP/M.6910 – *Gazprom/Wintershall/Target Companies*, para. 105.

¹⁴⁸ Previously, the FCO considered the markets for retail supply of gas to large (RLM) customers and small (SLP) customers as local, restricted to the DSO network area of the supplier, see FCO, B8-107/09 – *Integra/Thüga*, para. 59; FCO, B8-94/11 – *RWE/Stadtwerke Unna*, para. 96.

¹⁴⁹ FCO, B8-69/14 – *EWE/VNG*, paras. 159 et seq., 190 et seq.

¹⁵⁰ Form CO, paras. 1326-1327.

¹⁵¹ Form CO, para. 1432.

¹⁵² Replies to questionnaire Q1 – Competitors (Germany), question 82.

¹⁵³ Replies to questionnaire Q1 – Competitors (Germany), question 84.

- (140) The market for basic supply for gas is, like in electricity, local. For each local area, only one company is legally entitled to serve basic supply customers and there cannot be competition between basic suppliers active in different areas.
- (141) While there are local elements of competition, the Commission considers that on balance the market for special contracts is national in scope with local elements of competition.
- (142) First, there are around 1,000 gas suppliers in Germany.¹⁵⁴ The FCO notes that in 2017, more than 50 gas suppliers operate essentially across the entire nation (in 93% of the network areas) and more than 100 gas suppliers are operating in 40% of network areas. On average, gas consumers in Germany can choose between almost 120 suppliers in their network area. The average number of suppliers per area has steadily increased in recent years. In 2010 in the majority of the of the network areas (62%) there were less than 30 suppliers available to customers.¹⁵⁵
- (143) Second, the majority of respondents price in general the same across the country but occasionally differ between areas also for household customers and only the minority stated that their net prices differ by area for all or the majority of products.¹⁵⁶ Second, the majority of respondents indicated that their sales strategy does not differ by area.¹⁵⁷ Third, the Parties' internal documents showed also for gas under special contracts that the Parties monitor activities of competitors throughout Germany without focusing on specific regions or competitors, as competitive developments in gas and electricity are internally monitored and assessed similarly by the Parties (see recital (337)). Fifth, there is considerable supply-side substitution and the Commission did not identify significant barriers to entry or expansion.¹⁵⁸
- (144) Similarly to electricity, the special contract tariffs of the basic supplier are typically higher than the special contract tariffs offered by other suppliers.¹⁵⁹ In the Commission's view this is due to an incumbency advantage that the basic supplier enjoy thanks to some demand stickiness caused among other things by, e.g., customer inertia or loyalty to the historical incumbent, etc.. Most of the special contract customers who are with the basic supplier's most expensive tariffs are in many respects similar to basic supplier customers in the sense that the local element of competition is more pronounced, the local incumbent has a degree of pricing power vis-à-vis these customers and the merger does not affect this. However, for the more contestable customers, those who look around and actively choose their supplier on the basis of the offers available on the market, the Parties – outside special contracts with their basic supply entity - tend to price as competitively as other suppliers even in their own incumbency areas.
- (145) As with electricity, the competitive offers available to those gas customers who are engaged and willing to switch supplier is further proved by the Commission's analysis which shows that there is no systematic link between the tariffs that the

¹⁵⁴ FNA/FCO, Monitoring Report 2018, p. 331 (legal entities).

¹⁵⁵ FNA/FCO, Monitoring Report 2012, p. 222.

¹⁵⁶ Replies to questionnaire Q1 – Competitors (Germany), question 80. Also, many competitors are active across Germany. About 50% of respondents stated that they are active across the whole or most of Germany. Replies to questionnaire Q1 – Competitors (Germany), question 79.

¹⁵⁷ Replies to questionnaire Q1 – Competitors (Germany), question 84.

¹⁵⁸ Similar arguments as those raised in paras. x-ref apply to retail gas.

¹⁵⁹ According to the FNA/FCO monitoring report of 2018 (p. 452 et seq.), the average gap in the controllable component of the tariff between the special contracts offered by the basic supplier and the tariffs offered by other suppliers ranges between 10% and 20% depending on the level of consumption.

Parties charged to newly acquired customers (and therefore most likely targeted to customers who are engaged)¹⁶⁰ and the incumbent's share of supply at local level. This suggests that the current competition and threat of entry constrains local incumbents at least with regard to the group of customers who are engaged/more contestable, and this in turn points to a national market.

- (146) In light of the above, the Commission concludes that, for the purposes of this Decision, the retail supply of gas to household customers under special contracts is national, although there are local elements of competition. Even if (*quod non*) the market were to be defined as local in scope, in the competitive assessment the Commission has also considered the effects of the Concentration on a local level and concluded that even on a local basis the Concentration does not raise competition concerns.

7.1.6.3. Conclusion on market definition

- (147) For the purposes of this Decision, the retail supply of gas to household customers under basic supply will be regarded as a separate product market and the market will be regarded local in scope, restricted to the relevant basic supply area. The retail supply of gas to households customers under special contracts will be regarded as a separate product market and the market will be regarded national in scope.

7.1.7. Metering

- (148) Metering relates to the measurement of consumed electricity, gas, water or heat for the purposes of invoicing and providing transparency/optimisation of consumption.
- (149) There are differences within the metering sector in Germany between electricity/gas and district heating/water metering.
- (150) For district heating and water metering, according to the regulatory framework, customers cannot choose their metering service provider and the metering services are supplied by their network operator.
- (151) For electricity and gas, prior to 2005, metering point operation was the responsibility of the respective DSO in its network area and a *de jure* monopoly. In 2005, the legislator allowed third-parties the operation of electricity and gas metering points and introduced competition.¹⁶¹ The DSO was still responsible for the operation of the metering points in the respective network area (as the existing metering point operator, "eMPO"); however, customers were given the choice to switch to a third party. In 2016, a new regulatory framework was introduced, the Metering Point Operation Act (*Messstellenbetriebsgesetz*, "MPO Act") in which network and metering point operation were unbundled. For the operation of electricity and gas meters, two new market roles were defined : the "normally responsible metering point operator" ("nMPO", predominantly the eMPO/DSO)¹⁶² on the one hand and the "competitive metering point operator" ("cMPO") on the other. However, to date, cMPOs still exercise only fringe competition on e/nMPOs in the respective network areas of the latter.

¹⁶⁰ These customers were previously with other suppliers with a competitive tariff and are therefore very likely to have switched back to one of the competitive tariffs of the incumbent.

¹⁶¹ In the New Energy Industry Act (*Energiewirtschaftsgesetz*), article 21 (b).

¹⁶² eMPOs had the opportunity to registers as nMPO for their respective network area before the MsbG came into force and almost all DSOs did according to the FNA, see Form CO, para. 1651. If an ePMO declines this role, it will be assigned to any other company which formally applies for it and fulfills the statutory requirements (authorization by the FNA and a SMGWA certificate).

- (152) In the expected roll-out of modern meters (of the 2nd generation) and smart-metering for electricity and gas across Germany, the modern meters¹⁶³ will replace the existing ones.¹⁶⁴ These modern meters can be expanded by a high secure communication device, the “smart-meter gateway” (“SMGW”) that will allow the communication of the data metered to authorised market participants according to relevant laws and data protection regulation and which needs to be certified by the BSI (*Bundesamt für Sicherheit in der Informationstechnik*). The technical operation of the SMGW (only the transmission device and not the meter itself) must be done by a Smart Meter Gateway Administrator (“SMGWA”). The SMGWA also requires a certificate by the BSI and is responsible for the operation, configuration, administration, monitoring and maintenance of the SMGW and the connection of other technical equipment (e.g. the meter itself) to the SMGW.
- (153) The MPO Act defines various obligations related to the roll-out of new electricity and gas meters in Germany:
- (1) All electricity meters in Germany need to be replaced with modern meters by 2032, with a general obligation for the nMPO to sequentially roll out modern meters for certain proportions of its metering points at different points in time (e.g. the nMPO needs to have installed 10% of its metering points with modern meters by summer 2020).
 - (2) The roll-out of smart-metering systems for electricity by nMPOs (composed of a modern meter with an SMGW) is mandatory only for customers with higher consumption levels or feed-in electricity.¹⁶⁵ For other customers, it would only be optional, at the request of the customer. The rollout of smart-metering systems would also happen sequentially, with 95% of the metering points equipped by 2032, and the roll-out would begin only once the BSI has certified three SMGWs by three independent SMGW-manufacturers (at the moment of this writing, only one SMGW is certified, eight are in certification)¹⁶⁶. For the deployment of smart-metering systems by nMPO (but not cMPO), price-caps differing by consumer’s types and consumption levels apply.¹⁶⁷
 - (3) For gas metering, a general obligation exists to replace the existing meters with gas meters compatible with SMGW on every regular periodic replacement.
- (154) White label services are services such as e.g. procurement, installation, operation, maintenance and the provision of IT solutions, which are provided to MPOs.
- (155) Sub-metering activities are the measurement of energy and water consumption for allocating the consumption to individual units within a building (e.g. in multi-

¹⁶³ In the following, „modern meters“ refers to 2nd generation modern meters.

¹⁶⁴ This applies to both the general analogue meters and the 1st generation modern meters, which were already used for load-measured customers with an annual consumption of more than 100 MWh.

¹⁶⁵ If the e/nMPO declines this role as nMPO and no third party applies to become the nMPO, the original e/nMPO would only be obliged to roll-out 2nd generation modern meters, but not smart metering systems. Form CO, para. 1651.

¹⁶⁶ See Bundesamt für Sicherheit in der Informationstechnik (BSI) https://www.bsi.bund.de/DE/Themen/DigitaleGesellschaft/SmartMeter/SmartMeterGateway/Zertifikate/24MsbG/zertifikate24MsbG_node.html.

¹⁶⁷ An adjustment of the upper price limit by the Federal Ministry for Economic Affairs and Energy is possible at the earliest for the years from 2027 or - potentially - if the new Energy Directive is transposed into national law. Minutes of a call with the FNA on 15 May 2019, para.19 (ID6392).

residential complexes), as opposed to a meter, which measures consumption to a whole building.¹⁶⁸

7.1.7.1. Product market definition

The Commission's decisional practice

- (156) In the past, the Commission has considered a separate market for electricity metering which comprises installation, maintenance, meter-reading and other data related services.¹⁶⁹ The Commission left open whether a segmentation by services provided to load-measured customers (“LM-customers”) and non-load-measured customers (“NLM-customers”), due to services provided being sufficiently different, would be appropriate for Great Britain.¹⁷⁰
- (157) The Commission also considered separate markets for (i) installation and operation of electricity meters and (ii) meter reading and associated data processing activities.¹⁷¹
- (158) The Commission also considered a separate market for sub-metering, as the reading, recording, collecting and processing consumption-dependent data in relation to sub-meters.¹⁷²
- (159) The Commission left open whether such markets could be divided further according to the product measured (such as electricity, gas, water or heat).¹⁷³

The Notifying Party's view

- (160) The Notifying Party considers it appropriate to define separate markets for (i) metering services, including gas, electricity, heat and water metering as well as white label services, and (ii) sub-metering services. Alternatively, the Notifying Party also submits information on potential further segmentations of the former metering market by substance measured (namely (i) water, (ii) heat, (iii) electricity, (iv) gas) and by market role ((v) nMPO and (vi) cMPO) as well as for a separate market sub-segment for (vii) white-label metering services.
- (161) The Notifying Party notes that it would not be appropriate to further segment the market for metering services for electricity and gas between LM- and NLM-customers, as the difference in service provided is only minor, and would be further reduced due to the mandatory deployment of modern meters and smart metering systems. Moreover, most suppliers offer services to both LM and NLM-customers.¹⁷⁴
- (162) The Notifying Party notes that it would not be appropriate to further segment the market for metering services for electricity and gas between consumers equipped with modern meters with vs. without a SMGW. It submits that the SMGW is only a communication device add-on to modern meters and that the Commission in IV/M.913 – *Siemens/Elektrowatt* held that mechanical and electronic meters (incl. remote reading) would not form separate markets.¹⁷⁵ Moreover, most suppliers of

¹⁶⁸ Sub-metering services are also offered for electricity consumptions, mainly to B2B consumers looking for understanding better their consumption processes, but such activity usually part of the services offered by the electricity MPO.

¹⁶⁹ COMP/M.1949 – *Western Power Distribution/Hyder*, para.15.

¹⁷⁰ COMP/M.1949 – *Western Power Distribution/Hyder*, para.16.

¹⁷¹ COMP/M.2890 – *EDF/Seeboard*, para 25. *et seq.*

¹⁷² COMP/M.3874 – *CVC/Ruhrgas Industries*, para.17.

¹⁷³ COMP/M.3874 – *CVC/Ruhrgas Industries*, para.19.

¹⁷⁴ Form CO, para. 1700.

¹⁷⁵ COMP IV/M.913 – *Siemens/Elektrowatt*, paras. 27 *et seq.*

metering services would be able to get the necessary SGMW Administration certificate necessary to operate SMGW, or to outsource this activity to certified companies.

- (163) The Notifying Party also notes that it would not be appropriate to further segment the market for metering services for electricity and gas between operation and installation of meters vs. meter reading and associated data processing activities, for several reasons. First, the consumers do not enter into a separate agreements for those services but are only in contact with their MPO. Second, while it is possible to outsource some or all of installation, operation, reading and data processing to white-label service suppliers, the MPO remains the responsible party. Third, with the development of smart-metering, the MPO would also read the data remotely.¹⁷⁶

The Commission's assessment

- (164) The Commission notes that the previous decisions of the Commission concerning metering activities are more than ten years old and that technology, markets and regulations have evolved since then.
- (165) Based on its assessment and for the purposes of this Decision, the Commission considers (i) a market for metering services for gas and electricity as eMPO/nMPO; (ii) a market for metering services for gas and electricity as cMPO; (iii) a market for metering services for heat and water (iii) a market for sub-metering services and a (iv) market for white label services.
- (166) On a separate product market for sub-metering services, the Commission notes that the end-customers of these services are different from customers of metering services, and that most companies active in the sub-metering market are not offering metering services and vice-versa.¹⁷⁷ Also the FCO defines a separate market for sub-metering.¹⁷⁸
- (167) On the possible distinction between the (i) installation and operation of electricity meters and (ii) meter reading and associated data processing activities, the Commission notes that for Germany, the legislator defines metering operation as encompassing both, so that all these services are a uniform responsibility of the relevant MPO.¹⁷⁹ Therefore, the Commission does not consider such a distinction into separate markets appropriate for Germany.
- (168) On the distinction between metering services for gas and electricity vs. metering services for heat and water, the Commission notes that the regulatory framework differs. For water and heat metering, the relevant network operator is the MPO and the consumer cannot choose its MPO. There is therefore no competition for water and heat metering, which is, however, foreseen for gas and electricity metering.
- (169) For the metering of gas and electricity, the Commission considers it appropriate a distinction in (i) metering services for gas and electricity as eMPO/nMPO and (ii) metering services for gas and electricity as cMPO. Similar considerations apply as the ones concerning a distinction concerning retail supply of electricity and gas with regard to a difference between basic supply and special contract. First, competition in metering takes place predominantly on the market for competitive metering point

¹⁷⁶ Form CO, para. 1707.

¹⁷⁷ Form CO, para. 1778 and figure 107.

¹⁷⁸ See i.a. FCO, Sektoruntersuchung bei Ablesediensten von Heiz- und Wasserkosten; FCO, B10-177/01 – Viterra/Minol.

¹⁷⁹ Form CO, para. 1707.

operation, i.e. cMPO. Second, different regulation applies to cMPOs and eMPOs/nMPOs. The latter, which is the default MPO and typically still the former eMPO/DSO, is subject to regulation such as price-caps, modern meter and smart-meter roll-out obligations, that do not apply to cMPOs. Third, (nationwide) market entry from outside the energy industry (e.g. by Deutsche Telekom or Deutsche Bahn) happens on the cMPO market. However, the Commission notes that for the purposes of this Decision, it can be left open whether the metering markets for gas and electricity should be further sub-divided by cMPOs and eMPOs/nMPOs, as the Concentration does not raise concerns with regard to its compatibility with the internal market under any market definition.

- (170) With regard to a potential differentiation of gas and electricity metering services according to customer size, the Commission notes that technical difference between meters (and the related services) for these customers formed the basis for such a distinction in COMP/M.1949 – *Western Power Distribution/Hyder* for Great Britain 19 years ago. The Commission considers that a distinction in half-hourly metered customers and non-half-hourly metered customers does not reflect the current the market reality in Germany, due to the technical development since the decision and in light of the regulated roll-out of modern meters in Germany.
- (171) Concerning white label services, the Commission is of the view that it can be left open for the purposes of this Decision, whether white label services should be further distinguished into white label services concerning (i) metering services for gas and electricity as eMPO/nMPO;¹⁸⁰ (ii) metering services for heat and water and (iii) SMGWA services, as the Concentration does not give rise to competition under any plausible market definition.

7.1.7.2. Geographic market definition

The Commission's decisional practice

- (172) In COMP/M.1949 – *Western Power Distribution/Hyder*, the Commission left the market definition open for a segmentation of metering services provided to load-measured customers (“LM-customers”) and non-load-measured customers (“NLM-customers”), but considered that these markets could be national or local in scope (transitionally, as the development started from traditional local monopolies).¹⁸¹
- (173) In its further decisional practice, the Commission has considered the relevant geographic markets for metering services to be (at least) national.¹⁸² The Commission has also considered the market for sub-metering services to be national in scope.¹⁸³

The Notifying Party's view

- (174) The Notifying Party agrees with the Commission’s approach to consider the relevant geographic market for metering services as national in scope, based on different legal frameworks in different EU Member states. However, it submits that the market structure is not homogeneous across Germany, as regulation establishes that the

¹⁸⁰ The Commission considers that white label services – at least today and in the near future - are more likely to play a role concerning markets where an obligation to provide certain services exist, which then can be outsourced. Hence, the Commission does not consider a market for white label services for gas and electricity metering as cMPO, the cMPO market being still in its infancy and only players with proprietary capability would enter this activity. See also Response to RFI 70, question 4.

¹⁸¹ COMP/M.1949 – *Western Power Distribution/Hyder*, para.19.

¹⁸² COMP/M.3874 – *CVC/Ruhrgas Industries*, para.23; COMP/M.2890 – *EDF/Seeboard*, para 27.

¹⁸³ COMP/M.3874 – *CVC/Ruhrgas Industries*, para.23; COMP/M.2890 – *EDF/Seeboard*, para 27.

network operator is the default eMPO or nMPO for electricity and gas metering. Likewise, the respective network operator is established as MPO for water and heat metering. Therefore, the Notifying Party submits that the market for electricity and gas metering as well as the market for heat and water metering services should be defined at network area level for Germany.¹⁸⁴

- (175) The Notifying Party also agrees with the Commission's practice to consider the market for sub-metering services as national in scope.
- (176) Ultimately, the Notifying Party considers that the exact geographical market definitions can be left open.

The Commission's assessment

- (177) For the purpose of this Decision, the Commission is of the view that the markets for metering services for gas and electricity as eMPO/nMPO are local in scope, restricted to the respective network area, in line with the Parties argumentation and the findings by the FNA/FCO.¹⁸⁵ Similarly, the markets for metering services for heat and water are considered to be local in scope, restricted to the respective network area. The markets for (i) metering services for gas and electricity as cMPO (potential separate market); (ii) sub-metering services; and (iii) white label services are national in scope.¹⁸⁶
- (178) The Commission considers that white label services (provided to all MPOs) are likely to be national in scope. There are no perceivable barriers that would restrict the offer of such services to a certain area, as most MPOs also provide such white label services and market entrants from outside the industry enter nation wide (e.g. Telefonica).¹⁸⁷ Similar considerations apply to the potential separate market for metering services for gas and electricity as cMPO. The majority of respondents to the market investigation active as cMPO stated to be active equally nationwide.¹⁸⁸ Also, the SMGWA contract between MPOs and SMGWA service providers are usually contracted on a national basis, as having different SMGWAs may lead to technical problems and incompatibilities.¹⁸⁹ The Commission did not have any indication that a deviation from precedents concerning the national scope of a sub-metering market would be necessary.

¹⁸⁴ Form CO, para. 1714.

¹⁸⁵ The Notifying Party submits that "e/nMPOs both conduct metering activities primarily in their own DSO network areas" and that the FNA/FCO found in their joint monitoring reports of 2017 and 2018 that in approximately 90% of all DSO areas in Germany each e/nMPO commands a market share of 99% or more in its respective DSO area. See Form CO, para. 1718.

¹⁸⁶ The Commission considers that white label services (provided to all MPOs) are likely to be national in scope, i.e. as most if not all customers (i.e. MPOs) are still local monopolist and to have a customer base of a certain size, there must be larger geographical coverage. Moreover there are no perceivable barriers that would restrict the offer of such services to a certain area, most MPOs also provide such white label services and market entrants from outside the industry enter nation wide (e.g. Telefonica). Similar considerations apply to the market for metering services for gas and electricity as cMPO. The majority of respondents to the market investigation active as cMPO stated to be active equally nationwide (replies to questionnaire Q1 – Competitors (Germany) question 151). A SMGWA contract between a MPO and a SMGWA service provider are usually contracted on a national basis, as having different SMGWAs may lead to technical problems and incompatibilities (see Form CO, para. 16749).

¹⁸⁷ Form CO, para. 1767.

¹⁸⁸ Replies to questionnaire Q1 – Competitors (Germany) question 151.

¹⁸⁹ Form CO, para. 16749.

7.1.8. *E-mobility*

(179) The Parties submitted that, for the purpose of analysing the Concentration, it is appropriate to consider the following relevant product markets (i) the wholesale supply of Electric Vehicle (EV) Charging Stations, (ii) the retail supply of private EV Charging Stations, (iii) the market for installation and operation of public EV Charging Stations, (iv) the market for subscription services for public EV Charging Stations and (v) white-label services for public EV Charging Stations.¹⁹⁰

(180) The Commission considers that the Concentration raises competition concerns only in relation to the installation and operation of public EV CS in Germany. This Section will first discuss the definition of this relevant market and then will consider other e-mobility-related markets in which the Parties are active.

7.1.8.1. Installation and operation of public EV CS

(181) Public charging takes place in locations freely accessible to all customers such as fuel stations, supermarket parking lots or public parking lots. Public charging currently accounts for up to 20% of the energy charged.¹⁹¹ Charge Point Operators (“CPO”) typically enter into agreements with municipalities and business customers to get access to attractive locations and then operate the EV CS.

(182) There are different types of CS that vary depending on the charging speed: (i) regular charging (AC charging: Charging; ≤ 22 kW), (ii) Fast charging (AC/DC Charging; > 22 -100 kW), (iii) Ultra-Fast charging speed (≥ 150 kW). Charging speed is particularly important on motorways and CS on motorways tend to be equipped with fast or ultra-fast charging power.¹⁹²

(183) The number of EV Charging Stations is closely correlated with the number of EVs. EV-sales are expected to grow strongly in Germany until 2029, approximately 27% per year¹⁹³, an (at least) equivalent growth rate is expected for EV Charging Stations. In fact, it is expected that the EV Charging Station market will grow faster in the coming years as the necessary infrastructure for sufficient coverage still needs to be built ahead of demand, which is essentially a pre-condition for further growth of EVs.

(184) The German EV Charging Stations market is still in development. There are currently 25,241 public EV Charging Stations installed in Germany, 25,000 of which had been built between 2015 and 2017. 88% of EV Charging Stations in Germany charge only with regular charging speed whereas c.12% are fast Charging Stations, allowing for higher charging speeds¹⁹⁴.

(185) Different market roles exist with respect to the supply side of public EV Charging Stations:

- (1) Charge Point Operator (“CPO”): CPOs operate public and private (charging at work) EV Charging Stations and develop networks of EV Charging Stations. CPOs enter into agreements with municipalities and business customers to get access to attractive locations. For installation and maintenance services, CPOs can use white-label services providers.

¹⁹⁰ Form CO, para. 1965.

¹⁹¹ Form CO, para. 1890.

¹⁹² Form CO, para. 1890.

¹⁹³ Form CO, para. 1882.

¹⁹⁴ There are only 7 ultra-fast EV Charging Stations currently active in Germany (outside of the Tesla Superchargers network) to the Commission’s knowledge; Form CO, para. 1919 and Table 163.

- (2) White-label services providers are active in construction and engineering of private and public EV Charging Stations. They do not operate EV Charging Stations or provide access to them but rather focus on retail and installation services.
- (3) E-mobility service provider (“EMP”): EMPs do not install or operate public EV Charging Stations but rather provide solutions that enable end-users to use the EV Charging Stations operated by CPOs, such as payment solutions and system management. EMPs serve both CPOs and end-customers. They enter into contracts (“interoperability-agreements”) with CPOs in order to provide access to the respective public EV Charging Station network.
- (4) Roaming platform provider: Roaming platform providers allow EMPs to offer their customers to charge their EV at public EV Charging Stations that are not part of the charging network of a particular EMP using the same identification and without their EMP concluding a bilateral contract with the respective CPO.

7.1.8.2. Product market definition

The Commission's decisional practice

- (186) In its previous decisions related to provision of e-mobility related activities, the Commission has left open any product market definition, noting in 2012 that the e-mobility sector was rapidly developing and could be subject to radical changes in the coming years¹⁹⁵. At the time, the Commission considered (i) a broad market for the provision of e-mobility solutions and (ii) a market for the manufacturing, supply and installation of charging infrastructure for e-mobility solutions.

The Notifying Party's view

- (187) The Notifying Party submits that the market for installation and operation of public EV Charging Stations might be further segmented in regular/fast EV Charging Stations on the one hand and ultra-fast EV Charging Stations on the other hand.¹⁹⁶
- (188) The Notifying Party submits that from a supply-side perspective ultra-fast EV Charging Stations are technically more complex than regular/fast EV Charging Stations, that the number of CPOs offering ultra-fast EV Charging Stations is significantly lower in comparison with the other EV Charging Stations types and that ultra-fast Charging Stations require considerably higher investments due to the novelty of the hardware and its technical complexity¹⁹⁷. From a demand-side standpoint, with ultra-fast Charging Stations customers can be served significantly more quickly which makes them particularly suitable for drivers on motorways.¹⁹⁸ The Notifying Party considers that the distinction between regular/fast and ultra-fast can be left open, as the Parties activities are currently limited in ultra-fast public Charging Stations.¹⁹⁹
- (189) The Notifying Party does not consider it appropriate to further subdivide the market for installation and operation of public EV Charging Stations based on the location of the EV Charging Station on- or off- motorways²⁰⁰ because (i) there is currently no price difference between EV Charging Stations on- and off-motorway, (ii) the costs

¹⁹⁵ See COMP/M.66416441 – *Verbund/Siemens/E-mobility Provider Austria*, para. 12.

¹⁹⁶ See Form CO, para. 1987.

¹⁹⁷ See Form CO, para. 1989.

¹⁹⁸ See Form CO, para. 1988.

¹⁹⁹ See Form CO, para. 1990.

²⁰⁰ See Form CO, paras. 1999 et seq.

incurred by CPOs for installation and maintenance of public Charging Stations on motorways do not significantly differ from off-motorway locations, (iii) there is a high degree of demand-side substitutability between on-motorway EV Charging Stations and EV Charging Stations located in the vicinity of a motorway.²⁰¹

The Commission's assessment

- (190) The Commission takes the view that for the purpose of this Decision, the installation and operation of public Charging Stations on-motorways and off-motorways should be considered as separate markets. The Commission also considers that on motorways, fast Charging Stations on one hand, and ultra-fast Charging Stations on the other hand, belong to separate markets. The Commission also considers that off motorways ultra-fast Charging Stations constitute a separate market. However, the Commission considers that it can leave it open whether or not regular and fast Charging Stations off-motorways should be part of the same relevant market.²⁰²
- (191) The Commission notes that in the Annual Report of the Market Transparency Unit for Fuel²⁰³, the Bundeskartellamt concludes that a significant overprice exists on fuel stations located on motorways compared to fuels stations located in the close vicinity of motorways and further off motorways. This supports the idea that stations on motorways can charge a premium compared to off-motorways stations because drivers do not consider them as fully substitutable.
- (192) The Commission acknowledges that currently prices for EV CS (including on-motorways CS) are set uniformly across the country (i.e. no local pricing). However, the market investigation indicates that the market is still at an infancy stage and national pricing has been part of the overall strategy to encourage use by EV customers. However, many market participants expect that as the market grows and approaches a more mature stage, the EV charging market will likely develop similarly to traditional fuel stations on motorways²⁰⁴ where prices are, to a large extent, set locally to reflect different competitive conditions.
- (193) On the distinction between regular/fast vs ultra-fast, the Commission's investigation supports the Notifying party's view that they are in separate markets. Ultra-fast technologies require significantly less time to recharge EV. The Notifying Party submits that to recharge an electric vehicle for 100 km takes approximately 10 minutes with ultra-fast technology and approximately 30-60 minutes with fast technologies. Moreover, while today few stations are equipped with ultra-fast technologies and only some electric vehicles can be compatible with ultra-fast CS²⁰⁵, market participants expect that going forward ultra-fast stations will become increasingly common and price of fast and ultra-fast CS will diverge. For example,

²⁰¹ First, there are no toll stations preventing customers to leave the motorway to recharge. Second, customers are incentivised to leave motorways as the charging infrastructure in Germany is not dense enough for long distance travels in Germany with EVs and to solely rely on EV Charging Stations at on-motorway locations. Indeed, according to the Notifying Party, not every services area at motorways is equipped with EV Charging Stations and EVs in Germany on average have a range of 298 km due to their limited battery storage. It also notes that many companies, like Tesla, EnBW or Allego build EV Charging Stations in the immediate vicinity of motorways.

²⁰² The Commission's market investigation produced mixed results. Approximately 60% indicated that regular CS are not substitutable with fast CS but their response in many cases referred to such segmentation in the context of motorways stations.

²⁰³ Issued 12 Avril 2019, available on the Bundeskartellamt website.

²⁰⁴ Minutes of conference calls with competitors, on 16 May 2019 para. 7 (ID5025), on 5 June 2019 para. 16 (ID6068), and on 5 June 2019 para.8 (ID5236).

²⁰⁵ Minutes of a conference call with a competitor on 5 June 2019, para. 11 (ID6068).

one CPO noted that “*In the future, it is likely that fast and ultra-fast charging will be offered at different tariffs.*”²⁰⁶

7.1.8.3. Geographic market definition

Installation and operation of fast and ultra-fast public Charging Stations on motorways

The Commission's decisional practice

- (194) In its decisional practice for fuel stations on motorways, the Commission considered the relevant market to be predominantly national in scope with elements of local competition.²⁰⁷

The Notifying Party's view

- (195) The Notifying Party considers it appropriate to define the relevant market as covering the whole European Economic Area (“EEA”). However, it also observes that the market possesses some national specificities with respect to the permits required for the installation and operation of public EV Charging Stations.²⁰⁸
- (196) The Notifying Party submits that there are no elements of local competition. First, it notes that unlike for fuel stations, EV drivers can charge at private EV Charging Stations. Second, that there are no local competitions on prices between CPOs as price levels do not differ on a local basis, but are typically uniform across Germany, do not fluctuate on an hourly or daily basis and there are no large indicator panels in front of EV Charging Stations disclosing the prices. Third, from a demand-side perspective, the Notifying Party claims that customers do not select a specific EV Charging Station based on prices but rather based on other factors (such as charging speed).

The Commission's assessment

- (197) In line with its precedents for fuel stations, the Commission considers that competition for EV CS on motorways has a strong local element in that each CS competes most closely with CSs located nearby. There are indications from the market investigation that a distance of 50 km is a good proxy to identify stations which are likely to place a material competitive constraint on each other. First, in M.1628 – *TotalFina/ELF* (2000), the Commission assessed the merger on motorways sections of 40 km.²⁰⁹ Second, the planning principles for investments laid down by the Federal Ministry of Transport and Digital Infrastructure provides that stations on motorways should be built at a distance of 50-60 km, up to 80 km in less congested areas.
- (198) The Commission also acknowledges that the competition on the market for EV CS on motorways may have some national elements. In M.7603 – *Statoil Fuel and Retail/Dansk Fuels*, the Commission considered that the following aspects point to a more national dimension: i) for Business to Business (B2B) customers, competition could take place at a national level with the usage of a charging card that provides access to a specific network of Charging Stations²¹⁰, ii) price setting mechanism

²⁰⁶ Minutes of a conference call with a competitor on 5 June 2019, para.4 (ID5236).

²⁰⁷ COMP/M.7849 – *MOL Hungarian Oil and Gas/ENI Hungaria/ENI Slovenija*, paras. 40 et seq. and 43 et seq.; COMP/M.7603 – *Statoil Fuel and Retail/Dansk Fuels*, paras. 54 et seq. and paras. 56 et seq.; COMP/M.1628 *TotalFina/Elf*, para 185.

²⁰⁸ See Form CO, paras. 2025 et seq.

²⁰⁹ The Commission also considered stations located near junctions with other motorways in the competitive assessment.

²¹⁰ Minutes of a conference call with a competitor on 5 June 2019, para. 16 (ID6068).

could involve both national and local competitive interactions, with a centrally design algorithm taking into account the prices advertised by locally monitored competing stations. As discussed above, there are expectations that the EV CS market may ultimately develop similarly to the fuel market on motorway (see recital (192)), this might well apply to the off-motorway CS. In any case, as the Commission does not find any competition problem irrespective of the exact definition of the geographic relevant market, it can be left open whether or not the market should be defined as national or local.

- (199) Regarding the arguments raised by the Notifying Party, the Commission notes that, first, private charging and charging on public CS on motorways are not substitutable as they are mainly used in different context²¹¹. Private charging generally takes place at home or at work, and cannot be used for long-distance journey which is one of the reasons to drive on motorways. Second, as discussed above, the Commission acknowledges that today prices charged to end-consumers do not differ locally and that some factors other than prices (such as charging speed) play an important role in the customer choice. However, market participants expect that the EV CS business will likely develop similarly to traditional fuel stations where the competitive conditions at local level influence the fuel operators' strategy (on prices and/or other dimensions).
- (200) For the purpose of this Decision, the Commission considers that the geographic definition can be left open as to whether the market is local or national with local elements of competition because the Concentration would raise competition concerns irrespective of the exact definition of the geographic market.

Installation and operation of public Charging Stations off motorways

- (201) In its decisional practice for fuel stations off motorways, the Commission considered the relevant geographic market to be national in scope with elements of local competition.

The Notifying Party's view

- (202) Similarly to CS on motorways, the Notifying Party considers it appropriate to define the relevant geographic market as EEA-wide, or at most national, but it argues that there are no significant elements of local competition.

The Commission's assessment

- (203) The Commission considers that the market for installation and operation of public Charging Stations is still at an infancy stage. While there seems to be somewhat more clarity about the roll-out of CS and the related business on motorways, off-motorways there is large uncertainty about the EV customers' consumption behaviour going forward (e.g. whether, and to what extent, it will differ from traditional fuel stations) and therefore as to how the market will eventually develop. The Commission considers the competition for EV CS off motorways will possibly have a local dimension, similarly to traditional fuel stations. However, the Commission considers that the exact definition of the market can be left open as the Concentration does not raise concerns under any plausible market definition²¹².

²¹¹ Form CO, para. 1890.

²¹² On a segmentation between regular/fast and ultra-fast Charging Stations, the Commission's assessment is the same as above (see para. (177)) for on-motorways Charging Stations.

7.1.8.4. Wholesale supply of EV CS

- (204) Innogy is active in the wholesale supply of EV CS but E.ON has no activities in this area.
- (205) The Notifying Party submits that, in view of the different demand and technological features, this market may be segmented into (i) public vs private EV Charging Stations and (ii) by charging speed/technology. The Notifying Party submits that the market is EEA-wide in scope as manufacturers and wholesalers are active across the EEA and the technical standard are fully harmonized across the EEA countries.²¹³
- (206) The Commission considers that the exact (product and geographic) market definition can be left open as there is no horizontal overlap in the Parties' activities and Innogy's share is below 30% under any plausible product (public vs private, or regular vs fast vs ultra-fast CS) or geographic market segmentation (EEA vs national).

7.1.8.5. Retail supply of private EV Charging Stations

- (207) In the Notifying party's view, the retail supply of private EV CS constitutes a relevant market (separate from the retail supply of public EV CS) because, from a demand perspective, customers operate the CS themselves (as opposed to have a third party operating the station) and charging speed is not important as the EV is typically charged at night or while the user is at work. Also, from a supply-side standpoint, public and private CS differ in that public CS require the service provider to be able to deal with marketing, invoicing and a wide-range of other processes/services that are not relevant for private EV CS.²¹⁴ The Notifying Party considers the geographic market for private EV CS can be defined as either EEA-wide²¹⁵ or national in scope but it can ultimately left open.²¹⁶
- (208) The vast majority of the respondents to the Commission's investigation confirmed that private and public EV Charging Stations are used in different contexts and are not (or only to a limited extent) substitutable in the customers' view.²¹⁷ From a geographic perspective, most of the respondents indicate that they are only active in Germany²¹⁸ and that within Germany they tend to apply a uniform nation-wide pricing policy.²¹⁹
- (209) For the purpose of this Decision, the Commission considers that the retail supply of private EV CS is a separate market and is national in scope. E.ON and Innogy are active in the retail supply of private EV CS but they have both very limited shares ([0-5]% Innogy and less than [0-5]% E.ON) and therefore the market is not affected.

7.1.8.6. Subscription services for public EV Charging Stations

- (210) Customers subscribe to EMP services in order to get access to public charging infrastructure, predominantly while being on long-distance journeys or if their private EV Charging Station is not available. These subscription services include

²¹³ Form CO, paras. 1968 et seq.

²¹⁴ Form CO, paras. 1976-1981.

²¹⁵ As the hardware is generally identical across the EEA without any national specificities.

²¹⁶ As many customers have a preference for a local supplier and usually procure private EV Charging Stations from a domestic supplier.

²¹⁷ Replies to questionnaire Q1 – Competitors (Germany), question 170.

²¹⁸ Replies to questionnaire Q1 – Competitors (Germany), question 175.

²¹⁹ Replies to questionnaire Q1 – Competitors (Germany), question 177.

access to regular, fast and ultra-fast EV Charging Stations and typically include additional services such as localization and payment services

- (211) The Notifying Party submits that the supply of subscription services to access public EV CS is a separate market but it does not consider it appropriate to further segment the market by charging technology (regular vs fast vs ultrafast).²²⁰ The Notifying Party submits that it is at least national in scope as customers require subscription services which allow for access to EV CS across Germany, and possibly with the option to charge EVs also in other European countries.
- (212) The Commission considers that the exact product market definition (whether a segmentation by charging technology is appropriate) can be left open as the Concentration does not raise concerns under any plausible market definition. The Commission considers the geographic scope of the market to be national: most of the EMPs responding to the Commission's investigation indicated that they are only active in Germany,²²¹ and that within Germany they are active across the country²²² and they typically pursue a uniform nation-wide pricing policy²²³.
- (213) The Parties have a limited presence in this market. Their combined share is less than [0-5]% and therefore the market is not affected.

7.1.8.7. White-label services for public EV Charging Stations

- (214) The Notifying Party considers it appropriate to define a separate market for white-label services for public EV Charging Stations.²²⁴ White-label services are back-end or front-end IT services provided to CPOs or EMPs. Back-end services include services for CPOs to manage network access and to monitor and manage problems with maintenance tools as well as payment solutions. Front-end services include e.g. applications which allow customers to find available EV Charging Stations and to execute payments.
- (215) In the Notifying Party's view, the geographic market definition can be either national²²⁵ or EEA-wide²²⁶ but it can ultimately left open as no competition concerns arise irrespective of whether the market is national or wider in scope.
- (216) The Commissions concurs with the Notifying Party that the supply of white-label services for public EV CS is a separate market. The market investigation supports the view that the geographic scope of the market is national: most of the suppliers responding to the Commission's investigation indicated that they are only active in Germany,²²⁷ and that within Germany they are active across the country²²⁸ and they typically pursue a uniform nation-wide pricing policy²²⁹
- (217) The Parties have limited activities in this market. Their combined share is less than [5-10]% and therefore the market is not affected.

²²⁰ As, from a supply-side perspective there is not difference in contracting regular, fast or ultra-fast EV Charging Stations and the technical solutions to grant access to customers via the IT back-end do not differ for any of these EV Charging Stations.

²²¹ Replies to questionnaire Q1 – Competitors (Germany), question 181.

²²² Replies to questionnaire Q1 – Competitors (Germany), question 182.

²²³ Replies to questionnaire Q1 – Competitors (Germany), question 183.

²²⁴ Form CO, para. 1965.

²²⁵ As there are certain national specificities, especially with regard to tax regulation.

²²⁶ As most suppliers are active across Europe.

²²⁷ Replies to questionnaire Q1 – Competitors (Germany), question 185

²²⁸ Replies to questionnaire Q1 – Competitors (Germany), question 186.

²²⁹ Replies to questionnaire Q1 – Competitors (Germany), question 187.

7.1.8.8. Conclusion on market definition

- (218) For the purposes of this Decision, the installation and operation of fast public Charging Stations on motorways and the installation and operation of ultra-fast public Charging Stations on motorways will be regarded as separate product markets and the geographic market will be left open between local or national with local elements of competition. The installation and operation of regular/fast public Charging Stations off motorways and the installation and operation of ultra-fast Charging Stations off motorways will be regarded as separate product markets, with likely local geographical scope, but the Commission considers that the exact definition of the market can be left open as the Concentration does not raise concerns under any plausible market definition.

7.2. Competitive Assessment - Horizontal non-coordinated effects

- (219) In assessing whether a merger would significantly impede effective competition by removing important competitive constraints on one or more suppliers, who would have increased market power as a consequence, the Commission conducts a competitive analysis based on an overall assessment of the foreseeable impact of the merger in light of the relevant factors and conditions.²³⁰ Market shares and concentration levels provide useful first indications of the market structure and of the competitive importance of both the merging parties and their competitors.²³¹ However, other factors to be considered in the overall assessment and which may influence whether significant non-coordinated effects would result from the merger include whether the merging firms are close competitors, whether competitors are unlikely to increase supply if prices increase, whether the merged entity has the ability to hinder expansion by competitors and whether the merger eliminates an important competitive force.²³² The analysis of barriers to entry also constitutes an important element of the overall competitive assessment. In that respect, the Commission also assesses whether entry into the market would be likely, timely and sufficient to deter or defeat the anti-competitive effects of the merger.²³³

7.2.1. *Distribution of electricity and gas*

7.2.1.1. The Parties' activities

- (220) E.ON operates electricity and gas distribution networks via its four regional utilities Bayernwerk, Avacon, E.DIS and HanseWerk and their respective subsidiaries.²³⁴ E.ON holds²³⁵ roughly [...] electricity concessions and roughly [...] gas concessions and it covers approximately [10-20]% of length of the German electricity distribution grid length and [10-20]% of length of the German gas distribution grid.²³⁶

²³⁰ Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings (2004/C 31/03), para. 24.

²³¹ Guidelines on the assessment of horizontal mergers, para. 14

²³² Guidelines on the assessment of horizontal mergers, paras. 26 et seq.

²³³ Guidelines on the assessment of horizontal mergers, paras. 68 et seq.

²³⁴ In addition, E.ON holds a few shareholdings in other distribution network operators (see Annex_6BII 16 - Annex_6BII 20). Also, E.ON holds a non-controlling 15.5% participation in Nord Stream AG. The other shareholders in Nord Stream AG are PAO Gazprom (51%), Wintershall Holding GmbH (15.5%), NV Nederlandse Gasunie (9%) and ENGIE (9%). Form CO, para. 386.

²³⁵ The number of concessions is based on the concessions held by the four regional utilities, excluding its subsidiaries.

²³⁶ The Parties also provide distribution network services to third party concession holders but in a limited number of cases. For example, E.ON provides these services for [...] electricity networks and [...] gas networks (see response to RFI 36).

- (221) Innogy operates electricity and gas distribution networks via its group companies Westnetz, Süwag, VSE, enviaM and Lechwerke AG (“Lechwerke”), BTB, OIE AG and Emscher Lippe Energie GmbH (“ELE”) and their respective subsidiaries.²³⁷ Innogy holds²³⁸ roughly [...] electricity concessions and roughly [...] gas concessions²³⁹ and it covers approximately [20-30]% of the length of the German electricity distribution grid and [10-20]% of the length of the German gas distribution grid.²⁴⁰

7.2.1.2. Competitive concerns

- (222) Given that each distribution network constitutes a distinct relevant geographic market, the activities of the Parties do not overlap and therefore the Concentration would not give rise to a horizontally affected market. Nonetheless, the Commission – partly on the basis of concerns raised by third parties - has assessed a number of hypothetical scenarios in which the Concentration might cause harm to consumers:
- (1) lessening of competition in concession tenders
 - (2) discrimination in the use of 110KV network
 - (3) negative impact on the efficiency benchmark for regulation
 - (4) undue ability to influence standard setting processes
- (223) These concerns are discussed in the recitals in this Section.

Competition for concessions

- (224) In Germany municipalities organise the operation of distribution networks for their residents by granting rights (“concessions”) to operators (DSOs) to install and operate distribution networks²⁴¹ in their area for 15-20 years (the average duration of concession agreements).
- (225) The DSO selection process for these concessions takes place via a tender process (Konzessionsvergabeverfahren) conducted by the municipality for its area or parts of it (“concession tender”). As the organiser of the tender process, the municipality has to make an announcement regarding the expiry of the current concession contract. The announcement is required to be published in the German Federal Gazette (Bundesanzeiger) at least two years before the expiry date of the current concession contract.²⁴²
- (226) After the municipality has been contacted by an interested party, it has to provide a description, in writing, of the criteria and of the scoring system for the tender. After expiry of the tender deadline, the municipality has to assess all offers received and make a decision based on the specified criteria. The decision is taken by the municipal council (formed of non-professional politicians and headed by the mayor

²³⁷ Innogy has more than [...] strategic partnerships with municipalities, including majority participations in municipal utilities and minority participations, inter alia in [...]. Form CO, paras. 403 to 405.

²³⁸ The number of concessions is based on the concessions held by RWE international (incl. OIE), enviaM, Süwag, VSE, Lechwerke, EWV, ELE, SW Düren, EWV, rhenag, SW Kamp-Lintfort, RWW and NEW, including their network entities.

²³⁹ Response to RFI 67.

²⁴⁰ Form CO, para. 404.

²⁴¹ Such rights are only granted for electricity distribution grids below 110kV and gas pipelines with a diameter of less than 300mm.

²⁴² If there are more than 100,000 customers directly or indirectly connected to the respective distribution network, the announcement has to be published in the Official Journal of the European Union.

of the municipality, all elected through municipal elections). The Notifying Party submits that municipalities have wide discretion in selecting, weighting and designing the award criteria, including the consideration of municipal interests. The main criteria include: price effectiveness, security of supply, network security, preservation of substance and investments, quality of customer services, efficiency, environmental aspects, innovation, etc..²⁴³

- (227) Both E.ON and Innogy regularly bid in tenders for electricity and gas concessions. The Commission has assessed whether the Parties are significant competitors to each other in this regard, but found that the Concentration would not significantly impede competition in the tenders for concessions.
- (228) First, the Parties do not compete closely in tenders.²⁴⁴ The market investigation revealed that the Parties have hardly ever competed in the same concession tenders in the past. In the period 2013-2017, E.ON participated in [...] network concession tenders, of which [...] related to electricity network concessions and [...] to gas network concessions. In the same period, Innogy participated in [...] tender, of which [...] were for electricity network concessions and [...] were for gas network concessions.²⁴⁵
- (229) Out of all these tenders, the Parties only competed in [...] instances, [...] for electricity concessions and [...] for gas concessions, which is less than [0-5]% of all tenders in which the Parties bid. The Commission has also considered whether the Parties competed indirectly through affiliated companies (i.e. companies in which the Parties hold a minority non-controlling share) but even then it found no additional instances of the Parties meeting in tenders in recent years.
- (230) Some market participants suggested that the Parties were competing mostly in municipalities located on the border of their "traditional DSO areas", as each of them was seeking to expand its network to adjacent areas (to benefit from economies of scale since local staff are needed for grid operations). However, the [...] tenders in which the Parties competed were not concentrated in any particular region and were not always located near the border of E.ON and Innogy DSO areas.
- (231) Second, municipal utilities are increasingly constraining the Parties in concession tenders. The Parties mostly participated in tenders for concession areas where [...]. However, when the Parties lost tenders, the tenders were mostly lost to municipal utilities. For example, E.ON won [...] out of [...] tenders for electricity distribution networks in which it participated. Of the [...] tenders lost by E.ON, [...] ([90-100]%) went to public or semi-public companies. Similarly, Innogy lost only [...] out of the [...] tenders for electricity distribution networks in which it participated. Of these [...] tenders, [...] ([80-90]%) were awarded to municipal utilities. The picture for gas concessions is very similar. [...] gas tenders lost by E.ON and more than [90-100]% of the gas tenders lost by Innogy went to public or semi-public companies.²⁴⁶
- (232) According to the Notifying Party, there is a strong trend towards remunicipalisation.²⁴⁷ Driving factors in this trend include the municipalities' interest

²⁴³ Para. 280 of Form CO.

²⁴⁴ The analysis took into account all the cooperation agreements and/or joint-ventures which E.ON or Innogy participate in, to the extent data was available. (response to question 4 of RFI 36).

²⁴⁵ The list of the tenders in which both Parties bid include: [confidential: description of specific tenders and outcomes].

²⁴⁶ Form CO, para. 492 et seq.

²⁴⁷ Form CO, para. 289 et seq.

in gaining more influence over the network's development, and the considerable and low-risk financial revenues of operating electricity and gas networks, low interest rates and a stable return on investment (usually [0-5] to [5-10]%). The Notifying Party argues that municipalities have ample discretion in the application of the award criteria and ultimately in the selection of the concession holder, and also that a recent amendment to the statutory provisions for concession tenders (implemented in 2017 and advocated by the municipalities), introduced the "consideration of municipal interests" as a legitimate criterion in concession tenders. This gives an even wider discretion to municipalities to design the tender process in ways that are advantageous to municipal utilities as bidders.

- (233) The remunicipalisation trend was also acknowledged by several respondents to the Commission's market investigation. One competitor confirmed that *"There is a trend of 're-municipalisation': there is a lot of pressure from the political institutions and local parliaments to re-acquire the grid."*²⁴⁸ A competitor noted that *"in general, the past 15 years have witnessed an increase in the participation of municipalities in tenders for concessions. This has been the result of a wave of remunicipalisation in which local communities have actively pursued regaining control of grid concessions...In the past, municipalities have had considerable success in tendering for concessions, partly due to their competitive advantage as a local 'brand'."* Another supplier stressed the discretion of municipalities in setting the awarding criteria *"Municipalities tend to stipulate tender conditions for the benefit of their own municipal utilities."*²⁴⁹
- (234) Some competitors raised concerns that, thanks to the merger, the Parties would achieve large economies of scale, for example in the procurement of grid equipment, and they would therefore have a significant competitive advantage vis-à-vis smaller suppliers. As a preliminary observation, the Commission considers that, should the merger generate savings for the Parties due to economies of scale, this could be beneficial for customers if any of the saving are to be passed on to them. Detrimental effects might in theory arise only if, in the longer term, the Parties were able to monopolise the market due to the fact that no competitor could match the cost structure of the Parties.
- (235) The Commission considers that, even pre-merger, the Parties are several times larger than most of the suppliers (especially small municipal utilities)²⁵⁰. If the size of DSO activities results in significant economies of scale, the Parties should have a considerable cost advantage already pre-merger and therefore they should be able to expand their DSO activities continuously at the expense of other (smaller) suppliers. However, the tender data reveals that the Parties have mostly been successful in winning tenders when they were already the incumbent but that they have had limited success in acquiring new concessions (in areas where they were not incumbent). For example, in the period 2013-2017 E.ON bid for [...] electricity concession in an area where it was not the incumbent²⁵¹ but it did not win, and it bid for [...] gas concession tenders in areas where it was not the incumbent and won only [...]. The economies of scale's argument is also at odd with the remunicipalisation trend (see recitals (232) and (233)) and the evidence that local

²⁴⁸ Minutes of meeting with a competitor, para 23, 12 December 2018 (ID3150).

²⁴⁹ Replies to questionnaire Q1 – Competitors (Germany), question 119.

²⁵⁰ E.ON, for example, is the second largest electricity distribution network operator and the largest gas distribution network operator.

²⁵¹ Form CO, para. 492.

municipalities are increasingly interested in distribution activities and are amongst the closest competitors of the Parties in tenders.²⁵²

- (236) Some market participants were concerned that the Parties may put in place tactics aimed at deliberately delaying handing over the concessions that they have lost. As one third party put it: *“There are ... currently several court cases where the new grid operator is seeking injunctions and damages as the old grid concessionaire delays the transfer of the grid. However, RWE and E.ON voluntarily take the risk of these sanctions to delay the transfer of the grid and continue to operate on it”*.²⁵³ This strategy frustrates small players’ attempts at entry and expansion.²⁵⁴ The Commission considers that irrespective of whether the conduct of these incumbents is legitimate, the conduct is not merger-specific in the sense that the Concentration is unlikely to increase the Parties’ incentives to pursue strategies of this sort.

a. Discriminatory use of 110kV network to foreclose competing DSOs

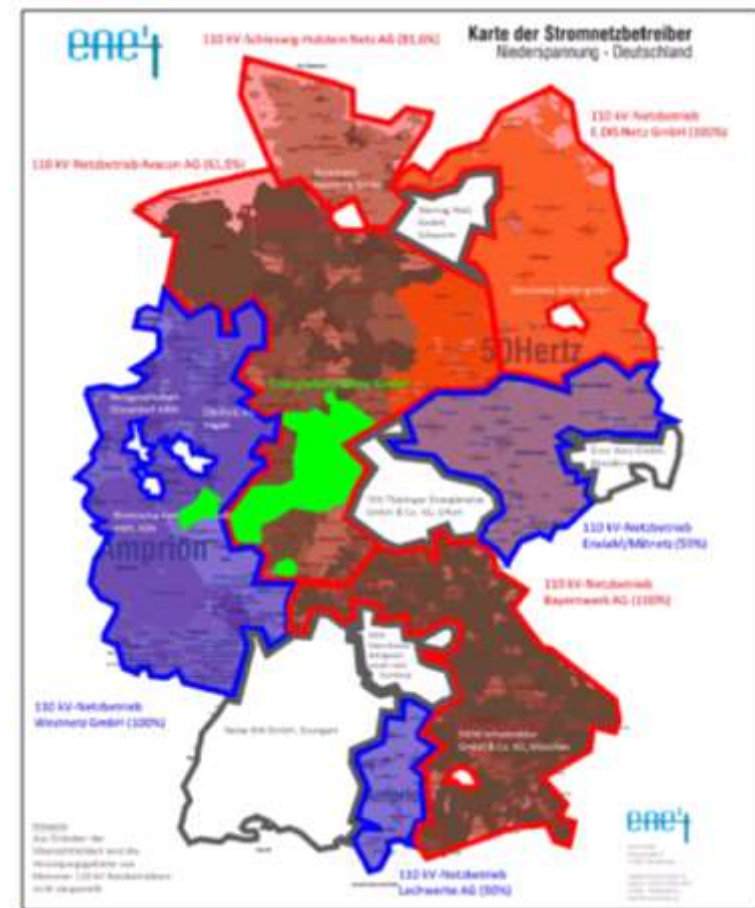
- (237) In Germany, 110-kV networks are part of the electricity distribution network operated by DSOs (and not part of the transmission network). 110-kV lines are considered as high-voltage networks, each network covering larger regions of Germany than each DSO. Medium power plants and major industrial consumers as well as lower-voltage networks and transmission networks are directly connected to the high-voltage network. Unlike the other voltage levels of the distribution network, 110-kV networks are not subject to concession tenders.
- (238) E.ON and Innogy operate a significant part of the 110 kV network in Germany, as shown in Figure 4.

²⁵² Economies of scale can allow companies to offer competitive network tariffs which is one of the awarding criteria (*price effectiveness*) regularly considered in tenders. There are however many other criteria that are factored in the selection of the concession holder (see para. 26 above). According to the Notifying Party, the network tariff level is typically weighted around [10-20]% in the municipalities’ decision (Form CO, para. 281).

²⁵³ Minutes of a meeting with a competitor on 28 August 2019, para 6 (ID876).

²⁵⁴ Minutes of a meeting with a competitor on 28 August 2019, para 7 (ID876).

Figure 4 – 110 kV network in Germany



Source: <https://www.enet.eu/portfolio/karten>

- (239) Access to the 110 kV network is regulated on the basis of fair and non-discriminatory principles. Sections 17 and 20 of the EnWG set out the regulatory provisions governing the cooperation between the 110-kV network operators and a wide range of market participants, including lower-voltage DSOs.
- (240) Some third parties are concerned that the merged entity could discriminate against competing DSOs by preventing effective connection and/or investment in network expansion thereby hindering the ability of competing DSOs to develop new systems/solutions, such as smart grid, grid-scale storage, e-mobility services, etc. They are also concerned that the merged entity could cross-subsidise between different voltage grids. E.ON could transfer part of its cost from the low and middle voltage network to the high voltage network, which non-integrated competitors could not do and they would therefore have higher distribution costs. These strategies would foreclose downstream competitors and impede effective competition in tenders for concessions.
- (241) The Commission has carefully considered this concern but ultimately concluded that foreclosure is unlikely to arise from the Concentration for the set out in recitals (242) to (245).
- (242) The vertical link between the Parties' activities as 110 kV network operator and the low voltage distribution market is pre-existent and not created by the Concentration. The Concentration does not strengthen the ability to foreclose downstream competitors as there is no structural change in the upstream market (each 110 kV network operator is a monopoly in its own geographic area and this is not affected by the Concentration).

- (243) In any case, access to the 110 kV network is subject to extensive regulation. Sections 17 and 20 of the EnWG require distribution network operators (including 110 kV grid operators) to connect downstream distribution networks to their systems on technical and economic conditions that are reasonable, non-discriminatory and no less favourable than the conditions offered to other operators. The regulatory framework also includes specific provisions aimed at discouraging any discriminatory conduct. For example, in the case of network disruptions due to lack of investment at a higher voltage level, DSOs have to report to the TSO and to the regulator that they are facing bottlenecks in their networks. As part of the regulatory framework, the costs of black-outs as a result of this behaviour are shifted to the regional DSO whose revenue cap would therefore be reduced.
- (244) As regards the ability to cross-subsidise between different voltage levels, the Commission notes that network tariffs are one of many criteria used in the tenders for awarding concessions and according to the Notifying Party, that criterion has a relatively small weighing (approximately [10-20]%) in the award decision. When combined with the fact that higher voltage network costs (including costs related to connection to the 110 kV grid) account for approximately [5-10]% of the low voltage total costs,²⁵⁵ it suggests that any misuse in the cost allocation between the 110 kV grid and the lower voltage grid would be unlikely to increase materially the costs incurred by non-integrated companies. It is also worth noting that the FCO has received no complaint so far as to possible discriminatory conduct in the cost allocations between networks.
- (245) Not only is the ability to foreclose unaltered but also the incentives are unaffected. It is unclear how the merger would increase the benefits from foreclosure downstream and therefore make any vertical foreclosure strategy more profitable. To the extent that discriminating in favour of its own DSO branch is profitable, this should hold equally true before and after the merger. It is worth noting that there are network areas where the Parties despite operating the 110 kV network, are not DSO and there are also instances in the past when, for instance, [...].²⁵⁶

b. Unparalleled influence over regulator and standard setting associations

- (246) Some market participants raised the concern that post-merger E.ON would have a majority on the boards and committees responsible for defining technical standards and process, such as the VDE (Verband der Elektrotechnik Elektronik Informationstechnik e.V.), and it would therefore be able to influence the setting of the technical standards.
- (247) The VDE Association brings stakeholders together to establish system requirements aimed at foresight development towards safe, reliable, environmental and economical friendly grid operation.²⁵⁷
- (248) For each technical standard a working group is responsible. The working group includes a variety of stakeholders (e.g. suppliers, network operators, installation companies, etc.) and industry experts. VDE/FNN asks for participation and checks potential specialists against the required needs of the working group to ensure all relevant interests are represented. Currently VDE/FNN operates [...] working

²⁵⁵ Parties' estimates on the basis of [...] costs. Source: the Parties' response to concerns raised by a competitor.

²⁵⁶ For example, in 2011 E.ON lost [description of outcomes of specific tenders].

²⁵⁷ Minutes of call with VDE/FNN of 17 May 2019 and 24 July 2019.

groups. Working groups are typically limited to 10 persons. Although working groups generally work on the basis of consensus, if a vote is held, each participant holds one vote. Only in one working group ([...]) would the merged entity have a majority of the participants post-merger.²⁵⁸

- (249) However, the working group members are appointed by a Steering Committee and the Steering Committee also has the power to change the composition of the working groups. VDE/FNN currently operates 3 Steering Committees. The responsible steering committee typically identifies a diversified cluster of relevant stakeholders, appoints the experts and brings them together for a given topic. In none of the [...] Steering Committees would the merged entity have a majority of the participants post-merger.²⁵⁹
- (250) The Steering Committee is nominated by the Forum, which is also in charge of approving publication of the final version of the standard. A meeting of the Fördererkreis (supporters circle) takes place once a year with all members (450) (TSOs (4), DSOs (approximately 300), manufacturers, metering point operators, plant operators, research institutes). The voting rights are based on the contribution of each member, but VDE/FNN rules provide for a cap of, maximum, 10%.²⁶⁰
- (251) VDE/FNN also operates expert groups where certain topics are discussed. In only 1 out of 16 expert groups (network stability) would the merged entity have a majority of the participants post-merger. However, these groups do not work on application rules and therefore do not set standards.²⁶¹
- (252) The Commission therefore considers that the merger is unlikely to give the merged entity the ability to unduly influence the VDE/FNN's decision-making process in relation to the setting of technical standards.

c. Impact on efficiency benchmark

- (253) Since electricity and gas networks constitute natural monopolies, network tariffs are regulated by the FNA. The network tariff regulation for electricity and gas DSOs in Germany is designed as incentive regulation. In practice the FNA sets a revenue cap²⁶² for each DSO for a period of five years²⁶³ (the "Regulatory Period"), which limits the level of tariffs DSOs can charge.²⁶⁴
- (254) Network tariffs are regulated at the network-operator level, i.e. they are based on the cost accrued at the network operator for all the distribution grids that it operates (the principle of "one network operator – one network tariff").²⁶⁵ Each network operator (legal entity) sets a uniform network tariff for its distribution grids. Put simply, the

²⁵⁸ Submission by the Parties of 25 July 2019 and 29 July 2019.

²⁵⁹ Submission by the Parties of 25 July 2019 and 29 July 2019.

²⁶⁰ Minutes of call with VDE/FNN of 17 May 2019 and 24 July 2019.

²⁶¹ E.ON and Innogy have [...] participants in this expert group composed of 9 participants in total.

²⁶² The revenue cap regulation distinguishes between distribution and transmission networks (Form CO, para. 321).

²⁶³ The first Regulatory Period for electricity (gas) ran from 2009-2013 (2009-2012) and the second Regulatory Period from 2014-2018 (2013-2017), i.e. electricity (gas) distribution networks are currently in the third Regulatory Period.

²⁶⁴ Form CO, paras. 316-319.

²⁶⁵ Network tariffs have to be appropriate, non-discriminatory, transparent, and – in comparison to other comparable customers – at the same price level as for intra-group customers (Form CO, para. 321).

network tariff is the result of the regulated revenue cap distributed among the connected customers based on the expected distributed volume of the DSO.²⁶⁶

- (255) The revenue cap is based on a review of each network operator's costs in the base year²⁶⁷ and on an efficiency benchmark. The efficiency benchmark is calculated by the FNA and results in an efficiency value for each network operator reflecting its efficiency in relation to the most efficient network operators. For this calculation the FNA uses information from all DSOs that participate in the standard procedure²⁶⁸ (*Regelverfahren*).²⁶⁹
- (256) Some third parties expressed concerns that, with the integration of Innogy, the Parties would drive up the efficiency level against which the other operators are benchmarked by acquiring economies of scale resulting in more negotiating power vis-à-vis input suppliers. Alternatively, the Parties may abuse their strong position showing high operational costs in the year that determines the cap for the next regulatory period.
- (257) The Notifying Party does not expect the efficiency levels to change because of the Concentration since the Parties' DSOs will remain separate after the Concentration. The Notifying Party notes that the FNA's models are agnostic in relation to the company group to which a DSO belongs. Each DSO enters the benchmarking analyses as an independent comparator, regardless of who owns and/or controls it (e.g. E.ON's E.DIS, Avacon, HanseWerk and Bayernwerk are each considered separately for the purposes of benchmarking). The same is true for Innogy's Westnetz, enviaM, Süwag, LEW and VSE. The change of owner of a DSO does not have any impact on the efficiency score and/or the efficiency frontier.²⁷⁰
- (258) The Notifying Party has also publicly stated that it does not envisage merging its DSOs and/or Innogy's DSOs.²⁷¹ The Notifying Party further submits that it would be difficult to do so as the Parties do not always own 100% of the DSO and consent of at least some co-shareholders would be required for merging the different regional entities into one single entity. Furthermore, there are limited incentives to merge DSOs given the limited synergies from merging DSOs on top of outsourcing/co-operation of overhead costs. Finally, smaller DSOs have an easier regulatory process.²⁷²
- (259) In any event, even if the Parties' DSOs were merged, the number of DSOs participating in the regulatory exercise with the FNA would remain high. The efficiency scores have been determined for 102 electricity DSOs and 90 gas DSOs which participated in the standard proceeding (2018) and fall under the FNA's remit. Out of the 102 electricity DSOs, [...] are affiliated with E.ON [...] controlled) and [...] are affiliated with Innogy [...] controlled). Out of the 90 gas DSOs, [...] are

²⁶⁶ Form CO, paras. 321-322 and 327.

²⁶⁷ The two years prior the start of the respective Regulatory Period.

²⁶⁸ Electricity distribution network operators with fewer than 30,000 customers and gas distribution network operators with fewer than 15 000 customers may choose to participate in what is known as the "simplified procedure" and are not subject to efficiency benchmarking. Instead, a general efficiency level is determined that is applicable to all these operators (Form CO, para. 334 and footnote 289).

²⁶⁹ Form CO, paras. 321-322, 334, 338.

²⁷⁰ Form CO, para. 470.

²⁷¹ Form CO, para. 471 (E.ON press release "E.ON and innogy integration planning making good progress", available at <https://www.eon.com/en/about-us/media/press-release/2018/eon-and-innogy-integration-planning-making-good-progress.html>).

²⁷² Form CO, paras. 471-473.

affiliated with E.ON ([...] controlled) and [...] are affiliated with Innogy ([...] controlled).²⁷³

- (260) This is confirmed by the FNA. The FNA analysed the effect on the efficiency benchmark if the Parties decided to merge all DSOs in which the Parties have a stake of more than 50%. The FNA confirmed that it is unlikely that there would be any significant effect on the efficiency benchmark. The FNA also analysed the effect on the efficiency benchmark if the Parties decided to merge all DSOs in which the Parties had any stake, however minimal. Even in this rather unlikely scenario, there would be no material impact on the efficiency benchmark.
- (261) The Commission therefore concludes that the Concentration is unlikely to lead to any significant impact on the efficiency benchmark that would make it impossible for other DSOs to compete with the Parties.

d. Further additional concerns

- (262) One competitor argued that the merged entity would have a very large share of the demand for grid services and this would give it an advantage over smaller grid operators since it would have priority in contracting scarce capacity from service providers. It is unclear whether there would be any scarcity in the provision of grid services and in any case, similar to the situation described in recitals (234) and (235), E.ON and Innogy are already larger than most of the other DSOs. To the extent that, as third parties have claimed, larger-sized companies have privileged access to scarce grid services that is likely to be the case even in the absence of the Concentration.
- (263) Some market participants also raised the concern that the Parties, by accounting for a large share of the demand for grid services post-merger, may foreclose access to an important route to the market if they were to source these grid services internally. However, the Commission understands that grid services other than the full network operation service (e.g. construction & maintenance of network facilities (e.g. substations), overhead lines services, underground and civil works) which the Parties purchase from third parties, have a local/regional focus, i.e. services are mainly provided and purchased locally (e.g. electricians for maintenance services are located in or close to the relevant network area). As the Concentration is geographically complementary, the Concentration is unlikely to lead to any material increase in the purchase volume at local level. The Commission also understands that services to DSOs constitutes only part of the demand available for suppliers active upstream. Upstream suppliers provide their services as generalists to a broad range of customers (e.g. electricians provide their services also to other customers (e.g. households or commercial customers) and, thus, are not entirely dependent on their services to DSOs). The Commission therefore considers that no customer foreclosure in relation to the supply of grid services for DSO activities is likely to arise as a result of the Concentration.

e. Conclusion on horizontal non-coordinated effects in the markets for the distribution of electricity and gas

- (264) The Commission concludes that the Concentration would not significantly impede effective competition as a result of horizontal non-coordinated effects arising in the markets for the distribution of electricity and the distribution of gas in Germany.

²⁷³ Form CO, paras. 480-481.

7.2.2. Retail supply of regular electricity to household customers

7.2.2.1. Basic supply

- (265) As discussed in recital (62), each basic supply area constitutes a separate relevant market and as one single company is determined as the basic supplier, that company is *de facto* a monopolist in that area. Therefore, the Concentration is unlikely to have any direct material effect in these markets. The Commission has nonetheless considered whether the Concentration may have an indirect effect in that it may strengthen the Notifying Party's ability to retain the basic supplier status in some local areas and by doing so, it may reduce the incentives to price special contracts competitively.
- (266) The basic supplier status is determined every three years by the DSO and is awarded to the electricity supplier that has the most household customers in the area, including customers on basic supply contracts and customers on special contracts (and including heating electricity).²⁷⁴ As the determination of the basic supply depends also on the number of household customers on special contracts, price strategies on special contracts might have effects on the basic supply market.
- (267) The Notifying Party submits that in some areas - when it is at risk of losing its basic supplier status to a competitor - it [...] to preserve or defend its customer base. In theory, due to the Concentration, the Parties could combine their household customer base and this could either remove an important challenger to the basic supplier status (if the merging party is the second largest supplier to households in the area) or increase the gap with other suppliers who may challenge the Parties' basic supplier status. Either way, the Concentration might reduce the risk of losing basic supplier status and therefore limit the Parties' incentives to price special contracts competitively. However, on the basis of the information collected during the investigation, the Commission considers that this risk is unlikely to arise as a result of the Concentration.
- (268) First, it is important to note that the basic supplier status is determined at the legal entity level, i.e. only the customers held by a legal entity form part of the basic supply determination (as opposed to combining the customers of all entities owned by the same parent company). In practice, this means that, when one of e.g. Innogy's subsidiaries (e.g. LEW) is the basic supplier, only LEW customers are counted in for the purposes of determining the basic supplier, but not any of the customers held by Innogy's other subsidiaries (eg. SÜWAG, eprimo, Innogy, etc.). If the merged entity were to influence the basic supply determination mechanism, it would have to integrate and legally merge its various entities. It is also worth noting that if this strategy were profitable, the Parties would most likely have already tried to implement it pre-merger.
- (269) Second, the Commission's assessment indicates that the Parties are rarely each other's closest challengers (i.e. the second largest supplier to households) for the basic supplier status. In the areas where the Parties are basic suppliers, municipal utilities ("Stadtwerke") are most often the second largest household supplier.²⁷⁵ Where E.ON is the basic supplier, Innogy is the closest challenger in only a limited number of areas (approximately [5-10]-[10-20]% of the local areas) and in any event, in these areas the gap between E.ON and Innogy is significant (typically above 50

²⁷⁴ Section 36 para.2 of the EnWG.

²⁷⁵ Submission of Parties in response to RFI 43.

percentage points) which implies that Innogy does not constitute an immediate threat to E.ON's basic supplier status. Stadtwerke are the first challengers for many or most of E.ON's basic supply areas ([40-50]-[70-80]% of the local areas). Where Innogy or its subsidiaries are the basic suppliers, E.ON is even more rarely the first challenger (approximately [0-5]-[5-10]% of the local areas) and in these areas the gap between E.ON and Innogy is significant (typically above 50 percentage points). Stadtwerke and Vattenfall are the entities who mostly challenge Innogy in its own basic supply areas.²⁷⁶

- (270) Third, E.ON [...] assesses whether its basic supplier status is at risk as a result of the second largest supplier in the area closing the gap and achieving a household customer base larger than E.ON's. In those areas where its basic supplier status is threatened, [description of E.ON's business strategy in basic supply areas, including confidential information on of closeness of competition between E.ON and Innogy]. In an internal assessment conducted by E.ON [description of E.ON's business strategy in basic supply areas, including confidential information on of closeness of competition between E.ON and Innogy] Innogy (Lechwerke) was identified as the 'challenger' (i.e. the second largest supplier in the area) only once [description of E.ON's business strategy in basic supply areas, including confidential information on of closeness of competition between E.ON and Innogy].²⁷⁷
- (271) Furthermore, where the other Party is the basic supplier, each Party tends to have a small share of customers (typically around [0-5]% or less) and therefore even if the Parties were to combine their household customers post-merger, in the vast majority of the areas this would not materially strengthen their position or their basic supplier status.²⁷⁸
- (272) The Commission therefore considers that the Concentration would not significantly impede effective competition in the market for retail supply of regular electricity to customers on basic supply contracts in Germany.

7.2.2.2. Special contracts

- (273) The Commission considers equally that the Concentration would not significantly impede effective competition in the market for the retail supply of regular electricity to customers on special contracts in Germany.
- (274) First, the market for the retail supply of regular electricity to customers on special contracts is national in scope and the Parties each have only a moderate market share of approximately [5-10]% for E.ON and approximately [10-20]% for Innogy.²⁷⁹ ²⁸⁰ The Concentration therefore does not lead to an affected market.
- (275) Second, there are over 1,000 suppliers active in Germany and, on average, every customer can choose between more than 120.²⁸¹ The Parties' largest competitors

²⁷⁶ Form CO, paras. 1177 and 1181.

²⁷⁷ Out of [...] named challengers. Response to RFI 19, Annex 15.

²⁷⁸ Form CO, Section 6B.

²⁷⁹ Response to RFI 44, updated Table 95.

²⁸⁰ Even if the entire share of the companies in which the Parties hold minority participation were to be added, they would increase the Parties' combined share by less than [0-5]%. Considering that this figure is limited and it overestimates the actual financial stake that the Parties own in these companies, the Commission considers that the Parties' minority shares would not materially alter their position post-merger and therefore the Commission's assessment.

²⁸¹ FNA/FCO, Monitoringbericht 2018, p. 253.

include EnBW (5-10%), Vattenfall (5-10%) and EWE, Mainova and Stadtwerke München each with around (0-5%).²⁸²

- (276) Third, the German retail market is generally seen as competitive. The FCO/FNA in their joint monitoring report 2017, noted a continuous decrease in market shares of the largest four electricity retail suppliers in the last years and stated that (based on 2016 data): “... *there is no longer any single dominant undertaking in either of the two largest electricity retail markets. [...] The cumulative share in the national market for supplying non-interval-metered customers on special contracts (above all household customers, excluding electric heating customers) stood at 34%, down two percentage points on a year earlier. These figures are clearly below the statutory thresholds for the presumption of market dominance (section 18(4) and (6) of the Competition Act – GWB)*“.²⁸³ The FCO/FNA found that retailer margins had been constantly declining in the last 7-8 years (-20% in the period 2011-2018).²⁸⁴ The Parties too had to cut their margin to keep up with the competition. E.ON’s gross profits on electricity special contracts decreased by [...] % between 2015 and 2017, and Innogy’s gross profits declined by [...] % between 2015 and 2018.
- (277) Fourth, the Parties are not particularly close competitors and many suppliers can exert a competitive pressure similar or comparable to the pressure that the Parties exert on each other.
- (1) customers who switch from E.ON and Innogy in their incumbency areas rarely choose the other merging Party. Only [10-20] % of customers who switched from Innogy went to E.ON in Innogy’s DSO areas in 2018. A similarly small proportion of customers ([10-20] %) switched from E.ON to Innogy in E.ON’s DSO areas in 2018. Furthermore, there are indications that the extent of switching between the Parties is decreasing. For example, the diversion from E.ON to Innogy in E.ON’s DSO areas has significantly fallen from [20-30] % in 2015 to [10-20] % in 2018;
 - (2) internally, the Parties monitor equally a large number of competitors and there is no indication that they monitor each other any more closely than other suppliers.²⁸⁵
 - (3) in their pricing decisions, neither E.ON nor Innogy pay particular attention to the other Party and offline E.ON’s tariff approach is [...]. Online E.ON relies on several methods for price determination but in none of these methods, Innogy (or in fact any other individual competitor) plays a particular role.²⁸⁶ Innogy and its regional supply entities charge special contract tariffs [...] (but not based on any individual competitor(s)).²⁸⁷
 - (4) the majority of competitors responding to the Commission’s investigation indicated that they have been able to attract customers switching away from the

²⁸² Response to RFI 66.

²⁸³ FNA/FCO, Monitoringbericht 2017, p. 29.

²⁸⁴ FNA/FCO, Monitoringbericht 2018, Figure 119.

²⁸⁵ See internal documents, e.g. Documents (ID4268-929 and ID4268-73435) for a monthly assessment (ID4268-58982) for switching to competitors following a change in general terms and conditions (AGB), (ID4268-57871) for switching following price adjustments; ID4268-73953 for switching following a bankruptcy of a competitor

²⁸⁶ [Description of E.ON’s pricing strategy]. Form CO, para. 994.

²⁸⁷ [Description of Innogy’s pricing strategy]. Form CO, para. 994.

Parties.²⁸⁸ Most of the competitors also indicated that they had products/tariffs in their portfolio that allow them to target all the relevant customer groups.²⁸⁹

- (278) Fifth, the Commission considered whether the Parties, while not close competitors across the board, may be competing particularly closely in the supply of specific groups of customers. It is standard practice for retailers to segment the market along certain key customer features. The most common customer segmentations in the retail supply of electricity include brand-conscious (with a preference for companies with a well-known brand), environmental-friendly (mostly interested in green tariffs) and price-sensitive (mostly attracted by online discounters). The Parties adopt a multi-brand strategy with the intent of approaching different types of customer. For example, eprimo (Innogy) and E WIE Einfach (E.ON) are the Parties' online brands and typically marketed at competitive tariffs [...]. The evidence collected by the Commission suggests that even at customer group level there are several suppliers which are as close to the Parties as the Parties are to each other.
- (1) the majority of respondents to the Commission's investigation indicated that there is no customer segment in which E.ON and Innogy compete particularly closely and for which there are limited alternatives to the Parties;²⁹⁰
 - (2) the majority of the competitors who responded to the Commission's investigation indicated that they were able to attract customers across the Parties' entire customer base (as opposed to some specific types of customer only).²⁹¹
- (279) Finally, barriers to entry and expansion in the market are relatively low. As discussed in recital (78), companies already active in the market can easily expand across areas thanks to the fact that most switches occur online where no physical assets / local presence is required to operate. Moreover, there are examples of large-scale entry even from outside the industry. Notably, Shell has approached the market with a nation-wide strategy.²⁹² The Parties also monitor Shell (and other oil companies) as actual or potential major competitors. [...].²⁹³ Competitors also seem to consider Shell as an important new competitive force. One competitor for example, one of the third parties who raised concerns, analysed the pricing behaviour of the Parties (eprimo) against EnBW and Shell.²⁹⁴ Likewise, the car manufacturer Volkswagen, through its subsidiary "Elli", has recently entered the market for retail supply of electricity to residential customers on a national scale.²⁹⁵
- (280) The Commission therefore considers that the Concentration would not significantly impede effective competition in the retail supply of regular electricity to customers on special supply contracts in Germany.
- (281) As discussed in Section 7.1.3, while the relevant geographic market is regarded as national, there are certain elements of local differentiation in the suppliers' offering. Price and sales strategies can sometimes be flexed to reflect local conditions and/or

²⁸⁸ Replies to questionnaire Q1 – Competitors (Germany), question 39.

²⁸⁹ Replies to questionnaire Q1 – Competitors (Germany), question 41.

²⁹⁰ Replies to questionnaire Q1 – Competitors (Germany), question 37.

²⁹¹ Replies to questionnaire Q1 – Competitors (Germany), question 39.

²⁹² Replies to questionnaire Q1 – Competitors (Germany), questions 20 and 22.

²⁹³ Internal document (ID4268-11118).

²⁹⁴ Meeting with a competitor on 15 April 2019 (ID5066).

²⁹⁵ See press release of 29 January 2019, (<https://www.volkswagenag.com/en/news/2019/01/electric-life-volkswagen-subsiary-elli-offers-volkswagen-natur.html>).

to meet growth target in some specific areas. Therefore, the Commission has also assessed whether the Concentration would impede competition in some narrower geographic areas.

- (282) As a preliminary point, the Commission notes that historical incumbents in their own areas still account for most of the special contracts. The Parties estimate that E.ON has a share of special contracts of [30-40]-[50-60]% in its own DSO areas and Innogy has a share of [50-60]-[60-70]% in its own DSO areas.²⁹⁶
- (283) Special contracts cover a variety of different customers. Some are customers who actively shop around for the cheapest offer and make an informed choice about their energy suppliers (they either switch to a new supplier or remain with their existing supplier eventually with a different tariff/contracts). Others, however, are inactive customers - even if they switch away from their basic supply contract, they do not actively shop around before switching, but instead are merely approached by their incumbent supplier who offers a slightly better tariff compared with the basic supply tariff. [...] ²⁹⁷ (see Section 7.1).
- (284) The local incumbent is likely to have some degree of market power over these customers, as is also shown by the fact that some customers on special contracts with their basic supplier pay a higher price compared with other special contract tariffs available on the market.²⁹⁸ Nonetheless, the Concentration is unlikely to have any significant material impact on these customers and there is limited competition for these customers in the first place.
- (285) Competitive activities in the market consequently focus on customers who are prone to switching, or generally willing to switch, “wechselwillig”²⁹⁹ as the FCO defined them in B8-107/09 – Integra/Thüga. The focus of the Commission’s investigation has therefore been on whether, for these customers, Innogy constrains E.ON where E.ON is the incumbent and vice versa. The evidence collected by the Commission indicates that Innogy is just one of many suppliers competing with E.ON where E.ON is the incumbent and vice versa, and post-merger the incumbent will continue to face significant competition from a large number of credible suppliers.
- (286) First, there are on average more than 100 suppliers offering electricity in each local area. While some of them have a small or negligible presence, there are several suppliers with a share comparable or larger than the smaller of the Parties.
- (287) Second, there is no indication that the Parties are particularly close competitors in some local areas or that the Concentration would remove an important competitive constraint locally:

²⁹⁶ The Commission conducted this analysis at the municipality or municipality-postcode level (depending on data availability), since municipalities play a large role in electricity and gas distribution networks in Germany. Municipalities organise their residents’ demand for electricity and gas distribution networks and offer the rights of way (*qualifizierte Wegenutzungsrechte*) in concession tenders for exclusively operating the networks in its territory. Also, the basic supplier is typically determined at concession area or municipality level (Prior to the 2005 reform, Section 10 of the EnWG 1998 assigned the basic supply area to the “municipal territory” (Gemeindegebiet) as it was previously the municipality which determined the basic supply status via concession agreements, see Form CO, para. 719 footnote 567).

²⁹⁷ Some basic suppliers, [...], are actively trying to switch customers from basic supply to special contracts, see Form CO, paras. 903.

²⁹⁸ Cf. FNA/FCO, Monitoringbericht 2018, p. 287-292 which indicates - depending on consumption levels - a spread of 16-44% in the controllable part of the price between the special contract tariffs charged by the basic supplier and the tariffs charged by retailers other than the basic supplier.

²⁹⁹ FCO, B8-107/09 – Integra/Thüga, para. 37.

- (1) in general, few customers switch between the Parties and there are only a limited number of isolated episodes where there has been a relatively high number of switches between the Parties. This suggests that the Parties are not systematically close. Moreover, the switching rates between the Parties have been falling across local areas. In 2015, the most common switching rate (which materialised in more than 15% of the local areas) was between [10-15]% and [20-30]%. Three years later, the most common switching rate (in more than 25% of the local areas) was less than [5-10]%. Figure 5 shows that the entire distribution of the switching rates from E.ON to Innogy (in the local areas where E.ON is DSO) has considerably shifted (to the left) from 2015 to 2018, i.e. switching rates have diminished across all local areas where E.ON is DSO.

Figure 5 – Diversion ratios from E.ON to Innogy in E.ON DSO area 2015-2018 - electricity

[...]

Source: Commission's analysis on the Parties' data

- (2) E.ON and Innogy have relatively small shares of supply in the DSO areas of each other (i.e. E.ON in Innogy's DSO areas and vice versa), generally below [0-5]%. It is also worth noting that the Parties' share of special contracts in their own DSO areas has been eroding constantly in recent years.³⁰⁰ Most of the shares lost by the Parties in their own DSO areas have been captured by other suppliers, in particular municipal utilities but also other competitors, including Vattenfall who experienced a sustained growth across both E.ON and Innogy DSO areas.³⁰¹
- (3) the Commission has also analysed whether E.ON's margins on tariff primarily targeted to the group of customers who are more engaged, are affected by Innogy's local market position, and vice versa. For each retail entity's tariffs representing jointly 80% or more of new customer acquisitions in 2018 (either online or offline), the Parties provided tariff components at the local level which enabled the Commission to compute local, yearly average margins for each tariff.³⁰² These margins were then compared with the local share of the non-incumbent Party at group level for special contracts. If Innogy were a particularly close competitor of E.ON, E.ON's margins would be expected to become comparatively lower as Innogy's strength/position in a local area increased. As Figure 6 shows, there is no clear link between margins of E.ON on the OptimalStrom tariff and the strength of Innogy at the local level (as measured by Innogy's local share at group level);³⁰³ as the share of supply of Innogy grows (horizontal axis), E.ON margins on the OptimalStrom (vertical axis) do not follow a decreasing pattern.³⁰⁴ Rather, these margins do not seem

³⁰⁰ For E.ON the share went from [50-60]-[50-60]% in 2015 to [30-40]-[50-60]% in 2018, and for Innogy from [50-60]-[70-80]% in 2015 to [50-60]-[60-70]% in 2018. Form CO, para. 1142.

³⁰¹ Form CO, Tables 97 and 99.

³⁰² The Commission analysed gross margins (which are net of network charges, taxes, procurement costs) as these provide a more meaningful measure of the evolution of suppliers' market power over time (i.e. of their ability to price above the costs) than prices. This is due to the fact that prices in Germany are for the most part affected by charges and taxes which are out of the suppliers' control and they account for the majority of the total price.

³⁰³ Innogy's share includes all special contract sales of Innogy group (i.e. encompassing sales from all Innogy subsidiaries). The share is reported on the horizontal axis with a minimum bound at 0% and a maximum bound at approximately 25%.

³⁰⁴ [...], see reply to RFI 43 dated from 4 April 2019.

to bear a relationship with Innogy's position. Similar results hold for E.ON Strom tariff.³⁰⁵

Figure 6 -Relationship between margin at customer level and increment local share of supply in retail of electricity, tariffs "Optimalstrom" and "Strom"

[...]

Source: Commission's analysis on the Parties' data

- (4) In the few areas where E.ON is at risk of losing its basic supplier status, Innogy is rarely the supplier challenging E.ON's status (i.e. the second largest supplier).³⁰⁶
- (288) Third, large national brands, such as E.ON or Innogy or Yello (EnBW) or Vattenfall, do not necessarily have a reputational advantage in competing locally. Regional suppliers and Stadtwerke are often seen as credible alternatives. A competitor, mainly active in the Brandenburg area noted that: *"both E.ON and Innogy and their national brands do not have a competitive advantage in gaining new customers at local level. National brands do not offer an advantage in local competition."*³⁰⁷ Another supplier, mainly active in the Federal State of Bavaria, submitted that while national suppliers can achieve greater economies of scale in developing and managing products, regional suppliers: *"are able to compete with lower prices, better and regional service."*³⁰⁸ This is also consistent with the replies to the Commission's Phase II short questionnaire to SME and micro-business customers who indicated that local Stadtwerke are perceived as credible suppliers, even more often than any of the Parties' main brands (and more so concerning the Parties' online brands).³⁰⁹
- (289) Fourth, the Commission assessed whether strong local positions may give rise to pricing power in the supply to customers who are prone to switch and whether, as a consequence, the Concentration by strengthening the Parties' position in their own incumbency areas, may lead to price increases. If this were the case, one would expect to observe that, e.g., E.ON's margins increase as its share of supply in the local increases. However, the Commission considered a number of the Parties' tariffs and found no systematic relationship between the incumbent's share of supply in its local area and the net price of its special contract tariffs targeted to newly acquired customers. As explained in recitals (88) to (89), the Commission analysed the Parties' tariffs for newly acquired customers and the relationship between those tariffs and shares of supply in local areas. Figure 7 shows the relationship between E.ON's margin on the OptimalStrom tariff and E.ON's share of supply in local

³⁰⁵ The Commission has replicated the analysis by using a number of E.ON's and Innogy's tariffs and the results are qualitatively very similar. For E.ON, the tariffs analysed were: KlassikStrom and KlassikStrom 24; OptimalStrom, OptimalStrom 24 and OptimalStrom 36; Strom, Strom 24 and Strom PUR; LifeStrom Premium. For Innogy's retail entities, the tariffs analysed were: SV Strom Stabil A and Strom Stabil & Natur; eprimoStrom grau.

³⁰⁶ The Commission notes that E.ON conducted an analysis of basic supply areas at risk (E.ON's internal document (ID1341-4147)). For [...] municipalities identified to be at (different) risk concerning retail supply of electricity to households [confidential information from E.ON internal documents]. Of [...] municipalities where the [...] competitor was identified by name, Innogy ([...]) appeared only once [confidential information from E.ON internal documents].

* Should read: "strongest"

³⁰⁷ Minutes of a conference call with a competitor on 20 May 2019 (ID6165), para. 6.

³⁰⁸ Minutes of a conference call with a competitor on 20 May 2019 (ID4954), para. 9.

³⁰⁹ Response to SME/micro-business questionnaire.

areas,³¹⁰ and it reveals no systematic link between the two, since the margins do not increase with E.ON's share of supply at group level in the local area.^{311 312} Similar results hold for the tariff E.ON Strom.³¹³

Figure 7 - Relationship between margin at customer level and incumbent local share of supply in retail of electricity, tariffs "Optimalstrom" and "Strom"

[...]

[...]

Source: Commission's analysis on the Parties' data

(290) The Commission therefore considers that the Concentration is also unlikely to raise competition concerns in any local areas in Germany.

a. Additional concerns raised by third parties

(291) During the investigation, some suppliers raised additional concerns about the possible impact of the Concentration on the retail supply of electricity in Germany. These concerns are briefly discussed and assessed in recitals (292) to (299).

(292) *Cross-subsidisation from basic supply contracts to special contracts*: some suppliers suggest that post-merger the Parties could make use of the large profits generated from their basic supply customers in order to subsidise/sustain very aggressive pricing policies in the special contracts market. This would ultimately cause smaller players (with no or limited basic supply activities) to be marginalised or to exit the market altogether. The Commission considers this concern is unlikely to materialise post-merger. To the extent that such cross-subsidisation strategies were profitable, one would expect to have observed these strategies already pre-merger given that the Parties have two of the largest portfolios of basic supply customers. However, in the context of the investigation in this case, there were no indications that the Parties would be pricing their special contracts below costs or at a level which is not sustainable to other or smaller players. On price-comparison websites there is often a number of suppliers who systematically or occasionally (e.g. during campaigns) charge prices lower than the Parties' (these suppliers do not only include 'discounters' but also Stadtwerke and other private suppliers). The large number of suppliers active in the market (see recital (286)) and the continuous entry of new players further suggest that either no cross-subsidisation strategies have been put in place or that, if they have, they have not been particularly successful in foreclosing competitors and/or discouraging entry.

(293) *Crowding competitors out of price-comparison websites*: some market participants expressed concerns that post-merger the Parties would control several brands and in theory they may be able to occupy all the highest positions in the rankings of price-

³¹⁰ E.ON's share includes all special contract sales of E.ON group (i.e. encompassing sales from all E.ON subsidiaries). The share is reported on the horizontal axis with a minimum bound at approximately 20% and a maximum bound at approximately 70%.

³¹¹ Similar lacks of patterns were found by the Commission for other tariffs of E.ON and other retail entities of the Parties.

³¹² This analysis does not necessarily contradict the finding described above that the Parties can charge - with their basic supplier brand - a substantially higher price than the other special contract tariffs available on the market. This analysis is mostly intended to look at the Parties' tariffs aimed at customers who are prone to switch.

³¹³ In their reply to the 6.1.c Decision, the Parties analysed the relation between pre-merger HHI at local level and margins of E.ON Strom tariff, showing a lack of apparent link between concentration and margins at customer level. The Commission extended this analysis to the relationship between incumbent share of supply and margins, which also showed a lack of systematic link between the two.

comparison websites, thereby crowding out competitors who would not have access to the most remunerative positions (because these positions enable suppliers to attract the largest number of customers). To implement this strategy, the merged entity would have to lower the prices of its brands below the optimal level in order to make them appear on the first page of the price-comparison website thereby foreclosing competitors. Even pre-merger the Parties each already have numerous brands in their portfolio (over 10 that are already active in electricity retail in Germany). Moreover, regarding the concern that the Parties post-merger would have more financial resources to purchase the advertised position appearing on the top of the ranking on PCWS, the Commission notes that the Parties are already among the largest suppliers in the market and they could pursue this strategy if profitable even pre-merger.³¹⁴ Therefore, the Commission considers these concerns not sufficiently realistic.

- (294) *Hindering competitors in use of agency services:* The Parties, and their competitors, make use of sales agency services which provide door-to-door and promotion sales services to utilities, telecommunication, companies, insurance companies and others. One competitor raised the concern that post-merger, E.ON would be so prominent on the gas and electricity retail markets that it could control agency services, noting that Innogy already owns one of these companies (4Motions). However, the Commission considers that there is no indication that E.ON could post-merger exert such a control over a significant part of all agency services active in Germany. The demand for such agency services extends to all companies making use of door-to-door and sales promotion services, not only to electricity and gas retailers (e.g. telecommunication or insurance companies). Consequently there is a large number of companies offering such services and a large number of small and large players making use of such services. Moreover, with the increasing use of online channels by customers to find and choose their energy suppliers, the relevance for such agency services is likely to diminish overall in the future.
- (295) *Increased competitive strength of the Parties:* A general thrust of third parties' argument is that the Concentration would increase the competitive strength of the Parties to the detriment of rivals who are already weaker today. According to third parties, the proposed concentration would therefore cause harm to competition, which should be prevented.
- (296) The Commission, however, considers that this argument does not hold. First, the Commission notes that the argument constitutes a so-called "efficiency offence". If a concentration allows merging parties to become more effective and thereby increases their competitive strength in the market, then this does not as such constitute harm to competition, but rather enhances competition. Competition law has the aim of protecting the competitive process, e.g., by preventing concentrations that lead to less (not more) competition. It does not, however, have the aim of stopping efficiency improvements to protect rivals from the impact of such competition.
- (297) Second, the German retail electricity supply market is in any event not a credible candidate for consumer harm due to increased competitiveness of the merging parties. In order to assume harm, the Concentration would need to hurt rivals' ability to gain market share. If this were the case, in the long run, rivals could therefore have to leave the market or be marginalised in a way that stops them from exerting

³¹⁴ These positions called "position zero" are offers which appear at the top of the first results page with a slightly different design. The same arguments also apply to the claim that the Parties would make additional arrangements with the price comparison portals to pay them higher commission.

competitive pressure. Such circumstances, where increased efficiency in the short run leads to consumer harm in the long run can, in very exceptional cases, potentially arise. In particular, this may be the case in markets with (i) strong economies of scale, (ii) an incumbent leader that dominates its rivals in scale, and (iii) a lack of a level playing field for smaller players. In such situations, a merger may hypothetically lead to a tipping of the market towards the dominant incumbent, to the ultimate detriment of consumers.

- (298) The German retail electricity supply market, however, does not meet these conditions. The German retail electricity supply market has attracted substantial entry and is today highly fragmented, with more than 1000 suppliers, including several municipal utilities (*Stadtwerke*). These companies are able to offer profitable services despite the fact that many of them have only a very small customer base. In a market that is characterised by such a diverse mix of large and small competitors, efficiency gains of merging parties are extremely unlikely to lead to competitive harm, and are instead highly likely to benefit consumers.
- (299) Finally, to the extent that third parties argue the merger merely brings about a stronger position and increased funds for the merged entity to engage in predation, this theory is also at odds with the facts of the case. The significant number of large, medium and small competitors (whose operation is protected by regulation that ensures a level playing field) makes it highly implausible that a predation strategy could be profitable for the merged party in this case. Moreover, both of the Parties are already very large players with deep pockets pre-merger. Yet the lowest prices in the market are often offered by smaller and new competitors, not the Parties.³¹⁵

7.2.2.3. Conclusion on horizontal non-coordinated effects in the market for the retail supply of regular electricity in Germany

- (300) The Commission therefore concludes that the Concentration would not significantly impede effective competition as a result of horizontal non-coordinated effects arising from the overlap in the activities of the Parties in the markets for the retail supply of regular electricity to households on basic supply contracts or in the market for the retail supply of regular electricity to households on special contracts in Germany.

7.2.3. *Retail supply of heating electricity*

The Notifying Party's view

- (301) The Notifying Party submits that the Concentration would not give rise to any competition concerns in the retail market for the supply of heating electricity in Germany. First, market shares are not a good proxy for market power due to the strong incumbency effect.³¹⁶ Second, the Parties are not close competitors of each other. Third, they face strong competition in their own DSO areas from a wide range and increasing number of national players, as well as local municipalities.³¹⁷ Fourth, the Notifying Party submitted an analysis to show a lack of association between margins and market shares, arguing that this would demonstrate that market shares would not be a good proxy for market power.³¹⁸ Finally, the Parties submit that the

³¹⁵ See also convenience translation of 10 May submission (ID4841), p.4; convenience translation of 10 May submission (ID4948), p.4; Form CO, para.966

³¹⁶ Response to 6(1)c decision, paras. 100 et seq.

³¹⁷ Form CO, paras. 1194-1231.

³¹⁸ Response to 6(1)c decision, paras. 104 et seq.

market for heating electricity will gradually be substituted to a considerable extent by regular electricity due to technological changes (see also recital (326)).³¹⁹

The Commission's assessment

(302) The Commission takes the view that the Concentration would significantly impede effective competition in the retail supply of heating electricity to household customers in Germany for the reasons set out in this Section.

a. Market shares

(303) First, the combined market share of the Parties for heating electricity is high. On a national level, the Concentration would combine the two largest suppliers, creating an entity that would be considerably larger than its second largest competitor. The Parties' combined market share amounts to [30-40]% with an increment of [10-20]% caused by the Concentration³²⁰. The next largest suppliers are EnBW and EWE whose market shares are each in the range of 5%-10%. Vattenfall is a small competitor in this market with a market share between 0%-5%. Not even all of the around 900 individual municipal utilities active in Germany taken together, have a combined market share equal to the combined market share of the Parties.

Table 1 – National market shares Parties and Competitors

%	2015	2016	2017	2018
E.ON & Affiliates	[20-30]	[20-30]	[20-30]	[10-20]
Innogy & Affiliates	[20-30]	[20-30]	[20-30]	[10-20]
<i>Combined</i>	<i>[40-50]</i>	<i>[40-50]</i>	<i>[40-50]</i>	<i>[30-40]</i>
Municipal utilities (incl. EWE)	[30-40]	[30-40]	[30-40]	[30-40]
EnBW	[5-10]	[5-10]	[5-10]	[5-10]
EWE	[5-10]	[5-10]	[5-10]	[5-10]
Vattenfall	[0-5]	[0-5]	[0-5]	[0-5]
Others	[5-10]	[5-10]	[5-10]	[5-10]
Total	100	100	100	100

Source: Parties, Reply to RFI 61.

(304) Existing customers still acquire heating electricity predominantly from the local basic supplier of regular electricity. The Parties are the basic supplier in the vast majority of municipalities where they are the DSO. In the light of this, the Commission has also analysed competitive conditions in the areas where the Parties are the DSO (these areas together account for approximately [40-50]% of the municipalities in Germany).³²¹

(305) At the DSO level, the Parties achieve a range of share of supply between [80-90] and [90-100]% in their own DSO areas.³²² On that local level, while the merger

³¹⁹ Response to 6(1)c decision, paras. 98 et seq.

³²⁰ Even if the entire share of the companies in which the Parties hold minority participation were to be added, they would increase the Parties' combined share by less than [0-5]%. Considering that this figure is limited and it overestimates the actual financial stake that the Parties own in these companies, the Commission considers that the Parties' minority shares would not materially alter their position post-merger and therefore the Commission's assessment.

³²¹ The approximately 11,000 municipalities in Germany tender long-term concession contracts to DSOs to operate the mostly municipality owned distribution networks.

³²² In E.ON DSO areas the combined share of supply is in a range of [80-90]% to [90-100]% with increments in the range of below [10-20]% to [0-5]%. In Innogy DSO areas the combined share of

increment looks relatively small in absolute terms (between [0-5]% and [5-10]%), it accounts for a material share of the residual supply (i.e. the supply from competitors other than the incumbent) suggesting that E.ON is often the most, or one of the most, successful challengers of Innogy in Innogy's DSO area, and vice versa. Looking at the residual supply, EnBW is typically smaller than E.ON or Innogy even when E.ON or Innogy is the challenger. Vattenfall, although it has a significant position in regular electricity, has only a very minor presence in heating electricity. As regards municipal utilities, although together they account for a share larger than the increment, for the reasons set out in recital (317) and following, they do not exert similar competitive pressure on E.ON as Innogy typically does (or Innogy on E.ON).

b. Competitive pressure imposed by E.ON on Innogy and vice versa

- (306) The outcome of the market investigation supports the view that the Parties exert significant competitive pressure on each other, both at national as well as on a local level.
- (307) The majority of the respondents to the market investigation consider the Parties to be close competitors based on e.g. their nation-wide coverage, the fact that they (with their brands) form a significant part of only few competitors on a national and/or local level and that they pursue similar sales strategies.³²³ In this vein, two competitors state that: “[t]here are no differences, only similarities!” and “Beide sind bundesweit aktiv mit jeweils sehr großer Marktmacht”.³²⁴ While a one competitor lists: “Beide im bundesweiten Markt aktiv mit eigenen Marke sowie mit den Tochterfirmen • Sehr ähnliche Produkte und Preisstellungen • Beide Marken (mit Ihren Töchtern) stellen oft 4-6 der nur 12-16 Angebote pro PLZ”.³²⁵ A further competitor considers that “they are two of the very few nation-wide retailers for electricity for heating purposes”.³²⁶ One competitor also considers that the Parties have similar sales strategies (nationwide offer) and similar customer care quality.³²⁷
- (308) In addition, the Commission notes that the diversion ratios between the Parties for heating electricity tend to be higher than diversion ratios for regular electricity. For example, diversion for heating electricity was about [20-30]% on average across areas, whilst the diversion from Innogy to E.ON in Innogy DSO areas for regular electricity was [5-10]% or less.³²⁸

c. Limited competition from other players

- (309) The Notifying Party submits that there are hundreds of suppliers offering heating electricity in Germany³²⁹ and even at a local/municipality level the number of active suppliers is well above 10 based on Verivox offers. At the local level, on the price

supply is in a range of [80-90]% to [90-100]% with increments in the range of [0-5]% to approximately [60-70]%.
³²³ Replies to questionnaire Q1 – Competitors (Germany), questions 60-62.

³²⁴ Replies to questionnaire Q1 – Competitors (Germany), question 60 (ID4014 and ID2096). Convenience translation: “Both are active nationwide, each with very large market power”.

³²⁵ Replies to questionnaire Q1 – Competitors (Germany), question 60 (ID2789). Convenience translation: “• Both active in the nationwide market with their own brand as well as with the subsidiaries • Very similar products and pricing • Both brands (with their daughters) often provide 4-6 of only 12-16 offers per post code”.

³²⁶ Replies to questionnaire Q1 – Competitors (Germany), question 60 (ID3840).

³²⁷ Replies to questionnaire Q1 – Competitors (Germany), question 60 (ID2773).

³²⁸ Form CO, 6B_III_Annex_36b.

³²⁹ FNA/FCO, Monitoring Report 2018, p. 296, in 2017 there were around 1000 suppliers of heating electricity (legal entities) active in Germany.

comparison-website Verivox there are on average 15 to 19 competitors in every municipality where the Parties are the DSO.³³⁰

- (310) However, the Commission notes that based on the Parties' own local market share data for the areas in which they are the DSO, this number decreases to 3 to 8 competitors on average.³³¹
- (311) On the basis of its market investigation, the Commission considers that the remaining suppliers would not be in a position to preserve the same competitive conditions as before the merger. Respondents to the market investigation support this view. For example, one competitor considers that *"already today we see rather limited competition in this market segment, in particular compared to regular electricity [...]. This rather low competition will further diminish in the future, as with new E.ON a dominant new player will evolve who is able to aggressively market this product (price and in particular in terms of promotion, e.g. as bundle product with heat pumps and similar devices)"*.³³²
- (312) The Commission notes that the heating electricity market is structurally more concentrated, at both national and local level, than the market for the supply of regular electricity. This fact, however, does not in itself indicate competition problems but nonetheless it helps identify a number of distinctive factors of the market for heating electricity that are important in assessing the impact of the Concentration on competition.
- (313) First, 85% of the respondents to the market investigation indicate that not all suppliers of regular electricity offer tariffs for heating electricity.³³³ As noted also by the Parties, there are much fewer competitors in heating electricity. In this vein, a competitor submits that *"there are probably less than 20 nation-wide retailers for this segment, who are active in every Basic Supply area. Compared to the supply of electricity to household customers, with offers in the range of hundreds of tariffs, this is[sic!] can be deemed very limited"*.³³⁴ The competitor also *"see[s] a dominance of E.ON and innogy in the regional markets for retail supply of electricity for heating purposes in Germany"*.³³⁵
- (314) Second, and more importantly, some of the competitors who have been major competitive driving forces in regular electricity are not active or have a very limited presence in heating electricity. These competitors include Vattenfall, discounters and small Stadtwerke beyond their incumbency area.
- (315) Vattenfall is the fourth largest supplier of regular electricity and is known as one of the 'Big 4' retail companies, together with E.ON, Innogy and EnBW. Vattenfall expanded its offerings for heating supply beyond its home regions Berlin and Hamburg only last year and has still a very small market share nationally and in most areas (see Table 1).
- (316) With regard to discounters, competitors generally expressed the opinion that these are not active in heating electricity. For example, one competitor submits that *"especially Discounter[sic!] do often not offer electricity for heating because of low*

³³⁰ Response to 6(1)c decision, paras. 112 et seq.

³³¹ Response to 6(1)c decision, Table 10.

³³² Replies to questionnaire Q1 – Competitors (Germany), question 69 (ID2769).

³³³ Replies to questionnaire Q1 – Competitors (Germany), question 53.

³³⁴ Replies to questionnaire Q1 – Competitors (Germany), question 66 (ID3840).

³³⁵ Replies to questionnaire Q1 – Competitors (Germany), question 72 (ID3840).

demand”.³³⁶ And similarly, another competitor considers that “because of the higher efforts for handling temperature-depending demand profiles and clearings in supplier-change-processes many suppliers decide to offer only electricity for regular households”.³³⁷ One competitor states: “Discounter bieten häufig aufgrund der regionalen Besonderheiten keine Heizstromprodukte an. Ein ausschließlicher Heizstrom-Lieferant ist uns nicht bekannt”.³³⁸

- (317) Small Stadtwerke may offer heating electricity, but they tend to focus on the areas where they are the basic supplier or DSO.³³⁹ A competitor explains: “Regular electricity addresses the standard use-case, whereas[sic!] electricity for heating purposes only applies to a rather small clientele. Therefore, typically only larger retailers offer electricity for heating purposes as a minimum number of customers is required to justify the extra effort providing this additional tariff”.³⁴⁰ Another competitor explains that municipal utilities are only offering heating as a defensive strategy in their own DSO areas, but not beyond.³⁴¹

d. Barriers to entry/expansion

- (318) Based on its market investigation, the Commission considers that the barriers to enter and expand (both locally and on a wider/national scale) into the market for heating electricity are considerable (and significantly higher than for regular electricity).
- (319) Market participants have put forward various reasons as to why it is more difficult to enter the heating electricity market as compared to the regular electricity market. Barriers to entry are perceived inter alia in the following features of the market: (i) a temperature dependent demand and consequent difficulties to estimate overall demand and procure correctly; (ii) different load-profiles determined at DSO level (potentially also depending on heating technology used and also using individual methodologies to establish these profiles) which requires gathering and processing a large amount of data; (iii) different concession fees and network charges determined by each DSO; (iv) different metering system required than for regular electricity; (v) the necessity to calculate and offer different products based on the different parameters set by the DSOs; (vi) more demanding IT and internal processes due to more varying products and input variables; (vii) a relatively small market; and (viii) difficulties to identify potential customers with consequent limited efficiency of any marketing campaigns.³⁴² These features of the heating electricity markets translate in the following main barriers to entry:
- (320) First, to be a supplier of heating electricity it is necessary to have a significant capability to obtain and process a large amount of information and data, including from local DSOs. In this vein, a competitor explains “although the German Federal Cartel Office has done some important work on leveling[sic!] the playing field, the supply of electricity for heating purposes is still a very demanding business with lots of barriers to entry. Not every local DSO does offer the necessary information when using the business processes for electricity (GPKE) and in general the business

³³⁶ Replies to questionnaire Q1 – Competitors (Germany), question 53 (ID2296).

³³⁷ Replies to questionnaire Q1 – Competitors (Germany), question 53 (ID2586).

³³⁸ Replies to questionnaire Q1 – Competitors (Germany), question 53 (ID2668). Convenience translation: “Discounters due to the regional characteristics often do not offer heating products. An exclusive heating electricity supplier is not known to us”.

³³⁹ See e.g. Replies to questionnaire Q1 – Competitors (Germany), question 55 (ID2005 and ID2683).

³⁴⁰ Replies to questionnaire Q1 – Competitors (Germany), question 53 (ID2769).

³⁴¹ Minutes of a conference call with a competitor, 7 May 2019 (ID4973).

³⁴² Replies to questionnaire Q1 – Competitors (Germany), question 53.

processes lack some detail. Furthermore, there are still conflicting views on how the network fees and concession fees have to be determined in regard to the relevant uses cases, e.g. heat pump and night storage heaters. As a result, a supplier faces uncertainty if he has calculated the tariffs correctly. A supplier faces more than 870 DSO areas in Germany and thus has to deal with up to 870 conflicting views on appropriate concession fees for electricity[sic!] for heating.”³⁴³

- (321) Second, entering the market for heating electricity requires additional investments to develop additional capabilities to calculate different tariffs, procurement of electricity taking into consideration weather forecast or developing knowledge about load profiles of customers. In this vein, a competitor explains that for a supplier of regular electricity not active in heating electricity it would be difficult to enter the market because *“such a potential supplier would need to adapt his energy procurement strategy to the demand patterns of customers of electricity for heating purposes and create separate tariffs. He would also have to invest in consultancy and customer advice”*.³⁴⁴ In the same vein, another competitor considers important difficulties are faced in setting up new tariffs or gaining process competence referring to the interface of each DSO at the network area level.³⁴⁵ One competitor adds that *“supplying heating electricity requires knowledge about the load profiles of customers in order to be able to estimate costs for procuring electricity... Entering the market for heating electricity requires additional investment to measure concrete situations about each customer and learn more about consumer behaviours. A small supplier is exposed to higher risks because suppliers can spread consumption risks across their customer base... the risk is too high with a small customer base. Larger suppliers with economies of scale have more abilities to enter the market.”*³⁴⁶ A further competitor is of the opinion that *“electricity for heating requires some more process knowledge”*.³⁴⁷ Other competitor considers that *“there are a lot of differences in calculating the tariffs”*.³⁴⁸ In the same vein, one competitor considers that *“the difficulty with the market for heating electricity is the structural discrepancies across areas. Each area has a different structure depending on the number of meters, the kind of profile of consumers, etc. For instance, within Westnetz region, a given area could have nearly no consumption during noontime while another could show high consumption at that time. Because of this complex market structure, there are few competitors in the market for heating electricity, as it requires investment into the knowledge of the structure.”*³⁴⁹ The competitor further explained that barriers to entry differ considerable for heating electricity if compared to regular electricity because *“for normal electricity, they work with standard profile groups in order to calculate volumes for their purchase of energy on the wholesale market. Regarding heating electricity however, a given customer could correspond to many different profiles depending on the outside temperature. Predicting volumes of energy purchase for heating electricity is therefore more difficult and not always accurate.”*³⁵⁰

³⁴³ Replies to questionnaire Q1 – Competitors (Germany), question 53 (ID3840).

³⁴⁴ Replies to questionnaire Q1 – Competitors (Germany), question 53 (ID2579).

³⁴⁵ Replies to questionnaire Q1 – Competitors (Germany), question 54 (ID2773).

³⁴⁶ Minutes of a conference call with a competitor, 20 May 2019 (ID4954), para. 15.

³⁴⁷ Replies to questionnaire Q1 – Competitors (Germany), question 53 (ID3976).

³⁴⁸ Replies to questionnaire Q1 – Competitors (Germany), question 53 (ID1788).

³⁴⁹ Minutes of a conference call with a competitor, 7 May 2019 (ID4973).

³⁵⁰ Minutes of a conference call with a competitor, 7 May 2019 (ID4973).

- (322) Third, marketing strategies, IT systems (process, billing), logistic or sales structures are more complex and demanding for the supply of heating electricity than for regular electricity. Moreover, suppliers of heating electricity require a specialised customer support services. In this vein, another competitor considers that *“the complexity in processing and billing is higher”*³⁵¹. One competitor submits that *“a retailer would need a capable legal department and a well trained customer service due to a high number of special situations/problem cases. Whereas the usual number of problem cases is around 3 - 5% in the retail market (supply to households and SMEs), we see 50 - 60% of problem cases in the supply of electricity for heating purposes”*.³⁵²
- (323) Fourth, the number of potential customers for heating electricity is considerably smaller than for regular electricity and more difficult to identify and target. Moreover, supplying heating electricity requires additional capabilities as explained above. As a consequence, it is more difficult to recover the additional investment required. In this vein, a competitor submits that *“few customers with heating electricity in relation to the rest, therefore the additional expense for the maintenance and calculation of heating electricity tariffs depending on the sales region is not borne”*.³⁵³ Similarly, one competitor states that: *“Die Lieferung von Heizstrom ist komplexer als die von Allgemeinstrom (unterschiedliche Kalkulationsparameter, unterschiedliche Schaltzeiten in den verschiedenen Netzen, teilweise unterschiedliche Lastprofilverfahren). Zudem ist die Anzahl der Kunden eingeschränkt und regional sehr unterschiedlich. Außerdem sind diese Kunden nur mit Mehraufwand zu identifizieren und vertriebslich schwieriger erreichbar. Synergien mit den bestehenden Strukturen zur Lieferung von Allgemeinstrom sind nicht in allen Prozessen vorhanden. Daher konzentrieren sich einige Anbieter auf die Lieferung von Allgemeinstrom.”*³⁵⁴ Other competitor explains that some regular electricity suppliers are not also active in supplying heating electricity because: *“Es sind Investitionen nötig, um entsprechende Heizstromprodukte und -prozesse initial neu aufzusetzen. Die „normalen“ Prozesse (Abrechnung, Beschaffung) sind aufgrund der Temperaturabhängigkeit des Verbrauchs nur teilweise nutzbar (Abrechnung, Beschaffung): Dem gegenüber steht – im Vergleich zum normalen B2C-Geschäft - ein relativ kleines Marktpotential. Im Übrigen birgt dieses Segment ein doppeltes Risiko: Es bestehen zusätzliche Risiken durch Temperaturabweichungen (z.B. Mengenrückverkauf an den Markt, wenn Temperatur > Normaltemperatur), gleichzeitig weniger Verkaufserlöse aufgrund geringerer Abnahmemengen.”*³⁵⁵

³⁵¹ Replies to questionnaire Q1 – Competitors (Germany), question 53 (ID2593).

³⁵² Replies to questionnaire Q1 – Competitors (Germany), question 54 (ID3840).

³⁵³ Replies to questionnaire Q1 – Competitors (Germany), question 53 (ID2567).

³⁵⁴ Replies to questionnaire Q1 – Competitors (Germany), question 53 (ID2322). Convenience translation: *“The supply of heating current is more complex than that of regular electricity (different calculation parameters, different switching times in the different networks, sometimes different load profile methods). In addition, the number of customers is limited and regionally very different. In addition, these customers can only be identified with additional effort and are more difficult to reach in terms of sales. Synergies with existing structures for supplying regular electricity are not available in all processes. As a result, some providers are focusing on providing regular electricity.”*

³⁵⁵ Replies to questionnaire Q1 – Competitors (Germany), question 53 (ID2816). Convenience translation: *“Investments are required in order to set up the corresponding heating current products and processes initially. The “normal” processes (billing, procurement) are only partially usable (billing, procurement), due to the temperature dependence of consumption: on the other side stands - in comparison to the normal B2C business - a relatively small market potential. Moreover, this segment*

- (324) The barriers to entry and expansion created by the hurdles described above are well illustrated by eprimo's recent exit from the market. [Information on eprimo's business strategy].³⁵⁶ [Information on eprimo's business strategy].³⁵⁷
- (325) Therefore, because the market for heating electricity is a highly concentrated market, the Parties exert significant competitive pressure on each other, there are limited credible alternative to the parties and barriers to entry are high, the Commission considers that the merger is likely to raise competition concerns regarding heating electricity. Sufficient market entry or expansion of activities, either (or both) at national or at network area level, in response to potential price increases by the Parties cannot be expected by the vast majority of current heating electricity suppliers. The arguments raised by the Notifying Party against such a finding cannot dismiss these concerns, as detailed in the following.

e. The heating electricity market is not disappearing

- (326) The Notifying Party submits that heating electricity is being substituted by regular electricity due to technological changes (i.e. the switch from night storage heaters to more efficient heat pumps). However, most market players responding to the market investigation consider the market for heating electricity will evolve but do not think it will disappear. In fact, several consider that the market will grow, e.g. one competitor expects that: *"the market for electric heating will grow because new buildings will be built very energy efficient[sic!] and in order to this will [sic!] oil and gas heating become more uninteresting[sic!]"* and another competitor explains that *"[...]in the long run more and more customers will demand electricity tariffs for heating purposes as the energy transition in Germany progresses (and with it the decarbonisation of the heating sector) [...]"*.³⁵⁸ Moreover, the FCO noted the underlying technological changes responsible for the alleged market development away from night storage heaters towards more efficient heat pumps already in its sector inquiry in 2010, hence expecting a decrease in market volume for heating electricity to come.³⁵⁹ Contrary to these expectations, however, the total volume of heating electricity has not changed since then.³⁶⁰ Ultimately, what will happen in the long term is admittedly uncertain, but the Commission found no indication that heating electricity tariffs will no longer be offered to customers in the short or medium term.
- (327) The Commission's view that the merger would significantly impede effective competition is also supported by the majority of respondents to the market investigation who indicated that the Concentration would have a negative impact on the intensity of competition and prices.³⁶¹ For example, one competitor states in this

carries a double risk: there are additional risks due to temperature deviations (for example, volume sales back to the market if temperature > normal temperature), and at the same time less sales revenue due to lower volumes consumed)."

³⁵⁶ Form CO, para. 825.

³⁵⁷ Response to RFI 53: "[Information on eprimo's business strategy]"

³⁵⁸ Replies to questionnaire Q1 – Competitors (Germany), question 68 (ID2896 and ID2773).

³⁵⁹ FCO, Sektoruntersuchung Heizstrom ("Sector Inquiry") 2010, p. 9.

³⁶⁰ In 2009, heating electricity for household customers in Germany accounted for around 14Twh (Sector Inquiry 2010, p. 3) and in 2017 it was around 14TWh (FNA/FCO Monitoring Report 2018, p. 46), with very little fluctuation in the years in between (see e.g. FNA/FCO: Monitoring Report 2012, Monitoring Report 2015, Monitoring Report 2017).

³⁶¹ Replies to questionnaire Q1 – Competitors (Germany), questions 69-71.

regard that: *“Die Entwicklung der Preise für Strom zu Heizzwecken wird deutlich schneller erfolgen als im übrigen Strommarkt. Bereits jetzt besteht seitens RWE und E.ON eine deutliche höhere Marktdurchdringung als im übrigen Strommarkt. Mit der geplanten Fusion wird hier eine Quasi-Monopolstellung aufgebaut. Wegen der komplexeren Strukturen der Netznutzungsentgelte wird es E.ON zukünftig gelingen, andere Wettbewerber zu verdrängen und anschließend die Preise für Strom zu Heizzwecken frei zu bestimmen, was zu einem Anstieg der Preise führen wird.”*³⁶² One competitor elaborates: *“Das fusionierte Unternehmen aus E.ON und RWE/innogy wird zunächst noch besser im Stande sein, die eigene Stellung in den „Heimatemärkten“ bei der Versorgung mit Heizstrom abzusichern. Zum anderen wird es dem Konzern durch Zusammenführung und Synchronisation der Preisstrategie noch mehr möglich sein, selektives Pricing zu betreiben und andere Anbieter aus dem Markt zu verdrängen. Für kleinere aktive Wettbewerber aber auch für potenzielle Markteinsteiger dürfte die Entwicklung verdrängend bzw. abschreckend wirken.”*³⁶³ Another competitor explains: *“Durch den geplanten Zusammenschluss und die damit entstandene Marktmacht gerade auf dem Gebiet des Heizstroms würde der Wettbewerb stark beeinträchtigt, s.o., insbesondere im Segment Heizstrom ist der Wettbewerb grundsätzlich noch deutlich geringer wie im Strom- und Gassektor”*.³⁶⁴

- (328) To summarise, the evidence above shows that the Concentration is likely to significantly impede competition in the retail supply of heating at the national as well as the local level. On a national level, the merged entity would be by distant the largest supplier with a share of approximately [40-50]%. The Parties are very close competitors in a market where, in view of the large barriers to entry and expansion, there are few alternative suppliers who are capable to exert a competitive pressure on the Parties. This conclusion applies equally to local markets. Where either of the Parties is incumbent, the merging Party is one of the very few suppliers which can credibly challenge the incumbent position. This is all the more important considering that the incumbent typically still holds a very strong position locally (often well in excess of 80%). The need to collect and process information/data at DSO-level (in addition to other capabilities/assets described above in recitals (318) to (325) poses an hurdle for smaller companies which struggle to achieve the scale to compete effectively with the Parties.

³⁶² Replies to questionnaire Q1 – Competitors (Germany), question 68 (ID2188). Convenience translation: *“The development of prices for electricity for heating purposes will be much faster than in the rest of the electricity market. RWE and E.ON already have significantly higher market penetration than in the rest of the electricity market. The planned merger will create a quasi-monopoly position here. Due to the more complex structures of network charges, E.ON will in the future succeed in squeezing out other competitors and subsequently freely set prices for electricity for heating purposes, which will lead to an increase in prices”*.

³⁶³ Replies to questionnaire Q1 – Competitors (Germany), question 68 (ID2789). Convenience translation: *“The merged company from E.ON and RWE/innogy will initially be better able to secure its own position in the “home markets” for the supply of heating electricity. Furthermore, the merger and synchronization of the pricing strategy will make it even more possible for the group to pursue selective pricing and to squeeze out other providers from the market. For smaller active competitors but also for potential market entrants, the development is likely to be suppressive or deterring.”*

³⁶⁴ Replies to Questionnaire Q1 – Competitors (Germany), question 69 (ID2730). Convenience translation: *“By the proposed concentration and the resulting market power, in particular in the area of heating electricity, competition would be seriously affected, see above, especially in the heating electricity segment competition in general is much lower than in the electricity and gas sectors.”*

f. Conclusion on horizontal non-coordinated effects in the market for the retail supply of heating electricity in Germany

- (329) The Commission therefore concludes that the Concentration would significantly impede effective competition as a result of horizontal non-coordinated effects arising from the overlap in the activities of the Parties in the market for the retail supply of heating electricity in Germany, independent of whether a national market with local elements or local markets are considered.

7.2.4. *Retail supply of electricity to large industrial customers*

- (330) On a national market for the retail supply of electricity to large/industrial customers, the combined market share of the Parties would not exceed [10-20]%, with an increment brought about by the merger of about [0-5]%.³⁶⁵ Therefore, the Concentration does not give rise to a horizontally affected market.

7.2.5. *Retail supply of gas to household customers*

7.2.5.1. Basic supply

- (331) As for the retail of electricity to households, the Commission notes that only one energy company has the role as a basic supplier of gas within a specific (regional) network area and therefore *de jure* has to be considered as a monopoly.³⁶⁶ Therefore, in line with the arguments discussed by the Commission in Section 7.2.2.1, the Concentration would have limited direct or indirect effects in these markets. In light of the above, the Commission considers that the Concentration is unlikely to impede competition significantly in the retail supply of gas to customers under basic supply contracts in Germany.

7.2.5.2. Special contracts

- (332) The Commission also considers that competition concerns in the supply of gas to customers under special contracts are unlikely to arise from the Concentration.
- (333) As discussed above, the market for the retail supply of gas under special contracts is national in scope with geographic differentiation. In this market, the Parties' market shares will be less than [5-10]% (E.ON) and less than [5-10]% (Innogy) and the Parties' combined market share would be approximately [10-20]%,³⁶⁷ which would be lower than in the market for the retail supply of electricity. The Concentration therefore does not lead to an affected market.
- (334) The next largest competitors to the Parties would be EnBW with a market share of 5-10% and EWE, Mainova, Enercity, and Rheinenergie with market shares of about 0-5%.³⁶⁸
- (335) Moreover, similarly to electricity, the number of suppliers active in Germany (1,035 gas suppliers in 2017)³⁶⁹ increased constantly in the recent years so that, on average,

³⁶⁵ Form CO, para. 624; Response to RFI 44 paras. 9 and 10.

³⁶⁶ Section 36 para. 2 of the EnWG.

³⁶⁷ Even if the entire share of the companies in which the Parties hold minority participation were to be added, they would increase the Parties' combined share by less than [5-10]%. Considering that this figure is limited and it overestimates the actual financial stake that the Parties own in these companies, the Commission considers that the Parties' minority shares would not materially alter their position post-merger and therefore the Commission's assessment.

³⁶⁸ Response to RFI 66.

³⁶⁹ FNA/FCO, Monitoringbericht 2017, p. 358.

every customer can choose between 116.³⁷⁰ This includes also entrants from outside the industry, such as Shell, who was also mentioned by large and small competitors in the market investigation as one of the three closest competitors to the Parties.³⁷¹

- (336) The German retail market for the supply of gas is also generally seen as competitive. The FCO/FNA stated in their joint monitoring report 2018 that “[s]ince market liberalisation and the creation of a legal basis for a well-functioning supplier switch, there has been a steady positive development in the number of active gas suppliers for all final consumers in the different network areas. This positive trend continued in 2017 as well.”³⁷² In line with this finding, household customer switching has overall increased for gas in the last years, from about 3% in 2008 to over 12% in 2016.³⁷³
- (337) As was the case on the market for the retail supply for electricity, set out in recital (277), the assessment indicates that the Parties are not particularly close competitors for the retail supply of gas to household customers under special contract and many suppliers can exert a competitive pressure similar or comparable to the pressure that the Parties exert on each other. In particular
- (1) customers who switch away from E.ON and Innogy in their incumbency areas rarely choose the other merging Party. While the Parties’ diversion ratios from Innogy to E.ON and vice versa range at a moderate level, the closer competitors in each case clearly are EnBW, Vattenfall, and municipal utilities with a significantly higher diversion ratio (from Innogy or E.ON). The diversion from Innogy to E.ON can reach up to [10-20]% while diversion from Innogy to EnBW can reach up to [10-20]%, to Vattenfall [20-30]% and to municipal utilities to [40-50]%. Similarly, diversion from E.ON to Innogy can reach up to [10-20]%, while diversion from E.ON to EnBW can reach [20-30]%, to Vattenfall [30-40]% and to municipal utilities [40-50]%;³⁷⁴
 - (2) as for electricity, in their internal documents the Parties monitor equally a large number of competitors and there is no indication that they monitor each other any more closely than other suppliers (see recital (277), point 2, the monitoring applies also to gas);
 - (3) neither E.ON nor Innogy in their pricing decisions pay particular attention to the other party (see recital (277), point 3); and
 - (4) the majority of competitors responding to the Commission’s investigation indicated that they have been able to attract customers switching away from the Parties.³⁷⁵ Most of the competitors also indicated that they have products/tariffs in their portfolio that allow them to target all the relevant customer groups.³⁷⁶
- (338) Finally, the Commission considers that barriers to entry and expansion in the market are relatively low. The average number of gas suppliers active per supply area significantly increased from 15 suppliers in 2009 to 105 suppliers in 2016.³⁷⁷

³⁷⁰ FNA/FCO, Monitoringbericht 2018, p. 335. Only household customers on average: 98.

³⁷¹ See e.g. Replies to questionnaire Q1 – Competitors (Germany), questions 95 and 96 (ID2730 and ID2289).

³⁷² FNA/FCO, Monitoringbericht 2018, p. 335.

³⁷³ FNA/FCO, Monitoringbericht 2017, p. 374.

³⁷⁴ Form CO, paras. 1351 et seq.

³⁷⁵ Replies to questionnaire Q1 – Competitors (Germany), question 105.

³⁷⁶ Replies to questionnaire Q1 – Competitors (Germany), question 107.

³⁷⁷ Form CO, para. 1296.

Companies already active in the market can easily expand across areas thanks to the fact that switches occur in particular online, where no physical assets/local presence is required to operate.

- (339) As discussed in section 7.1.6, while the market is national, there are certain elements of local differentiation in the suppliers' competitive offering that also apply to gas. Price and sales strategies can sometimes be adapted to local market developments and/or to meet growth target in some specific areas. Therefore, the Commission also assessed whether the merger may impede competition in some narrower geographic areas (see recital (146)), concluding that this is not the case.
- (340) Similarly to the retail supply of electricity (see recitals (283) and (284)) a significant number of customers under special contracts with the basic supplier are not active/engaged, and they tend to stick to their incumbent even if cheaper alternatives are available on the market. The merger is therefore unlikely to have any material impact on these customers and there is no (very limited) competition for these customers in the first place. Competitive activities in the market consequently focus on contestable customers.
- (341) However, the evidence collected by the Commission indicates that Innogy is just one of many suppliers competing with E.ON where E.ON is the incumbent and vice versa, and post-merger the incumbent party will continue to face significant competition from a large number of credible suppliers.
- (342) As mentioned in recital (338), there are on average more than 100 suppliers offering gas in each local area.³⁷⁸ While some of them may have a small/negligible presence, there are several suppliers with a share comparable or larger than the increment brought by the smaller of the merging Parties.
- (343) There is also no indication that the Parties are particularly close competitors in some local areas and that the merger would remove an important competitive constraint locally.
- (344) As for electricity, in general few customers switch between the Parties, which suggests that the Parties are not structurally close. Moreover, the switching rates between the Parties have been falling across local areas. Figure 8 below shows that the distribution of the local switching rates from E.ON to Innogy (in E.ON DSO areas) rates has considerably shifted to the left from 2015 to 2018, which means that the switching rate between the Parties has decreased across most of the local areas where E.ON is DSO.

Figure 8 - Diversion ratios from E.ON to Innogy in E.ON DSO area 2015-2018 - gas

[...]

[...]

Source: Commission's analysis on the Parties' data

- (345) The Parties have relatively small shares of supply in the DSO areas of the other merging Party (i.e. E.ON in Innogy DSO areas and vice versa), generally below [0-5]%.³⁷⁹ It is also worth noting that the Parties' share of special contracts in their own DSO areas has been constantly eroding in recent years.³⁸⁰ Most of the shares lost by

³⁷⁸ Form CO, para. 1296.

³⁷⁹ Form CO, paras. 1420 et seq.

³⁸⁰ E.ON from a range of [50-60]-[60-70]% in 2015 to [40-50]-[50-60]% in 2018, and for Innogy from a range of [50-60]-[70-80]% in 2015 to [40-50]-[60-70]% in 2018. Form CO, para. 1415.

the Parties in their own DSO areas have been captured by municipal utilities and other competitors, such as Vattenfall, who experienced a sustained growth across both E.ON and Innogy DSO areas.³⁸¹

- (346) The Commission analysed also for gas, whether E.ON margins³⁸² are affected by Innogy's local market position, and vice versa. However, the margin analysis shows that E.ON's margins on tariffs targeted to newly acquired customers (and therefore likely to be customers prone to switching) do not appear to be linked with Innogy's local share of supply at group level, similar to the analysis presented in recital (287) for the retail supply of electricity.³⁸³

Figure 9 - Relationship between margin at customer level and increment local share of supply in retail of gas, tariffs "Optimalerdgas" and "Erdgas"

[...]

[...]

Source: Commission's analysis on the Parties' data

- (347) Again, as for electricity, in the [...] municipalities for which E.ON was at risk of losing its status as basic supplier of gas, Innogy was rarely identified as the supplier challenging E.ON's status (i.e. the second largest supplier), based on the internal assessment made by E.ON in 2017.³⁸⁴
- (348) As discussed above for electricity (recital (288)), large national brands do not have necessarily a reputational advantage in competing locally for the retail supply of gas. Regional suppliers, in particular Stadtwerke, are often seen as more credible alternatives by respondents to the customer questionnaire of the Commission.
- (349) The Commission also assessed for gas, whether strong local positions may give rise to pricing power in the supply of gas to customers who are prone to switch and whether this may lead to price increases due to the merger by strengthening the Parties' position in their own incumbency areas. Using the same methodology as for electricity (see recital (289) above) the Commission considered a number of the Parties' tariffs, and again found no systematic link between the local share of supply of the incumbent and the net price of the incumbent competitive tariffs. The following two graphs show the outcome of the Commission's analysis in relation to two tariffs of E.ON: Optimalerdgas and Erdgas.

Figure 10 - Relationship between margin at customer level and incumbent local share of supply in retail of gas, tariffs "Optimalerdgas" and "Erdgas"

[...]

[...]

Source: Commission's analysis on the Parties' data

³⁸¹ Form CO, Tables 131 and 133.

³⁸² The Commission analysed gross margins (which are net of network charges, taxes, procurement costs) as these provide a more meaningful measure of the evolution of suppliers' market power over time (i.e. of their ability to price above the costs) than prices. This is due to the fact that prices in Germany are for the most part affected by charges and taxes which are out of the suppliers' control and they account for the majority of the total price.

³⁸³ The Commission has replicated the analysis by using a number of E.ON's and Innogy's tariffs and the results are qualitatively very similar. For E.ON, the tariffs analysed were: OptimalErdgas, Erdgas and KlassikErdgas 24. For Innogy's retail entities, the tariffs analysed were: SV Erdgas Stabil A and Strom Erdgas Smart direct A.

³⁸⁴ [...]. Response to RFI 19, Annex 5 (ID1341-4147).

- (350) In light of the above, the Commission considers that the Concentration is also unlikely to raise competition concerns in any local areas in Germany.
- 7.2.5.3. Conclusion on horizontal non-coordinated effects in the market for the retail supply of gas in Germany
- (351) The Commission therefore concludes that the Concentration would not significantly impede effective competition as a result of horizontal non-coordinated effects arising from the overlap in the activities of the Parties in the markets for the retail supply of gas to households customers under basic supply or under special contracts in Germany.
- 7.2.6. *Retail supply of gas to large industrial customers*
- (352) On a national market for the retail supply of gas to large/industrial customers, the combined market share of the Parties would not exceed [5-10]%, with an increment brought about by the merger of about [0-5]%. Therefore, the Concentration does not give rise to a horizontally affected market and does not raise any concerns.
- 7.2.7. *Metering*
- (353) The Commission considers that the Concentration will not significantly impede effective competition on the market for electricity and gas metering services, nor on any hypothetical sub-market, for the following reasons.
- 7.2.7.1. Market for heat and water metering services
- (354) For heat and water metering services, the regulatory framework provides for *de jure* monopoly at network area level, as the sole entitled metering point operator is the network operator. In consequence, the market (and potential submarkets for heat vs. water) are not affected by the Concentration.
- 7.2.7.2. Market for metering services for gas and electricity as eMPO/nMPO
- (355) The market metering services for gas and electricity as eMPO/nMPO (and potential sub-markets according to the commodity measured) are also monopolies at network area level, with the network operator as the sole entitled metering point operator. Therefore this market is also not affected by the Concentration.
- 7.2.7.3. Market for metering services for gas and electricity as cMPO
- (356) The market for cMPOs is only starting to develop in Germany. The Parties' activities are also still *de minimis* and the combined market share in Germany would remain below [0-5]%,³⁸⁵ even when further divided submarkets. Therefore, the Concentration does not give rise to an affected market for metering services for gas and electricity as cMPO.
- 7.2.7.4. Market for sub-metering
- (357) The Concentration does not give rise to an affected national market for sub-metering. The market is characterised by a few large and many small players, including the Parties, as the sector inquiry into sub-metering conducted by the FCO in 2017 showed.³⁸⁶ In the sector inquiry, the Parties belonged to the group of small players with market shares below 1%, so the combined market share of the Parties still remains below [0-5]%.

³⁸⁵ Form CO, paras. 1728 and 1729.

³⁸⁶ FCO, Sektoruntersuchung Submetering Darstellung und Analyse der Wettbewerbsverhältnisse bei Ablesediensten für Heiz- und Wasserkosten, May 2017, page 27 *et seq.*

7.2.7.5. Market for white-label services

- (358) The Concentration does not give rise to an affected market for white label services or any potential sub-markets.
- (359) On a potential sub-market for white-label services for metering of electricity and gas, the Parties' combined market share does not exceed [0-5]%³⁸⁷.
- (360) On a potential sub-market for white-label services for metering heat and water, the Parties' combined market share does not exceed [0-5]%³⁸⁸.
- (361) On a potential sub-market for SMGWA services, the combined market share of the Parties would remain below [5-10]%.³⁸⁹
- (362) In course of the proceedings, a complaint was raised that only few larger players will be able to provide smart meter operation services profitably, due to the regulated price caps and that E.ON and Innogy would be one of those few pre-merger, even more so post-merger. This assessment, however, is based on a number of underlying assumptions, i.e. regarding costs and economies of scale for E.ON and Innogy and other players, that were not substantiated vis-à-vis the Commission. The Notifying Party submits that [explanation on E.ON internal costs].³⁹⁰
- (363) In addition, the Commission considers that the following reasons make such a concern unlikely: First, the SMGW hardware and necessary infrastructure are provided by several independent suppliers, including Siemens and Landis&Gyr, which can be procured by any MPO and white label service provider.³⁹¹ While at the time of this Decision, there is only one certified SMGW in Germany³⁹², eight other SMGWs are awaiting certification by the BSI.³⁹³ Also, in general respondents to the market investigation expect that the SMGW market will be served by several competing SMGWs³⁹⁴. Second, the market investigation suggests that many respondents consider a critical size of approximately 100.000 to 300.000 smart-metering points to achieve the necessary scale to operate profitably as a SMGWA³⁹⁵ (there are approximately 51 million of metering points in Germany for electricity)³⁹⁶. Third, while the Commission recognizes that, i.e. due to the regulation concerning certification requirements and price caps, not all MPOs with a smaller customer (i.e. metering points) base may be in a position to offer SMGWA services themselves, they could co-operate with other small suppliers to achieve the necessary size. Lastly, market entrants also from big players outside the energy industry show that market entry and, hence, competition is possible. For example, the Deutsche

³⁸⁷ Response to RFI 69, question 1.

³⁸⁸ Response to RFI 69, question 1.

³⁸⁹ Form CO, para. 1773.

³⁹⁰ Submission by Parties 23.07.2019.

³⁹¹ Form CO, paras. 1686 and 1691.

³⁹² And according to the MsbG regulatory framework, the rollout for smart-metering systems will only start once three independent SMGW systems would have been certified by the BSI.

³⁹³ BSI website : https://www.bsi.bund.de/DE/Themen/DigitaleGesellschaft/SmartMeter/SmartMeterGateway/Zertifikate/24MsbG/zertifikate24MsbG_node.html.

³⁹⁴ Replies to questionnaire eQ1 – Competitors (Germany) question 161.

³⁹⁵ Replies to questionnaire eQ1 – Competitors (Germany) question 157. The indicated range seems to be most prominent, while the responses range from less than 1.000 to several million.

³⁹⁶ FNA/FCO, Monitoringbericht 2018, page 311.

Telekom already provides smart meter white-label services also for smaller Stadtwerke.³⁹⁷

(364) Some market participants also raised the concern that post-merger E.ON will have the majority in the boards and committees responsible for defining technical standards and process (the VDE/FNN), and it would therefore be able to influence the setting of the technical standards. As already assessed above (see (233) to (239)), the Commission considers that the merger is unlikely to give the merged entity unduly influence on the VDE/FNN's decision making process in relation to the setting of technical standards.

(365) Some market participants also raised the concern that the Concentration would remove any current competition between E.ON and Innogy on smart-metering services. As stated above, the market investigation shows that there are no current significant competition for smart-metering services as the smart-meter roll-out has not started yet.

7.2.7.6. Conclusion on horizontal non-coordinated effects in the market for the retail supply of heating electricity in Germany

(366) With regard to the markets in Germany for heat and water metering services, the market for sub-metering, the market for metering services for gas and electricity as eMPO/nMPO, the market for metering services for gas and electricity as cMPO and the market for white label services (including potential segmentations), the Commission concludes that the Concentration would not significantly impede effective competition as a result of horizontal overlaps in the activities of the Parties on these markets.

7.2.8. *E-mobility*

7.2.8.1. Installation and operation of public EV CS on motorways

(367) There are approximately 390 motorway fuel stations ("MFS") on motorways in Germany. The vast majority of these stations (360) are operated by Autobahn Tank & Rast ("T&R")³⁹⁸ which accounts for more than 90% of the MFS on motorways.

(368) T&R is a former state-owned enterprise that was privatized in 1998. There are currently 315 MFSs in T&R's network with fast EV CS designed for an output of 50 kW to 150 kW. T&R has launched a second expansion phase which will entail upgrading the majority of the existing MSFs with additional fast EV CS with an output of 150 kW and ultra-fast EV CS with an output of up to 350 kW at around 80 MSAs additionally.³⁹⁹

(369) Tank & Rast does not operate EV CS itself, rather it has entered into cooperation agreements (in 2017) with four CPOs to equip and operate EV CS on its MSF, namely: E.ON, Innogy, EnBW and Ionity.

(370) E.ON and Innogy have cooperation agreements with T&R covering, respectively, [...] and [...] motorway locations, out of which respectively [...] and [...] are MFS. Together, the Parties have more than [60-70]% of the T&R MSF covered by agreements to install and operate fast EV CS.

³⁹⁷ See <https://www.t-systems.com/de/en/references/overview/reference/stadtwerke-emden-smart-metering-789560> and <https://www.telekom.com/de/medien/details/einmal-smart-metering-to-go-352146>

³⁹⁸ T&R's response to RFI dated 8 May 2019, questions 1 and 2 (ID4915).

³⁹⁹ T&R's response to RFI dated 8 May 2019, question 1 (ID4915).

- (371) On locations with operational fast Charging Stations (which may comprise some services areas on motorways without MFS), the Parties together also have more than [60-70]% of the location covered by an agreement with T&R. Table 2 below summarises the cooperation agreements in place between T&R and CPOs, where there currently are operational Charging Stations.

Table 2 – Current cooperation agreements between Tank & Rast and CPOs

CPOs	Locations with operational EV CS	Number of operational EV CS	Number of operational EV Charging Points
EnBW	[...]	[...]	[...]
Innogy	[...]	[...]	[...]
E.ON	[...]	[...]	[...]

Source : T&R's reply to RFI dated 8 May 2019, question 6 (ID4915).

- (372) Of all MFS in T&R's networks, 87% have already been allocated for the equipment and operation of EV CS to CPOs. There are only few locations that remain to be equipped with EV CS.⁴⁰⁰

The Notifying Party's view

- (373) The Notifying Party submits that the Concentration does not raise competition concerns in relation to the installation and operation of both fast and ultra-fast EV CS on motorways mainly for the following reasons:⁴⁰¹ (i) off-motorways stations (especially Autohöfe) exert a significant constraint on on-motorways CS and should be seen as part of the same relevant market with on-motorway CS; (ii) the Parties are not close competitors on motorways as there is no instance where both Parties operate CS at the same service area; (iii) customers' decision as to which station to use is *'rather driven by other considerations, such as other offers at the serviced rest area'*, (iv) the market for EV CS is expected to grow significantly in the coming years and there are c.1,500 MSA without MFS on motorways which are owned by T&R. CPOs can then expand on motorways by obtaining a concession to operate EV CS in these areas and the responsible local authorities are obliged to award these concessions according to the European public procurement law.

The Commission's assessment

- (374) The Commission does not agree with the Notifying Party's view.
- (375) First, as per the arguments set out in the market definition Section 7.1.8, the Commission considers that off-motorways stations (including Autohöfe) are not part of the same relevant market as on-motorway CS. While some drivers may consider leaving the motorway to re-charge their car, this is unlikely to constrain sufficiently the behaviour of CS located on-motorways.
- (376) Second, the Commission does not consider that only CSs located at the same service area place a constraint on each other. As argued in recital (197), the Commission's precedents as well as the market investigation in the present case support the view

⁴⁰⁰ T&R's response to RFI dated 8 May 2019, question 6 (ID4915).

⁴⁰¹ Parties' response to RFI 56, question 13.

that stations in different service areas are in competition, to the extent that they are located within a reasonably short distance.

- (377) Third, the Notifying Party claims that the customers' choice of the service area where to stop is driven by factors other than the charging price. The Commission found no evidence in support of this argument. The Commission considers that, as much as for traditional fuel stations, other factors may influence drivers' decision regarding the station where to stop but price and the services related to recharging are important elements too.
- (378) Finally, the Commission acknowledges that motorway service areas (MSAs) without MFS may be an entry point for new CPOs but it is unclear whether the mere future availability of these locations to install EV CS would be sufficient to remove the competitive concerns raised by the Concentration. First, these locations are unlikely to be as attractive as MFS from a business perspective. The Parties themselves recognize that multiple factors drive customer' choice and the availability of services additional to recharging is likely to be one of them. Also, some CPOs told us that MSA without MFS have a number of limitations. For example, a CPO said that the motorway service areas are *"far more attractive where restaurants and other facilities are present, also for safety considerations."*⁴⁰² Another CPO indicated that would not consider operating a charging station in a MSA without MFS because *"the attractiveness of a charging station highly depends on the availability of additional services such as toilets, restaurants and other recreational facilities, therefore MSA without fuel Charging Stations are far less attractive for EV charging compared to an MSA with fuel stations."*⁴⁰³
- (379) On the basis of the market definition, the Commission considers that when a pair of E.ON's and Innogy's EV CS on motorways are (i) within a distance of 50 km and (ii) when there is no other competitor's EV CS in between the Parties' on the same route, they place the most direct constraint on each other. For these pairs of EV CS the merger is likely to harm customers as it would remove the important competitive constraints that the Parties impose on each other. The Commission identified 47 combinations of the Parties' CS that meet the conditions set out above. These include: Charging Stations in operation, Charging Stations which are planned or in construction, and also Charging Stations for which the Parties are still in negotiation with the motorway operator to have access to the relevant service areas. The complete list of E.ON's station locations where the removal of the competitive constraint as a result of the Concentration, which has been established based on the above-mentioned criteria, is shown in Table 3 below.

⁴⁰² Minutes of a conference call with a competitor on 5 July 2019, para. 6 (ID6198).

⁴⁰³ Minutes of a conference call with a competitor on 5 June 2019, para. 6 (ID5236).

- (382) Off-motorways, both Parties operate only [...] ultra-fast public Charging Stations at the time of this Decision.⁴⁰⁵ Their future expansion plans cover [...] for E.ON⁴⁰⁶, [...] ⁴⁰⁷, and [...].⁴⁰⁸

The Notifying Party's view

- (383) The Notifying Party argues that (i) the German market is highly fragmented with the 10 to 13 largest CPOs commanding an aggregated share of less than 40%, (ii) the Parties are not close competitors as they pursue different business strategies ([...]), and (iii) barriers to entry are low as supported by the fact that in recent years there have been a number of new entries and/or companies announcing plans to expand their EV CS network. These include: The New Motion (owned by Shell), Fastned, Allegio, eLoaded, Ionity, etc.

The Commission's assessment

- (384) The Commission notes that on a nation-wide basis the market of installation and operation of ultra-fast Charging Stations would not be affected. The Commission also notes that the Parties operate very few ultra-fast public Charging Stations off-motorways (only [...]). Moreover, many large competitors (such as Allegio, EnBW, Ionity, etc) have expansion plans for ultra-fast Charging Stations, similar or larger in scale than the the Parties.⁴⁰⁹
- (385) The Commission notes that on a nation-wide basis the market of installation and operation of regular/fast Charging Stations would not be affected and there are a number of competitors, including large companies. In addition, the market is rapidly evolving and further market entry can be expected. For example, Deutsche Telekom announced recently its plan to integrate EV Charging Stations into distribution boxes. Volkswagen also announced its plans to enter the e-mobility market and aims to build public EV Charging Stations at the facilities of its 4.000 car dealer and service station partners in Europe.
- (386) Nonetheless, the Commission has also considered whether in some local areas the Concentration may significantly increase concentration and, as a result, lessen competition. The Commission examined narrower local areas on the basis of 3-digit postal codes and identified 16 areas that would meet the following thresholds (25% for the Parties' combined market share or delta HHI above 150)⁴¹⁰. Yet, the Commission considers that in none of these areas the Concentration is likely to significantly impede competition for the following reasons:⁴¹¹

⁴⁰⁵ Form CO, para. 1937 and 1945.

⁴⁰⁶ Response to RFI 48, question 2.

⁴⁰⁷ Response to RFI 53, question 3.

⁴⁰⁸ Response to RFI 53, question 3.

⁴⁰⁹ Form CO, para. 2081.

⁴¹⁰ Response to RFI 53, Table 2 and Table 3.

⁴¹¹ This conclusions would hold true even if the relevant market were to be split between regular and fast Charging Stations off motorways. First, the Parties have a very limited number of fast Charging Stations off-motorways and in 16 areas identified by the Commission the Parties' activities do not overlap. Given that off-motorways the vast majority of Charging Stations are regular, the evidence set out below would essentially equally apply to a market composed of regular Charging Stations only. See response to RFI 74.

- (a) First, a number of other CPOs are active in all these regions. They include both specialised e-mobility players (e.g. Allego, The New Motion) as well as local municipalities (e.g. Stadtwerke Leipzig, etc.)⁴¹²;
 - (b) Second, in most of the areas the merger increment is limited as it consists of only one station and in percentage terms it is often below 10%⁴¹³;
 - (c) Third, in some of these areas competitors (e.g. Allego, EWE, ChargePoint) have announced expansion plans⁴¹⁴.
 - (d) Fourth, some of the areas are in the immediate vicinity of large cities (such as, for example, Leipzig and Munich) or other municipalities where a network of additional stations are in operation and can therefore exert competitive pressure⁴¹⁵.
- (387) The Commission also considers that any measure of market concentration based on existing CS should be considered cautiously. As the investigation points out, the e-mobility market is developing rapidly and there is uncertainty how this may play out. Therefore, the current position of CPOs may not reflect the competitive conditions that will prevail in the future. The Commission also notes that the market seems to attract the attention and the interest of a wide range of players (car manufacturers, energy companies, oil companies, etc.) which have plans to roll-out extensive networks of EV CS.⁴¹⁶
- 7.2.8.3. Conclusion on horizontal non-coordinated effects in the market for installation and operation of public EV CS off motorways in Germany
- (388) In view of the above, the Commission concludes that the Concentration would not significantly impede effective competition as a result of horizontal non-coordinated effects arising from the overlaps in the activities of the Parties in the markets for the installation and operation of EV CS off-motorways in Germany.
- 7.3. Competitive assessment - Vertical non-coordinated effects**
- (389) Distribution networks operated by DSOs are vertically affected markets in relation to all related up- or downstream markets, as the combined market shares of the merged entity would be above 30% in distribution networks (natural monopolies).
- (390) Similarly, the Parties have market shares above 30% in the retail supply of both gas and electricity in those local markets, where they are the basic supplier (natural monopolies), giving rise to vertically affected markets concerning related up-stream markets.
- 7.3.1. *Generation and wholesale supply of electricity (upstream) – retail supply of electricity (downstream)*
- (391) With regard to the upstream market of generation and wholesale supply of electricity, the downstream markets for retail supply of electricity to household customers under basic supply and for the retail supply of heating electricity lead to vertically affected

⁴¹² Response to RFI 53, Table 2 and Table 3.

⁴¹³ Response to RFI 53, Table 2 and Table 3.

⁴¹⁴ Response to RFI 53, para. 14.

⁴¹⁵ Response to RFI 53, para. 18.

⁴¹⁶ Some competitors raised the concerns that the Parties, thanks to their position as DSO in a number of local areas, may have privileged access to public areas where to install EV CS. The Commission considers that even assuming that the Parties have this type of advantage in the areas where they are DSO, the Concentration is unlikely to have any material effect as the Parties' position as DSO in the local areas remains unaltered.

markets, as the Parties achieve combined market share exceeding 30%. The markets for retail supply of electricity to large/industrial customers and retail supply of electricity under special contracts do not give rise to vertically affected markets.

- (392) E.ON does not have the ability to foreclose competitors on the downstream markets by engaging in input foreclosure strategies, as E.ON does not have market power on the upstream market for the generation and wholesale supply of electricity in view of its minor market position (below [5-10]% in 2017) post-merger. Retail suppliers on the downstream markets would have ample alternative providers from which they can procure electricity on the wholesale market.
- (393) Customer foreclosure can occur when a supplier integrates with an important customer in the downstream market and stops or significantly reduces the purchasing from the competitors on the upstream market. The Commission notes that the demand of electricity for retail activities captured by the Parties accounts for less than 30% of the total demand in Germany and upstream competitors could still target more than 70% of the market downstream even if the Parties were to source all the volume they need downstream internally.⁴¹⁷ Therefore, the Commission considers that competitors on the upstream market for generation and wholesale of electricity would have sufficient alternative customers also post-merger.
- (394) The Commission therefore concludes that the Concentration would not significantly impede effective competition as a result of vertical non-coordinated effects arising from vertical links between the upstream market for generation and wholesale supply of electricity in Germany and the downstream markets for the retail supply of electricity in Germany.

7.3.2. *Distribution networks (upstream) - Generation and wholesale supply of electricity (downstream)*

- (395) The Notifying Party submits that about [...] % of the power generation is connected to the distribution grid, which is a required infrastructure to transport electricity from the location of generation to the consumer.⁴¹⁸
- (396) Due to the DSO being a natural monopolist, the ability to foreclose competitors on the downstream market is not changed by the merger. The Parties as DSOs are local monopolists on the upstream market pre- and post-merger. Moreover, the vertical link between the upstream and downstream market is already pre-existing. The Commission considers that the incentive to foreclose competitors on the downstream market does not materially change due to the merger either because of the small market position in the generation and wholesale supply of electricity.

⁴¹⁷ Incidentally, the Commission notes that, upon completion of the asset swap described in Section 3, RWE will hold a minority share of approximately 17% in E.ON. The impact of this minority share has been extensively assessed by the Commission as part of the M.8871 *RWE/E.ON ASSETS* investigation and the Commission concluded that the minority share did not materially affect the risk of vertical foreclosure. The conclusions set out in M.8871 are likely to apply even more to the present Concentration as RWE holds a minority share in E.ON but E.ON has no financial stake in RWE and therefore it would not benefit from strategies that are meant to strengthen the market position of RWE (such as, for instance, a customer foreclosure strategy). This reasoning holds equally for the vertical relationships between E.ON and RWE that would arise as a result of the minority stake (see M.8871 - *RWE/E.ON ASSETS*).

⁴¹⁸ Form CO, paras. 234 and 235.

- (397) The Commission considers that E.ON does not have the ability to foreclose competitors on the upstream market, as DSOs are natural monopolists and do not face any competition.
- (398) The Commission therefore concludes that the Concentration would not significantly impede effective competition as a result of vertical non-coordinated effects arising from vertical links between the upstream market for distribution network operation and the downstream market of generation and wholesale supply of electricity in Germany.
- 7.3.3. *Distribution networks electricity and gas (upstream) - retail supply of electricity and gas (downstream)*
- (399) Due to the DSO being a natural monopolist, all retail supply markets are vertically affected markets downstream.
- (400) For the same reason, the ability to foreclose competitors on the downstream market is unaltered by the merger on any downstream market as the Parties where they are DSO are local monopolists on the upstream market pre- and post-merger and the vertical links between the upstream and downstream markets are already pre-existing⁴¹⁹.
- (401) While the merger could have an effect on the incentives for foreclose, the Commissions considers that the incentives to foreclose competition the downstream retail markets do not materially increase due to the merger either.
- (402) First, the market position of the Parties on the downstream markets for retail supply of electricity or gas does not materially change due to the merger. On the local markets for retail supply of electricity or gas to households under basic supply, the Parties are local monopolist due to the nature of the markets (see recital (265) above for electricity and recital (331) for gas) and the merger changes neither the Parties' market position nor the incentives to engage in foreclosure strategies. On each of the national markets for retail supply of electricity and gas to households under special contact as well as on the national markets for retail supply of electricity and gas to large industrial customers, the combined market share of the Parties will remain below 20% (see recitals (274) and (333) above for electricity and recitals (330) and (352) for gas), so that the Parties would not have a strong market position on either of these markets to engage in profitable input foreclosure. For heating electricity, the Commission notes that on a national level, post-remedy implementation, the Parties would have a share of less than 30%. On a local level, while the Parties' combined share in their own incumbency areas is typically well above 30%, the increment caused by the Concentration is limited once the remedy will be implemented. Therefore, the changes in incentives to foreclose, if any, will not materially change as a result of the Concentration.
- (403) Second, the vast majority of respondents to the Commission's market investigation indicated that they did not experience any situation in the last three years where the DSO hampered their ability to sign a switching customer.⁴²⁰ Also, the majority of

⁴¹⁹ With the exception concerning areas, where one Party is the DSO and the other is the basic supplier. There, a new vertical link emerges. However, as both markets are natural monopolies, no input or customer foreclosure can arise.

⁴²⁰ Replies to questionnaire Q1 – Competitors (Germany), questions 123 and 136.

respondents did not consider that a DSO in Germany has the ability and incentive to hamper a retail supplier's ability to compete.⁴²¹

(404) The Commission considers the merger will have no impact on the likelihood of potential customer foreclosure. Since each distribution network constitutes a natural monopoly, no actual or potential rival in the upstream DSO market can be foreclosed.

(405) The Commission therefore concludes that the Concentration would not significantly impede effective competition as a result of non-coordinated effects arising from vertical links between the upstream markets for distribution networks operated by DSOs and the downstream markets for the retail supply of electricity or gas in Germany.

7.3.4. *Distribution networks for gas and electricity (upstream)- competitive metering point operation for gas and electricity (downstream)*

(406) After the mandatory upgrade to modern meters and/or SMGW, the MPO needs to conclude a contract with the DSO to establish a legal basis for any metering fees. The metering point operation is not included in the network usage contract.

(407) The ability to foreclose competitors downstream does not change through the merger as DSOs are local monopolists pre- and post-merger. The Commission considers that the incentives to foreclose are small and do not materially increase due to the merger, because: First, the increment brought by the merger on the downstream market is *de minimis* and the combined market share of the Parties on the downstream market remains below [0-5]% post-merger (see recital (356)). Second, the market is still in its infancy and the development (currently somewhat on hold because of the awaited smart meter roll-out) and overall still very small⁴²². Third, there are market entrants also from other industries (e.g. Deutsche Telekom). And fourth, as discussed above (see recital (243) and (253)), DSO's as natural monopolists are regulated to ensure non-discriminatory grid connection and usage for customers, suppliers and other network operators.

(408) E.ON does not have the ability to foreclose competitors upstream, as the DSO is a natural monopolist.

(409) The Commission therefore concludes that the Concentration would not significantly impede effective competition as a result of non-coordinated effects arising from vertical links between the upstream markets for distribution networks for gas and electricity operated by DSOs and the downstream markets for the competitive metering of electricity or gas in Germany.

7.3.5. *Retail supply of gas to power plants (upstream) – district heating (downstream)*

(410) In previous decisions, the Commission considered a separate product market for the supply of district heat and the geographic scope to be local and limited to the relevant district heating network.⁴²³ Therefore, the Parties' activities on the relevant local markets for district heating do not overlap horizontally, but the Parties are local monopolists pre- and post-merger, giving rise to vertically affected markets with regard to the retail supply of gas to power plants.

⁴²¹ Replies to questionnaire Q1 – Competitors (Germany), questions 124 and 137.

⁴²² Form CO, para. 1661.

⁴²³ COMP/M.8860 – *Fortum/Uniper*, paras. 147 and 150; COMP/M.5793 – *DALKIA CZ/NWR ENERGY*, para. 17 and COMP/M.4238 – *E.ON/PRAZSKÁ/PLYNÁRENSKÁ*, paras. 21 et seq.

- (411) The Commission is of the view that E.ON does not have the ability to foreclose competitors on the downstream market, as district heating suppliers are natural monopolists and there are no competing customers to foreclose.
- (412) With regard to input foreclosure for competitors on the upstream market, the Commission notes that the ability to foreclose does not change due to the merger and also the incentives to engage in such foreclosure strategy are not affected by the merger, as E.ON has no and Innogy only negligible activities in the supply of gas to power plants, the market share remaining well below 20%.⁴²⁴
- (413) The Commission therefore concludes that the Concentration would not significantly impede effective competition as a result of non-coordinated effects arising from vertical links between the upstream market retail supply of gas to power plants and the downstream markets for district heating in Germany.

7.3.6. *Vertical links related to metering*

- (414) The Concentration results in two vertically affected markets concerning metering services:
- (a) White label services (upstream) – normally responsible metering point operator (downstream); and
 - (b) White label services (upstream) – heat and water metering (downstream)
- (415) The Commission is of the view that E.ON does not have the ability to foreclose competitors on the downstream markets, as the nMPO as well as the heat and water metering providers are local monopolists, therefore on these markets there are no competitors to be foreclosed. Moreover, the combined market position of the Parties on the upstream market for white label services remains well below [0-5]%, so that all customers on the downstream market would have sufficient alternative white label service providers also post-merger.
- (416) The ability to foreclose competitors upstream does not change due to the merger nMPOs as well as heat and water metering providers are local monopolists pre- and post-merger and the vertical is existing already pre-merger. The Commission also considers that the incentives to foreclose do not materially increase due to the merger in view of the very limited market position of the Parties on the upstream market for white label services and the minor increment.
- (417) The Commission therefore concludes that the Concentration would not significantly impede effective competition as a result of non-coordinated effects arising from vertical links between the upstream market for white label services and the downstream markets for the competitive metering of electricity or gas and for metering of heat and water in Germany.

7.3.7. *Vertical links related to e-mobility*

- (418) The Concentration results in a number of vertically linked markets
- (a) the wholesale supply of EV CS and the retail supply of private EV CS;
 - (b) the wholesale supply of EV CS and the retail supply of public EV CS (either on or off-motorways);
 - (c) the white-label services for public EV CS and the retail supply of public EV CS (either on or off-motorways);

⁴²⁴ Response to RFI 69.

- (d) the retail supply of public EV CS (either on or off motorways) and the market for subscription services for public EV CS.
- (419) The Commission notes that:
 - (a) the wholesale supply of EV CS and the retail supply of private EV CS: the Parties' combined share in both the upstream and the downstream market is below 30% and therefore these markets are not affected.⁴²⁵
 - (b) The retail supply of public EV CS (either on- or off-motorways) and the wholesale supply of EV CS/the white-label services for public EV CS/the market for subscription services for public EV CS: the Parties' combined share in any of the markets vertically linked the retail supply of public EV CS is below 30%. On the retail supply of public EV CS on-motorways, the Commitments remove any relevant overlap between the Parties. On the retail supply of public EV CS off-motorways, the Commission considers (see above) that there is no local area where the Concentration would materially strengthen the Parties' position and thus their ability or incentives to pursue a vertical foreclosure strategy. Therefore, for any possible vertical link with the retail supply of public EV CS, either the markets would not be affected after the implementation of the Commitments, or, to the extent that the Parties' share in the retail supply of public EV CS off-motorways in some local areas is currently above 30%, the Concentration does not increase the risk of vertical foreclosure.
- (420) The Commission therefore concludes that the Concentration would not significantly impede effective competition as a result of non-coordinated effects arising from vertical links regarding the markets related to e-mobility services in Germany.

7.4. Competitive assessment - other theories of harm

- (421) Some stakeholders raised concerns about the effects of the merger on other energy-related markets, such as e-mobility, (smart) metering and data-driven solutions. The concerns are various in nature and, while they are often interlinked and the delineation between them is not clear-cut, they can be categorised into four different issues/theories of harm: (i) data issues, (ii) bundling issues, (iii) cross-selling and (iv) financial market power.

a. Data issues

- (422) Third parties argue that the merged entity will have a unique set of customer data as a result of its large customer base and its role as (smart) meter provider (due to its DSO activities and as such its role as the default metering providers). A smart meter provider collects all consumer consumption data. As there are large scale effects in processing data to develop new products (like for example personalised pricing, prosumer services, etc.), the Parties could have an unmatched advantage (also due to reinforcing/network effects).
- (423) However, with regard to the larger customer base, the merger will in principle not lead to a dataset for the merged entity that contains types of data different (more various) than the types already available to each of the Parties pre-merger. As a result

⁴²⁵ In the course of the investigation, a complaint was raised that post-merger E.ON would benefit from Innogy's technology in the wholesale supply of EV Charging Stations, which the Commission considers as unsubstantiated due to the limited market shares of Innogy in this market and its number of competitors, and the low combined market share ([0-5]%) of the Parties in the retail supply of private EV CS – Form CO, para. 2042.

of the merger the Parties will have the same type (the variety of) of data as they have pre-merger but for more customers. While scale certainly matters in data processing, additional data beyond a critical mass may not necessarily bring additional value and the return to scale is likely to be decreasing. The Parties already pre-merger each have a customer base and related data pool that is larger than most competitors' and no one has disputed that the Parties already today have the sufficient scale to exploit the benefits of data processing.

- (424) The Commission notes that there is still large uncertainty as to the minimum amount (and the type) of data that is required to develop new energy-solutions. For example: one competitor notes that *“Derzeit keine Angabe möglich, da Geschäftsfeld noch in Entwicklung.”* Similarly, other suppliers say *“Currently no answer possible”*, *“Eine konkrete Mindestanzahl zu nennen ist sehr schwierig und hängt stets von der Fragestellung an.”*, *“Eine pauschalisierte Aussage ist kaum möglich.”*, *“This depends strongly on the individual application.”*⁴²⁶
- (425) Even among those who provided estimates of the minimum amount, does not appear to be any consensus. Some indicate several millions of data points, others however suggest much smaller numbers. For example, a competitor indicates that: *“Smart Home: 5.000 customers seen as critical mass to develop data-based services since particular target groups are rather heterogenous; however, ~200.000 customers needed for a profitable business case”*. The Commission also notes that, when asked whether in the past they considered developing energy-related data-based products but could not because they were lacking a sufficiently large customer database to pursue the project, the vast majority of the respondents to the market investigation said no.⁴²⁷
- (426) With regard to the risk of foreclosure, the investigation found that several competitors, including smaller Stadtwerke, already offer or are developing all kinds of data driven solutions (like smart-home applications or control devices, energy management systems, energy efficiency services etc.), either alone or in co-operations with other players.⁴²⁸ In addition, large multinational companies are also already offering, also in co-operation with small energy retailers, or looking into smart-home and data related services/products (competitors incl. Google, Amazon, Samsung, Bosch, Phillips, telecom companies, etc.)⁴²⁹ and internal documents confirm that these companies are considered as entrants into the "Energy+" markets by the Parties.⁴³⁰
- (427) Finally, the Commission notes that meter data collection/usage is regulated. In addition, the new Electricity Directive foresees that vertically integrated companies should not have privileged access to data for the conduct of supply activities and foresees rules on easy and non-discriminatory data access (however, data access to competitors will largely depend on customer interest and consent; as the GDPR is applicable). This should reduce the risk of abusive/discriminatory conducts by vertically integrated companies. It is also worth noting that data collection/usage "behind the meter" (e.g. directly from home appliances) is unregulated and therefore

⁴²⁶ Replies to Questionnaire Q1 – Competitors (Germany), question 123.

⁴²⁷ Replies to Questionnaire Q1 – Competitors (Germany), question Q124.

⁴²⁸ Replies to Questionnaire Q1 – Competitors (Germany), question 123.

⁴²⁹ See i.a. Parties' Internal Documents, (ID4268-58274), (ID1341-3029) and (ID4268-4530).

⁴³⁰ See i.a. Parties' Internal Documents, (ID4268-58274), (ID1341-3029) and (ID4268-4530)

in theory non-energy players might have access to data more easily than energy suppliers.⁴³¹

b. Other complaints

- (428) In addition to and often linked to the data issues described above, complaints also include the following.
- (429) Bundling issues, i.e. in the future suppliers must be able to offer a platform of energy related products (retail supply, smart-home solutions, e-mobility services, metering) and the Parties will have a strong position in all these areas and will be able to offer a unique combination of services);
- (430) Cross-selling issues, i.e. the Parties will enjoy enormous cross-selling opportunities thanks to the broad spectrum of their activities and having a first mover advantage thanks to cross-selling will have negative long term consequences;
- (431) Financial power issues, i.e. the new markets described above may require large investment in innovation/R&D and no one else would be able to match the Parties' financial resources/spend capabilities.
- (432) However, despite acknowledging that the energy market is profoundly changing, even among market participants there is no consensus about how the market will ultimately evolve. Moreover, many players, incl. relatively small ones, are already today offering or developing bundled offers alone or in co-operation, a number of multinational players are looking into energy bundles/platforms and they are likely to have comparable cross-selling abilities and financial resources as the Parties. The picture below⁴³² from an E.ON's internal document shows that several different players are active in the various energy-related products/services. The picture also shows that E.ON and Innogy are active essentially in the same areas and therefore the Concentration does not materially enlarge the width of their portfolio.

Figure 11 – Activity overview in Germany

[...]

- (433) Recent market entries have taken place (e.g. Shell and BP have moved into energy retail and e-mobility)⁴³³ and the Parties' internal documents suggest that further entries are to be expected.
- (434) In view of the above, the Commission considers that at this stage of the industry development there is no indication that the Parties have or will have a significant competitive advantage in offering bundles of energy-related services. Many companies are investing in and developing portfolios of products. The concept of bundling several products is common across the industry. The following table, from a E.ON's internal presentation, shows how car manufacturers are progressively expanding their portfolio of e-mobility to include a larger set of services (public charging, wallbox, smart home, supply of electricity, etc.).⁴³⁴

⁴³¹ For example, according to the Parties' internal document [...] (ID4268-28711).

⁴³² Parties' Internal Document, ID4268-33528.

⁴³³ Internal Documents of Parties, ID4268-11118.

⁴³⁴ Internal Documents of Parties, ID4268-197.

Figure 12 – B2C emobility products and services

[...]

- (435) Some of these companies are large corporations already active in B2C markets and therefore already have a large customer base to whom they could cross-sell any new product that they could develop. These companies are also similarly (and possibly more) financially strong than the merged entity and there is no indication that they would not be able to sustain the competition for innovation in this area.

7.4.1. Conclusion on data and other issues

- (436) In conclusion, the Commission has investigated all the additional concerns described above and found insufficient evidence to support a finding of significant impediment to effective competition as a result of the Concentration in these areas.

7.5. Conclusion on Germany

- (437) For the reasons set out above, the Commission considers that as a result of horizontal non-coordinated effects arising from the overlap in the activities of the Parties, the Concentration would significantly impede effective competition in the markets for the retail supply of heating electricity to households and SMEs and the market for the installation and operation of public EV CS on motorways in Germany.

8. CZECHIA

- (438) In Czechia, both E.ON and Innogy are active in generation and wholesale supply of electricity,⁴³⁵ in the downstream wholesale supply of gas,⁴³⁶ in the distribution of gas,⁴³⁷ in the retail supply of electricity and gas, in metering (electricity and gas),⁴³⁸ in heat generation,⁴³⁹ in the operation of compressed natural gas (“CNG”) filling stations,⁴⁴⁰ in the maintenance and repair of technology equipment in the energy

⁴³⁵ The Parties’ combined market share is around [0-5]% on in the market for generation and wholesale supply of electricity (less than [0-5]% in generation), Form CO, paras. 2919, 2922.

⁴³⁶ The Parties’ combined market share in the downstream wholesale supply of gas is [0-5]% (Form CO, para. 3072). Neither E.ON nor Innogy is active in gas production or the upstream wholesale supply of gas.

⁴³⁷ Innogy (/RWE) is active in gas distribution through a controlling stake of 50,04% in Innogy Grid Holding (iGH), 100% owner of GasNet s.r.o. which is one of the gas DSOs in Czechia. iGH is a joint venture between Innogy and Macquarie (Form CO, paras. 3055, 3088). Following the agreement to transfer Innogy’s stake to RWE and subsequent transfer to E.ON, Macquarie exercised its right of first offer and therefore E.ON is not foreseen to become a shareholder of iGH, see also case M.9377 MIRA/BCI/iGH (responses to RFIs 34 and 51).

⁴³⁸ The Parties’ activities in this market are related to their DSO position as a core and mandatory activity of each DSO in its territory. The Commission does not consider that the Parties’ activities overlap in metering (electricity and gas) in Czechia for the following reasons: i) the Parties’ activities in metering are therefore limited to their DSO territories (E.ON being active in metering for electricity and gas, and Innogy in metering for gas only); ii) by law, customers have no choice of choosing the supplier of their meter device nor supplier of metering services; iii) pricing for all metering activities is regulated, and included in the regulated price for DSO services. Evidence collected in the market investigation support the view that metering for electricity and gas is not an affected market.

⁴³⁹ The Parties’ activities in this market are complementary since there is no overlap in the operation of their respective district heating networks. In any case, the Parties’ combined market share in terms of heat generation at national level is [0-5]%. The Commission will therefore not consider further this plausible market.

⁴⁴⁰ The Parties are active in the retail sales of CNG (compressed natural gas) as a motor fuel to customers, which can be either combined with service stations for other motor fuels or operated on a standalone basis. Motor fuels are generally considered substitutable from a supply-side perspective. In Czechia, the Parties supply CNG alongside other types of fuels. The vast majority (80-90%) of the CNG vehicles

sector,⁴⁴¹ in e-mobility services,⁴⁴² in PV systems,⁴⁴³ in home insurance services,⁴⁴⁴ in energy consulting,⁴⁴⁵ in energy auditing,⁴⁴⁶ in street lighting,⁴⁴⁷ in other lighting services,⁴⁴⁸ in heating/refrigeration systems and facilities,⁴⁴⁹ and in home assistance services.⁴⁵⁰

have both CNG and gasoline tanks similar to LPG/gasoline vehicles. In a past decision, the Commission has considered the sale of motor fuels as a single relevant product market although diesel, gasoline and LPG are not directly substitutable among them and the Commission has also left open whether the geographic scope of the market is national or narrower in scope. On such market the Concentration does not raise any competition concerns even under the narrowest plausible market definition. In any event, the Parties' overlapping CNG activities in Czechia will be divested. The Commission will therefore not consider further this plausible market.

441 The Parties' activities in this market are mainly related to their respective DSO areas and therefore complementary since E.ON focuses on electricity and Innogy on gas-related maintenance and repair services. The Parties' combined market share is [0-5]% on the narrowest plausible market definition. The Commission will therefore not consider further this plausible market. There is a vertical link with the operation of electricity and gas distribution networks, but given the negligible combined market share there is no significant impact on this vertical link. Moreover, following the remedy the market share will be the same as pre-merger.

442 The Parties' activities overlap in the retail supply of private EV Charging Stations and in the installation and operation of public EV Charging Stations. The Commission has not previously analysed these markets in Czechia. However, in line with the assessment undertaken for the same product markets in Germany, and in view of the evidence collected during the market investigation, the Commission considers that i) retail supply of private EV Charging Stations can be plausibly considered as a separate market also in Czechia with (at least) a national geographic scope, and that ii). the markets for installation of public EV Charging Stations can be plausibly distinguished also in Czechia between the installation and operation of public EV Charging Stations on- versus off-motorways, with a national or a sub-national geographic scope. As no affected markets arise under any of these plausible market definition in Czechia for all above-mentioned markets, the exact definition is left open. In particular, no concerns arise for the installation and operation of on-motorways EV Charging Stations in Czechia, as there are no pairs of EV fast Charging Stations or pairs of EV ultra-fast Charging Stations, located within a 50 km driving distance on motorways, each station of the pair being owned by a different Party (see RFI 66, answer to question 19).

443 The Parties' activities in this market are mainly related to distribution of photovoltaics and system integration services. The Parties' combined market share is below 20% on the narrowest plausible market definition. The Commission will therefore not consider further this plausible market.

444 The Parties' activities in this market are mainly related to the provision of home insurance services, as intermediaries, to their respective household customers, with the actual insurance product being offered by the respective insurance partner of each Party. The Parties' combined market share is [0-1]% on the narrowest plausible market definition. The Commission will therefore not consider further this plausible market.

445 The Parties' activities in this market are mainly related to the provision of energy consulting services to both existing and new customers aimed at increasing and optimising energy efficiency, in particular in relation to business and industrial customers. The Parties' combined market share is below 20% on the narrowest plausible market definition. The Commission will therefore not consider further this plausible market.

446 The Parties' activities in this market are mainly related to the provision of energy auditing services used for technical evaluation of the effectiveness of energy utilisation, in particular in relation to business customers. The Parties' combined market share is [0-5]% on the narrowest plausible market definition. The Commission will therefore not consider further this plausible market.

447 The Parties' activities in this market are mainly related to the construction, installation, operation and maintenance, and renewal and modernisation of streetlights and complementary since they are provided to municipalities located in their respective DSO areas. The Parties' combined market share is below 20% on the narrowest plausible market definition. The Commission will therefore not consider further this plausible market.

448 The Parties' activities in this market are mainly related to the development, construction and maintenance of lighting to business customers, including the provision of LED lighting solutions to such entities. The Parties' combined market share is below 20% on the narrowest plausible market definition. The Commission will therefore not consider further this plausible market.

8.1. Market Definition

(439) On the legal framework and general principles of market definition, see recital (34).

8.1.1. Introduction

(440) In Czechia, the electricity market was liberalised over a period of four years, from 2002 to 2006. Since January 2006, all customers, including households, can select their electricity supplier. There are approximately 78 companies active in electricity retail supply in Czechia.⁴⁵¹

(441) The development of the gas market has been similar to the electricity market, except that the liberalisation of the retail gas market in Czechia began in 2005 and was completed in 2007. There are approximately 70 companies active in gas retail supply in Czechia.⁴⁵²

(442) There is no longer any formal regulation of retail energy prices. The energy regulator ERO continuously monitors the energy sector and implemented measures to promote consumer welfare and effective competition in the gas and electricity markets.⁴⁵³

(443) Prior to liberalisation of the energy markets in Czechia, electricity and gas were industries with regionally defined, vertically integrated monopolist energy suppliers, also operating the relevant distribution network.

(444) The ultimate successors of these former regional monopolies took over the complete customer portfolios of the former monopolists. As a result, each of these companies had a close to 100% market share at the time of liberalisation in its respective region (DSO area).

(445) The electricity and gas distribution network in Czechia is currently operated by 3 electricity DSOs and 3 gas DSOs. The electricity DSOs are CEZ, E.ON and PRE. Each DSO area is shown on the map (Figure 13) below:

⁴⁴⁹ The Parties' activities in this market are mainly related to the provision of heating and cooling services to business and household customers as well as services including planning, installation, maintenance and warranties. The Parties' combined market share is below 20% on the narrowest plausible market definition. The Commission will therefore not consider further this plausible market.

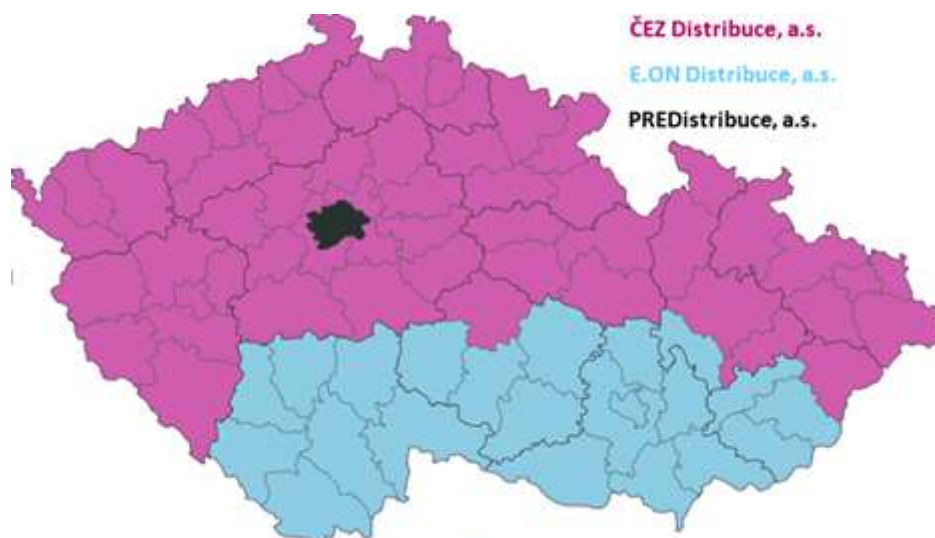
⁴⁵⁰ The Parties' activities in this market are mainly related to the provision of home assistance services for household customers, consisting in particular of the provision of maintenance and repair services for gas equipment such as gas-fired appliances. The Parties' combined market share is below 20% on the narrowest plausible market definition. The Commission will therefore not consider further this plausible market.

⁴⁵¹ Form CO, paras. 2891 and 2895.

⁴⁵² Form CO, paras. 3053 and 3056.

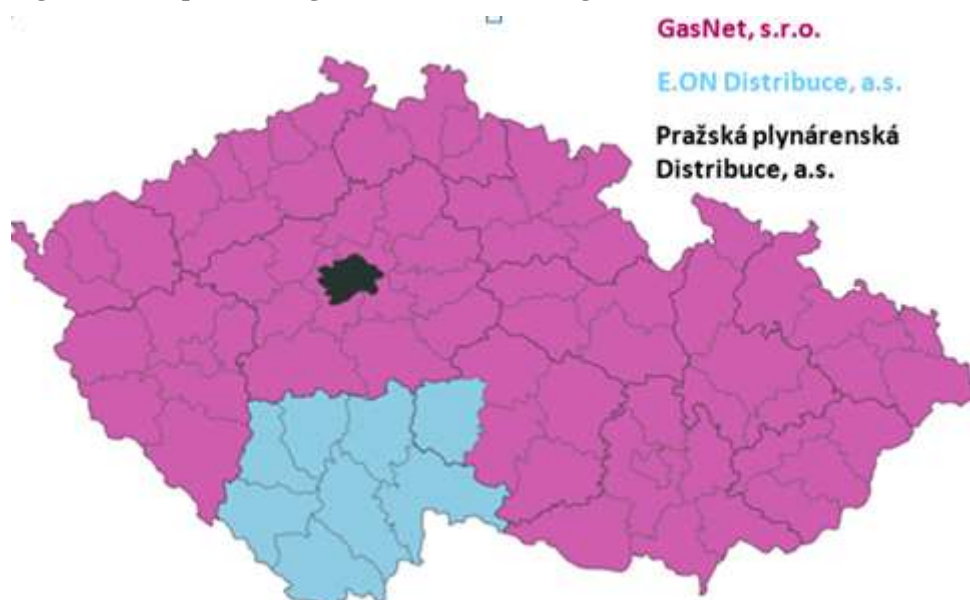
⁴⁵³ Form CO, paras. 2941.

Figure 13 - Map of Czech electricity DSOs (Form CO, Figure 4)



(446) The gas DSOs are Innogy (through GasNet, s.r.o), E.ON and Prazska Plynarenska ("PP"). Each DSO area is shown on the map (Figure 14) below:

Figure 14 - Map of Czech gas DSOs (Form CO, Figure 4)



(447) The customer portfolios were regionally concentrated in each DSO area, such that the incumbents did not compete against each other, but rather exercised a monopoly position in their respective regions. This situation progressively changed because of liberalisation of the market, but incumbents are still strong in their historical incumbency area.

(448) In the incumbency area, the incumbents traditionally have an extensive physical sales network. In Czechia such physical shops are still an important sales channel. Price comparison websites do exist in Czechia, but serve mostly for website operators/suppliers to gather contact details of potential new customers.

- (449) Dual offers of gas and electricity⁴⁵⁴ have historically contributed to the competitiveness of the market, as suppliers who were traditionally strong in electricity entered the market for gas supply and vice versa, thereby creating a strong competitive constraint on the incumbents.⁴⁵⁵
- (450) Thus, in the region where the E.ON's electricity DSO area overlaps with Innogy's (GasNet) DSO area, the Parties are strong in respectively retail electricity supply and retail gas supply. The effect of dual offer will be explained in the competitive assessment.⁴⁵⁶

8.1.2. *Generation and wholesale supply of electricity*

8.1.2.1. Product and geographic market definition

- (451) In previous decisions, the Commission has considered the product market as encompassing electricity generated in power stations, as well as electricity physically imported via interconnectors in the relevant geographic area and electricity bought and sold through bilateral agreements, regulated marketplaces and power exchanges.⁴⁵⁷
- (452) The Commission considered the market for generation and wholesale supply of electricity in Czechia as national in scope.⁴⁵⁸
- (453) The Notifying Party agrees with the Commission's decision practice as regards the product market definition, but considers that the geographic scope of the market may be broader than national due to advances in market coupling. However, in the Notifying Party's view the geographic market delineation can (also) be left open as no competition concerns arise under any market definition.
- (454) The evidence in the Commission's file has not provided any indication that would suggest that departing from the Commission's decisional practice would be appropriate.
- (455) As the outcome of the competitive assessment of the Concentration remains the same under all alternative market definitions, it is not necessary for the Commission to conclude on the exact product market definition. For the purposes of this Decision, the market will be regarded as national in scope.

8.1.3. *Distribution of electricity*

- (456) The transmission of electricity in Czechia involves two main types of networks: a transmission network, operated by a TSO, for high voltage (110, 220 and 400 kV) levels and regional distribution networks, operated by DSOs, for lower voltage

⁴⁵⁴ By "dual offers", the Notifying Party refers to offers for the supply of both electricity and gas by the same supplier. While these offers are common in the market, the sales of the two commodities generally remain independent of each other.

⁴⁵⁵ Form CO, para. 2938.

⁴⁵⁶ The Notifying Party submits that successful entry into the electricity or gas market is not dependent on or enhanced by the ability of the suppliers to offer dual services and some entrants remain single product suppliers (Form CO, para. 2938).

⁴⁵⁷ COMP/M.7927 – EPH/ENEL/SE, para. 9; COMP/M.5793 – Dalkia CZ/NWR Energy, para. 54; COMP/M.4238 – E.ON/Pražská Plynárenská, para. 18.

⁴⁵⁸ COMP/M.7927 – EPH/ENEL/SE, para. 34; COMP/M.5793 – Dalkia CZ/NWR Energy, para. 56; E.ON/Pražská Plynárenská, para. 19.

levels.⁴⁵⁹ In Czechia, distribution is further carried out on a much smaller scale over local distribution systems (“LDSs”).

- (457) Neither E.ON nor Innogy is active as a TSO and only E.ON is active as an electricity DSO.⁴⁶⁰ Both E.ON and Innogy have minor activities in operating LDSs,⁴⁶¹ both E.ON and Innogy only operate 1 LDS.

8.1.3.1. Product and geographic market definition

- (458) In previous decisions, the Commission has identified two separate markets for the transportation of electricity: transmission and distribution.⁴⁶²
- (459) In relation to distribution networks, the Commission has found the operation and management of lower voltage distribution networks to be a relevant product market. The Commission has in previous decisions found the geographic market for electricity distribution to be in line with the distribution network regions, such that each grid constitutes a distinct relevant geographic market.⁴⁶³
- (460) LDSs are locally isolated distribution networks for electricity or gas (servicing e.g. industrial parks or larger business areas), which are connected to one of the regional distribution networks via a single connection point and in which the respective licensee is the owner or operator of the relevant distribution infrastructure.⁴⁶⁴
- (461) The regulatory requirements for LDSs to enter the market, the access requirements and the application of price regulations are substantially the same as for DSO networks.⁴⁶⁵
- (462) The Czech NCA⁴⁶⁶ previously held that a LDS is created by defining a specific area, when the owner or user of this specific area decides to enter into a contract with the selected distribution company, so-called “contract concerning the definition of a distribution area”. Thereafter, the distributor invests in the set up of a new distribution network, or he purchases or rents an existing distribution network from the owner. This distributor is then responsible within the given area for the distribution of electricity and the connection of new customers to the same extent as regional distribution companies in view of their distribution systems.⁴⁶⁷
- (463) The Parties do not question the Commission’s or NCA’s case practice which according to the Parties states that each LDS, just as each regional distribution network, is a relevant market in its own right (and a natural monopoly).⁴⁶⁸
- (464) The evidence in the Commission’s file has not provided any indication that would suggest that departing from the Commission’s decisional practice would be appropriate.

⁴⁵⁹ Form CO, para. 2895, 2924 and 2930.

⁴⁶⁰ State-owned CEPS is the sole electricity TSO in Czechia (Form CO, para. 2895, 2928). In Czechia 3 DSOs operate the electricity distribution network.

⁴⁶¹ LDS are operated by over 200 operators (Form CO, para. 2895).

⁴⁶² COMP/M.5793 - *Dalkia CZ/NWR Energy*, para. 34; COMP/M.5365 – *IPO/EnBW/Praha/PT*, para. 30.

⁴⁶³ COMP/M.5793 - *Dalkia CZ/NWR Energy*, para. 35.

⁴⁶⁴ Form CO, para. 2925.

⁴⁶⁵ Form CO, para. 3872.

⁴⁶⁶ The Office for the Protection of Competition in Czechia.

⁴⁶⁷ Czech NCA decision of 28 December 2010, ÚOHS-S476/2010 *E.ON Trend/Lumen International/Potyla/Lumen Distribuční Soustavy*, para. 20 *et seq.*

⁴⁶⁸ Form CO, para. 2933.

(465) Furthermore, regarding LDSs and the Czech NCA's decision practice, the Commission notes that on the one hand the regulatory framework for the operation of the DSO network and the LDS is similar and both networks serve to supply end customers. On the other hand, LDSs are connected to one of the regional distribution networks via a single connection point which may point to a market downstream from the operation of a DSO network. For the purposes of this Decision, in Czechia distribution networks for lower voltage levels operated by DSOs will be regarded as a separate product market and the market will be regarded sub-national in scope and in line with the distribution network regions, such that the region for each network constitutes a distinct relevant geographic market. In the absence of competition concerns on any plausible market, the Commission leaves open whether LDS are part of the DSO distribution market or a distinct market in itself. The geographic scope is limited to the network covered by the LDSs.

8.1.4. *Retail supply of electricity*

8.1.4.1. Product market definition

The Commission's decisional practice

(466) The market for the retail supply of electricity involves the sale of electricity to the final customer.⁴⁶⁹ In previous decisions, the Commission left open, whether the Czech market for the retail supply of electricity could be sub-divided into: (i) the supply of electricity to large industrial customers connected directly to the high-voltage and medium-voltage network; and (ii) the supply of electricity to smaller industrial, commercial and domestic customers connected to the low-voltage network. In the most recent decision relating to the Czechia⁴⁷⁰, the Commission clarified the relevant threshold for low-voltage networks to be 1kV.

The Notifying Party's view

- (467) The Notifying Party agrees with the Commission's decisional practice⁴⁷¹ to distinguish between the retail supply of electricity to (i) small commercial and household customers connected to the low-voltage network (< 1kV) ("low voltage customers"), and to (ii) large commercial customers connected to high-voltage and medium-voltage networks (> 1kV) ("high voltage customers").⁴⁷²
- (468) The Notifying Party submits that an analysis of the Parties' pricing and margin data for these customer groups supports this distinction [further information about pricing and margin data].⁴⁷³
- (469) The Notifying Party also provided some evidence supporting a potential segmentation of low-voltage customers into "households" and "small commercial customers" connected to the low-voltage network ("small commercial customers"),

⁴⁶⁹ COMP/M.3440 – *EDP/ENI/GDP*, para. 56; COMP/M.5793 – *Dalkia CZ/NWR Energy*, paras. 37 et seq.

⁴⁷⁰ COMP/M.5793 – *Dalkia CZ/NWR Energy*, para. 37.

⁴⁷¹ The Notifying Party also refers to the Commission Implementing Decision (EU) 2018/1134 of 5 July 2018, paras. 28-29 where for the purposes of Article 34 of Directive 2014/15/EU the relevant product market was assessed based on a split based on the meter type. The Notifying Party submits that a split based on metering type would not yield substantially different results compared to the low-voltage, high-voltage distinction. In any event, this Decision is without prejudice to the application of the rules on competition and other fields of Union law, as reflected in paras. 18 and 29 thereof.

⁴⁷² Form CO, para. 2959.

⁴⁷³ Form CO, paras. 2963-2970.

but considered that as the Concentration will not raise competition concerns on either plausible market definition.⁴⁷⁴

The Commission's assessment

- (470) For the purposes of this Decision and in line with its previous decisional practice, the Commission considers the retail supply of electricity to households and SMEs connected to the low-voltage network (<1kV) as a separate market from the retail supply of electricity to large industrial customers connected directly to the high-voltage or medium-voltage network (>1kV).
- (471) Respondents to the market investigation also referred to alternative thresholds to segment the retail electricity market, but included the high voltage versus low voltage as an appropriate threshold⁴⁷⁵ The Commission sees therefore no reason to change its case practice in this respect.
- (472) Regarding the potential segmentation of the market for retail supply of electricity to low-voltage customers between households and SMEs, the Commission considers that, for the purpose of this Decision, such segmentation is not appropriate.
- (473) The vast majority of suppliers services both categories of customers, with offers based on public volume based price-lists.⁴⁷⁶ Also, suppliers consider the differences between serving the two types of customers as not significant, with the same competitive conditions applying on both cases.⁴⁷⁷
- (474) Given the similarities set out above the Commission considers that, for the purpose of this Decision, a segmentation between households and SMEs customers is not appropriate.

8.1.4.2. Geographic market definition

The Commission's decisional practice

- (475) In previous decisions, the Commission has generally left the geographic market definition open (national, narrower than national or at least national).⁴⁷⁸ In the Decision COMP/M.4238 – *E.ON/Pražská Plynárenská* of 11 July 2006 a national geographic scope was considered for Czechia.

The Notifying Party's view

- (476) The Notifying Party considers that the scope of the Czech market for the retail supply of electricity is (at least) national.⁴⁷⁹
- (477) The Notifying Party also submits that the competitive dynamic across the three DSO areas is similar and several suppliers offer the same energy prices across the three DSO regions.⁴⁸⁰

The Commission's assessment

- (478) As explained further below, the Commission takes the view that, for the purpose of this Decision, the market for the retail supply of electricity to high voltage customers

⁴⁷⁴ Form CO, para. 2980.

⁴⁷⁵ Replies to question 8 of questionnaire Q7 – Competitors (Czechia).

⁴⁷⁶ Minutes of conference call with a competitor, 14.12.2018 (ID3007), Minutes of conference call with a competitor, 18 December 2019 (ID2672), Minutes of conference call with a competitor, 10 April 2019 (ID5000).

⁴⁷⁷ Replies to question 7 of questionnaire Q7 – Competitors (Czechia).

⁴⁷⁸ COMP/M.4238 – *E.ON/Pražská Plynárenská*, para. 19.

⁴⁷⁹ Form CO, para. 2987.

⁴⁸⁰ Form CO, para. 2989.

as well as the retail supply of electricity to low voltage customers is national, although for the retail supply to low voltage customers there are local elements of competition.

- (479) With regard to the retail supply of electricity to low voltage customers, first all competitors responding to the market investigation indicate that they are generally active across Czechia.⁴⁸¹ Second, the vast majority of these respondents indicate they have the same prices across Czechia or only occasionally differ prices between different regions in Czechias.
- (480) However, some competitors⁴⁸² stress the importance of physical shops for acquiring new customers in Czechia. Such physical infrastructure is not equally spread across Czechia for all competitors (see competitive assessment, para 502).
- (481) In addition, the online sales channel often serves as an initial contact for interested customer details, but still is followed up through a physical process (door-to-door/shops).⁴⁸³
- (482) With regard to the retail supply of electricity to high voltage customers, first customers responding to the market investigation indicate that they source nationally⁴⁸⁴ and second suppliers are generally active nationwide.⁴⁸⁵
- (483) Therefore, the Commission concludes that for the purposes of this Decision, the geographic market for the retail supply of electricity to high-voltage customers as well as the retail supply of electricity to low voltage customers is national, although for the retail supply to low-voltage customers there are local elements of competition.

8.1.5. *Downstream wholesale supply of gas*

- (484) Entities trading on the wholesale gas market can buy gas under long-term contracts (which are typical for upstream wholesale relationships), at commodity exchanges, or from other traders.⁴⁸⁶
- (485) OTE, wholly-owned by the Czech State and the holder of the exclusive licence for the operation of a gas trading platform in the Czechia, has been organising a gas spot market since 2010, on which both day-ahead and intra-day trading is offered to market participants. For the purposes of the spot market, the entire territory of the Czechia is one balancing zone at which all gas transactions are registered (and hence there is only one “virtual trading point” in Czechia).⁴⁸⁷

8.1.5.1. Product and geographic market definition

- (486) In previous decisions, the Commission has identified separate markets for upstream⁴⁸⁸ wholesale supply of gas and downstream wholesale supply of gas (sales

⁴⁸¹ Replies to question 9 of questionnaire Q7 – Competitors (Czechia).

⁴⁸² Minutes of call with a competitor on 16 April 2019 (ID5147), Minutes of a call with a competitor on 10 April 2019 (ID5000), and another competitor on 29 March 2019 (ID4221).

⁴⁸³ Minutes of a call with a competitor of 14 December 2018 (ID3007), Form CO, 6D Annex 5.

⁴⁸⁴ Replies to question 14 of questionnaire Q8 – Large customers (Czechia).

⁴⁸⁵ Replies to question 9 of questionnaire Q7 – Competitors (Czechia).

⁴⁸⁶ Form CO, para. 3066.

⁴⁸⁷ Form CO, paras. 3059 and 3067.

⁴⁸⁸ Neither E.ON nor Innogy has activities in the upstream wholesale supply of gas. Only Innogy is active in gas storage, but those activities will be transferred back to RWE.

to suppliers with the purpose to further resell gas to other wholesalers or downstream suppliers).⁴⁸⁹

- (487) The Commission has considered the wholesale gas supply markets in Czechia to be national.⁴⁹⁰
- (488) The Notifying Party does not question the Commission's decision practice.
- (489) The evidence in the Commission's file has not provided any indication that would suggest that departing from the Commission's decisional practice would be appropriate.
- (490) Therefore, for the purposes of this Decision, the downstream wholesale supply of gas market in Czechia will be regarded as national in scope.

8.1.6. *Distribution of gas*

- (491) The transportation of gas in the Czech involves two types of networks: transmission network (operated by the gas TSO⁴⁹¹) for high pressure and distribution networks (operated by DSOs) for lower pressure. In Czechia, distribution is further carried out on a much smaller scale over gas LDSs.
- (492) Neither E.ON nor Innogy is active as a gas TSO.⁴⁹² Both E.ON and Innogy are a gas DSO in Czechia and both have minor activities⁴⁹³ in operating LDSs.⁴⁹⁴ Given the limited overlap as both E.ON and Innogy only operate 1 LDS, the competition impact will not be further discussed.

8.1.6.1. Product and geographic market definition

- (493) In previous decisions, the Commission has identified two separate markets for the transportation of gas: transmission and distribution.⁴⁹⁵
- (494) In relation to distribution networks, the Commission has found the operation and management of lower pressure gas distribution networks to be a relevant product market and a natural monopoly.⁴⁹⁶ The Commission has in previous decisions found the geographic market for gas distribution to be in line with the distribution network regions, such that each grid constitutes a distinct relevant geographic market.⁴⁹⁷
- (495) The Notifying Party submits that electricity and gas LDSs operate in the same manner and are subject to the same regulatory requirements and thus the same conclusions would apply as for electricity LDSs.^{498 499}
- (496) The Notifying Party does not question the Commission's or NCA's case practice practice which according to the Parties states that each LDS, just as each regional

⁴⁸⁹ COMP/M.6984 – *EPH/Stredoslovenská energetika*, para. 21.

⁴⁹⁰ COMP/M.5365 – *IPO/ENBW/PRAHA/PT*, para. 21; COMP/M.3868 *DONG/Elsam/Energi E2* (2006) paras 147-168 and 193.

⁴⁹¹ The sole gas TSO in Czechia is NET4GAS (Form CO, para. 3059).

⁴⁹² Form CO, paras. 3075 and 3076.

⁴⁹³ Both E.ON and Innogy operate 1 gas LDS (Form CO, paras. 3084, 3089).

⁴⁹⁴ LDS are operated by approximately 30 operators (Form CO, para. 3079).

⁴⁹⁵ *E.ON/Pražská Plynarenska*, para. 13.

⁴⁹⁶ *E.ON/Pražská Plynarenska*, para. 13.

⁴⁹⁷ *E.ON/Pražská Plynarenska*, para. 15.

⁴⁹⁸ The Czech NCA decision of 28 December 2010, ÚOHS-S476/2010 *E.ON Trend/Lumen International/Potyla/Lumen Distribuční Soustavy* (para. 20 et seq.) related to electricity.

⁴⁹⁹ Form CO, para. 3096, footnote 2192.

distribution network, is a relevant market in its own right (and a natural monopoly).⁵⁰⁰

- (497) The evidence in the Commission's file has not provided any indication that would suggest that departing from the Commission's decisional practice would be appropriate.
- (498) Regarding gas LDSs, given the similarities between electricity and gas DSOs, the Commission considers such LDSs can be assessed in the same way. Thus, for the purposes of this Decision, in Czechia distribution gas networks (medium and low pressure) operated by DSOs will be regarded as a separate product market and the market will be regarded sub-national in scope and in line with the distribution network regions, such that the region for each network constitutes a distinct relevant geographic market. In the absence of competition concerns on any plausible market, the Commission leaves open whether LDSs are part of the DSO distribution market or a distinct market in itself. The geographic scope is limited to the network covered by the LDSs.

8.1.7. *Retail supply of gas*

8.1.7.1. Product market definition

The Commission's decisional practice

- (499) The Commission has, in its previous decisions, considered the retail supply of gas to final customers as a separate relevant product market, generally distinguishing between: the supply of gas to (i) gas-fired electricity plants, (ii) large industrial customers, (iii) small commercial customers and (iv) households.⁵⁰¹ As E.ON does not supply gas to gas-fired electricity plants, the Parties' activities do not overlap horizontally in this segment which is therefore not further discussed.⁵⁰²
- (500) Furthermore, with regard to Czechia, the Commission has in the past also considered a sub-segmentation of the retail gas market along the methodology used by the Energy Regulatory Office ("ERO").⁵⁰³ ERO distinguishes, based on annual consumption, (i) large commercial customers (more than 4200 MWh), (ii) medium commercial customers (between 630 and 4200 MWh), (iii) small commercial customers (below 630 MWh, excluding households) and (iv) household customers.⁵⁰⁴

The Notifying Party's view

- (501) In the view of the Notifying Party, the appropriate segmentation for the retail supply of gas in Czechia is between (i) small customers with annual consumption below 630 MWh ("small customers") and (ii) large customers with annual consumption above 630 MWh ("large customers").⁵⁰⁵

⁵⁰⁰ Form CO, para. 2925.

⁵⁰¹ COMP/M.4180 – *Gaz de France/Suez*, paras. 77-86; COMP/M.3696 – *E.ON/Mol*, paras. 107-124.

⁵⁰² Form CO, para. 3124. For completeness, the Parties are also not active in supplying gas to traders and regional suppliers (Form CO, para. 3123).

⁵⁰³ COMP/M.4238 – *E.ON/Pražská Plynárenská*, paras. 13-14; COMP/M.5365 – *IPO/EnBW/Praha/PT*, paras. 21-22.

⁵⁰⁴ The Notifying Party also refers to the Commission Implementing Decision (EU) 2018/1134 of 5 July 2018, paras. 28-29 where for the purposes of Article 34 of Directive 2014/15/EU the relevant product market was assessed based on a split between large and small retail gas customers. This Decision is without prejudice to the application of the rules on competition and other fields of Union law, as reflected in paras. 18 and 29 thereof.

⁵⁰⁵ Form CO, para. 3126.

- (502) The Notifying Party submits that the levels of consumption, prices and gross margins reflect such segmentation. In addition, small customers (households and small commercial customers) are targeted through the same sales channels.
- (503) [Details of internal pricing considerations]⁵⁰⁶, [details of internal pricing considerations].⁵⁰⁷

The Commission's assessment

- (504) For the purposes of this Decision the Commission considers it appropriate to distinguish the market for the retail supply of gas in Czechia between (i) small customers with annual consumption below 630 MWh (“small customers”) and (ii) large customers with annual consumption above 630 MWh (“large customers”).
- (505) The majority of the respondents to the market investigation indicated that they have different offerings for small and large customers. In addition, the respondents that indicated the threshold for distinguishing between small and large customers confirmed the 630 MWh level.⁵⁰⁸
- (506) Market participants generally confirmed the use of price lists based on consumption level for households and small commercial customers. Most interviewed market participants use the same price lists, or very similar price lists for both households and small commercial customers.⁵⁰⁹ Market participants also considered the competitive conditions for households and small commercial customers similar.⁵¹⁰
- (507) However, with regard to larger customers market participants point to the fact that these companies need a more tailored approach and they often source through tender procedures.⁵¹¹ The responses to the market investigation do not support a further segmentation of the large customer segment depending on the consumption level (e.g. below or above 4200 MWh per year, as none of the competitor to the market investigation distinguished large customers based on an a consumption level of 4200 MWh.⁵¹² Two competitors indicated that it applied the 630 MWh to distinguish large gas customers, and no alternative threshold was highlighted.⁵¹³
- (508) Therefore, for the purposes of this Decision, the market for the retail supply of gas in Czechia between (i) small customers with annual consumption below 630 MWh (“small customers”) and (ii) large customers with annual consumption above 630 MWh (“large customers”).

⁵⁰⁶ [Further information about pricing].

⁵⁰⁷ Form CO, paras. 3128 and 3131.

⁵⁰⁸ Non-confidential replies to question 45 of questionnaire Q7 – Competitors (Czechia).

⁵⁰⁹ Non-confidential replies to question 46 of questionnaire Q7 – Competitors (Czechia), and Non-Confidential version of the minutes with 2 competitors.

⁵¹⁰ Non-confidential replies to question 48 of questionnaire Q7 – Competitors (Czechia).

⁵¹¹ Minutes of a conference call with a competitor (ID4755), Minutes of a conference call with a competitor, (ID5186).

⁵¹² Non-confidential replies to the to question 45 of questionnaire Q7 – Competitors (Czechia).

⁵¹³ Non-confidential replies to the to question 45 of questionnaire Q7 – Competitors (Czechia).

8.1.7.2. Geographic market definition

The Commission's decisional practice

- (509) In its decisional practice the Commission has left open whether the geographic scope of the market for the retail supply of gas is national or narrower in scope in Czechia.⁵¹⁴
- (510) In COMP/M.4238 – *E.ON/Pražská Plynárenská* the retail supply of gas to households was defined as regional in scope, but the market for the retail supply of gas to households was not yet liberalised at the time of the Decision COMP/M.4238 – *E.ON/Pražská Plynárenská*.

The Notifying Party's view

- (511) The Notifying Party submits that the relevant geographic market should be defined at least as national⁵¹⁵ in scope for all retail supply of gas to final customers.⁵¹⁶
- (512) While for historic reasons the focus of incumbent players may still be felt in their traditional areas, all major players and new entrants are active throughout Czechia with no or little differentiation in their offerings.⁵¹⁷
- (513) The Notifying Party submits a national market for retail gas is also supported by the comparison of prices and gross margins across the DSO areas based on the data available to the Parties.⁵¹⁸ [...].⁵¹⁹

The Commission's assessment

- (514) With regard to Czechia, as further explained below, the Commission concludes that for the purposes of this Decision, the geographic market for the retail supply of gas to large customers as well as the retail supply of gas to small customers is national, although for the retail supply to small customers there are local elements of competition.
- (515) With regard to the retail supply of gas to small customers, the Commission notes that the competitive process is very similar to the retail supply of electricity. First, the respondents to the market investigation indicate that suppliers are generally active across Czechia.⁵²⁰ Second, the vast majority of the respondents indicate that they have the same prices across Czechia or only occasionally differ prices between regions in Czechia⁵²¹.
- (516) However, as for electricity, some competitors⁵²² stress the importance of physical shops for acquiring new customers in Czechia. Such physical infrastructure is not

⁵¹⁴ COMP/M.4238 – *E.ON/Pražská Plynárenská*, paras. 15-16; COMP/M.5365 – *IPO/EnBW/Praha/PT*, para. 21.

⁵¹⁵ The Notifying Party observes that the Czech NCA has repeatedly defined the market for the retail supply of gas as national in scope, referring to the Czech NCA decision of 18 June 2012, ÚOHS-S492/2011/KS *ČEZ/Energotrans*, para. 80; Czech NCA decision of 14 December 2016, ÚOHS-S0713/2016/KS *Bohemia Energy/X Energie*, para. 17; Czech NCA decision of 7 July 2016, ÚOHS-S0438/2016/KS *BOHEMIA ENERGY entity/RIGHT POWER*, para. 18 (Form CO, para. 3158).

⁵¹⁶ Form CO, para. 3159.

⁵¹⁷ Form CO, para. 3160.

⁵¹⁸ Form CO, para. 3161.

⁵¹⁹ Form CO, footnote 2222.

⁵²⁰ Non-confidential replies to the to question 49 of questionnaire Q7 – Competitors (Czechia).

⁵²¹ Replies to question 51 of questionnaire Q7 – Competitors (Czechia).

⁵²² Minutes of call with a competitor on 16 April 2019 (ID5147), Minutes of a call with a competitor on 10 April 2019 (ID5000), and another competitor on 29 March 2019 (ID4221).

equally spread across Czechia for all competitors. (see further competitive assessment).

- (517) In addition, the online sales channel often serves as an initial contact for interested customer details, but still is followed up through a physical process (door-to-door/shops).⁵²³ With regard to the retail supply of gas to large customers, customers responding to the market investigation indicate that they source nationally⁵²⁴ and suppliers are generally active nationwide.⁵²⁵
- (518) Therefore, the Commission concludes that for the purposes of this Decision, the geographic market for the retail supply of gas to large customers as well as the retail supply of gas to small customers is national, although for the retail supply to small customers there are local elements of competition in view of pricing strategies and the importance of physical shops as further detailed in the competitive assessment.

8.2. Competitive assessment

8.2.1. Horizontal non-coordinated effects

8.2.1.1. Generation and wholesale supply of electricity

- (519) The activities of the Parties only overlap horizontally to a limited extent with a combined market share of [0-5]% in Czechia.⁵²⁶ Therefore, the Commission will not consider further this market.

8.2.1.2. Electricity distribution activities

- (520) The activities of the Parties do not overlap horizontally as regards of operation of lower voltage electricity distribution networks operated by DSOs in Czechia or the operation of electricity LDSs in Czechia, irrespective of whether the operation of LDSs are in the same or separate product market as DSO networks. Therefore, the Commission will not consider further this market.

8.2.1.3. Retail supply of electricity

a. Retail supply of electricity to low-voltage customers

Market structure

- (521) The Parties are both active in the market for the retail supply of electricity to low voltage customers. The main suppliers is CEZ with a share of [30-40]%.

⁵²³ Minutes of a call with a competitor of 14 December 2018 (ID3007), Form CO, 6D Annex 5.

⁵²⁴ Replies to question 39 of questionnaire Q8 – Large customers (Czechia).

⁵²⁵ Replies to question 39 of questionnaire Q7 – Competitors (Czechia).

⁵²⁶ In terms of generation only, the combined market share of the parties is [0-5]% (Form CO, paras. 2919 and 2922).

Table 4 – Market shares for the retail supply of electricity to low-voltage customers at national level (by volume)⁵²⁷

%	2015	2016	2017	2018
E.ON	[20-30]	[20-30]	[20-30]	[20-30]
Innogy	[0-5]	[0-5]	[0-5]	[0-5]
Combined	[20-30]	[20-30]	[20-30]	[20-30]
ČEZ	[40-50]	[40-50]	[30-40]	[30-40]
Bohemia Energy⁵²⁸	[5-10]	[10-20]	[10-20]	[10-20]
PRE	[10-20]	[10-20]	[5-10]	[5-10]
Centropol	[5-10]	[5-10]	[5-10]	[5-10]
Other	[0-5]	[0-5]	[5-10]	[5-10]
Total	100	100	100	100

Source: Reply to RFI 44, Annex 1.

The Notifying Party's view

- (522) The Notifying Party submits that the Concentration would not raise competition concerns as (i) the Parties' combined market share is moderate on a national level and the increment brought about by the Concentration is limited, (ii) there are numerous alternative suppliers on the market, including two competitors having a larger market share than Innogy's share in the E.ON DSO area, (iii) the Parties are not each other's closest competitors as evidenced by the diversion ratio analysis and (iv) entry in the market remains easy.⁵²⁹ Also, in the Parties' view, looking at market shares on new acquisitions would give a better presentation of the market structure.

Commission Assessment

- (523) As further explained below, in the Commission's view the Concentration would significantly impede effective competition as a result of horizontal non-coordinated effects arising from the overlaps in the activities of the Parties in the markets for the retail supply of electricity to low voltage customers in Czechia, even though the combined market share at national level is [20-30]%.
(524) Evidence collected during the market investigation show that at national level, the Parties are close competitors for the following reasons.
(525) Both have an incumbency area, E.ON from its activity as an electricity and gas DSO, Innogy from its activity as a gas DSO, which offer them a significant legacy customers portfolio, effective brand recognition (notably through better credibility) and larger ability to approach their existing customer with dual-commodity or retention offers⁵³⁰. Moreover their incumbency areas overlap where Innogy is particularly well-placed to leverage its position in the gas supply market to small

⁵²⁷ The Parties' combined market shares based on PODs are higher, for 2018: [20-30]% (with increment [5-10]%).

⁵²⁸ As Bohemia Energy acquired Amper in 2018, the market share of Amper is included in Bohemia Energy's market share since 2015.

⁵²⁹ Form CO, paras. 3008-3031.

⁵³⁰ Q7–Competitors (Czechia) – replies to questions 22, 23 and 24; or minutes of a conference call with a competitor on 29 March 2019, para. 10 (ID4221).

customers and make electricity offers to E.ON's customer⁵³¹. Outside the Prague area, CEZ is the only other electricity supplier with an incumbency area.

- (526) In the area where the incumbency areas overlap, the share of supply is also significantly larger than the Parties' market share. The share of electricity supply to low voltage customers in the overlapping area is [60-70]% for E.ON and [5-10]% for Innogy⁵³².
- (527) Both have a widespread network of local shops, particularly dense in their incumbency area⁵³³. Market investigation shows that having a widespread and dense saloes shop network provide an advantage in order to attract low-voltage customers. Indeed, on sales data submitted by the Notifying Party, the breakdown of new contracts by retail channel shows that Innogy concluded around [40-50]% of new contracts in shops on a national basis⁵³⁴. As for E.ON, [...].⁵³⁵ The advantage of having large sales network has been confirmed by competitors during the market investigation: one competitor observes that *"this is one of the disadvantages of small players in the market which generally have difficulties to operate shops/customer offices"* and *"the transaction will give a big competitive advantage to the Parties in view of the customer/distribution offices. As confirmed by the Kantar research, customer offices are important in the retail gas and electricity markets"*.⁵³⁶ Another competitor stressed that *"both E.ON and Innogy have an important advantage from their historical network of local offices located across Czechia"*.⁵³⁷ On the difference between networks due to the DSO legacy and other sales network, one competitor considers that *"suppliers who are also DSO have a big advantage because of their customer's office in the area"* as customers may be approached with commercial offers when walking into an office for network-related matters.⁵³⁸ Another competitor also notes that having selling and distribution offices in the same place is an advantage and that quality of services is, along with prices, one of the two factors to attract customers, and that one of its component is the presence of customers offices.⁵³⁹
- (528) Both have the ability to efficiently cross-sell (when a supplier in one commodity offers to its own customers tariffs for the supply of the other commodity), better than suppliers which do not have an incumbency position and a well developed sales network in the area. For low-voltage electricity (and this argument will apply *mutatis mutandis* for small customers in the retail supply of gas) Innogy has the contact details and existing business relationships with many customers due to its activity in gas. This gives Innogy a competitive advantage vis-à-vis most other suppliers in challenging E.ON's incumbent position. As a competitor observed *"Cross-selling is an important as revealed by the current situation of the big players on the market. The big players were historically present in one commodity but are now strong in*

⁵³¹ Response to RFI 51, Tables 5 and 6.

⁵³² Response to RFI 51

⁵³³ E.ON has 31 shops nationally, 21 of which are in its electricity DSO area. Innogy has 41 shops nationally, 38 of which are in its DSO area. Only CEZ has more shops than the Parties, with [...] shops nationally, [...] of them in its DSO area, next competitors being Centropol with [...] shops only. See response to RFI 56, Annex 1.

⁵³⁴ Response to RFI 51, Annex 1, Table 3.

⁵³⁵ Response to RFI 51, Annex 1, Table 1.

⁵³⁶ Minutes of a conference call with a competitor on 29 March 2019, para.27 (ID4221).

⁵³⁷ Minutes of a conference call with competitor, 16 April 2019, para.12 (ID5147).

⁵³⁸ Minutes of a conference call with a competitor on 29 March 2019, para.10, 15 and 18 (ID4221).

⁵³⁹ Minutes of a conference call with a competitor on 16 April 2019, para.10 and 13 (ID5147).

both.”⁵⁴⁰ Another competitors observed that “*incumbents have a great advantage in being able to approach clients easily through one commodity and then supply them with the other commodity*”.⁵⁴¹

- (529) The Commission notes that Innogy exercises an important competitive constraint on E.ON that would be removed as a consequence of the Concentration. Indeed as can be seen in the national diversion ratios from E.ON for low voltage customers below, Innogy is second only to Bohemia to attract E.ON’s customers, far above other competitors⁵⁴².

Table 5 – National diversion ratio from E.ON for low-voltage customers

Competitor	2015-2018 average (%)
Bohemia Energy	[20-30]
Innogy	[20-30]
MND	[5-10]
PRE	[5-10]
CEZ	[0-5]
Every other competitor	[0-5]

Source : RFI 44 – Annex 1, Figure 1.

- (530) At national level, barriers to entry subsist for competitors that are trying to match the Parties’ advantage inherited from their incumbency position. For example, one competitor had to close one of its only three sales offices as there was no sufficient scale effect to attract enough customers and balance the costs of the office.⁵⁴³

Conclusion on the retail supply of electricity to customers connected to the low-voltage network in Czechia

- (531) The Commission, therefore, concludes that the Concentration would be likely to significantly impede effective competition as a result of horizontal non-coordinated effects arising from the overlap in the activities of the Parties in the market for the retail supply of electricity to low voltage customers in Czechia.

b. Retail supply of electricity to high-voltage customers

Market structure

- (532) The Parties are active in the retail supply of electricity to high voltage customers with a share of [...] % for E.ON and [5-10] % for Innogy. CEZ is the largest supplier with a share of [20-30] % nationally.

⁵⁴⁰ Minutes of a conference call with a competitor on 29 March 2019, para.18 (ID4221).

⁵⁴¹ Minutes of a conference call with a competitor on 10 April 2019, para. 19 (ID5000).

⁵⁴² The conclusion is also true when only considering diversion ratio in E.ON’s electricity DSO area (RFI 44 – Annex 1, Figure 229).

⁵⁴³ Minutes of a conference call with a competitor on 29 March 2019, para. 11 (ID4221).

Table 6 – Market shares for the retail supply of electricity to high voltage customers at national level (by volume)

%	2017	2016	2015
E.ON	[20-30]	[20-30]	[20-30]
Innogy	[5-10]	[0-5]	[0-5]
<i>Combined</i>	<i>[20-30]</i>	<i>[20-30]</i>	<i>[20-30]</i>
ČEZ	[20-30]	[20-30]	[30-40]
PRE	[10-20]	[10-20]	[10-20]
Bohemia Energy	[0-5]	[0-5]	[0-5]
Centropol	[0-5]	[0-5]	[0-5]
EP Energy Trading	[0-5]	[0-5]	[0-5]
Lumius	[0-5]	[0-5]	[0-5]
All other competitors	[0-5]	[0-5]	[0-5]

Source: Form CO, Annex 1.

The Notifying Party's view

- (533) The Notifying Party submits that there can be no competition concern as (i) there are numerous suppliers and high switching rates, (ii) price is decisive given the level of sophistication of the customers, and (iii) the Parties are not close competitors.⁵⁴⁴

Commission assessment

- (534) For the reasons set out below, the Commission considers that the Concentration would not significantly impede effective competition as a result of horizontal non-coordinated effects arising from the overlap in the activities of the Parties in the market for the retail supply of electricity to high voltage customers in Czechia.
- (535) The Parties have a moderate combined markets share ([20-30]%), the increment is limited ([5-10]%) and there is no indication that they compete particularly closely at national level. Also, compared to small customers, the local element of competition is significantly less pronounced for larger customers and there is no indication that the Parties are any particularly close in some regions/local areas within Czechia⁵⁴⁵. Also, contrary to the retail supply of electricity to low-voltage customers, no market participant raised concerns with regard to the impact of the merger on the retail supply of electricity to high voltage customers.⁵⁴⁶
- (536) In view of the relatively moderate Parties' combined market share and the existence of some competitors with a decent market size and the lack of concerns in the market investigation, the Commission considers that competitors are likely to be able to exert sufficient competitive pressure on the combined entity for the supply of retail supply of electricity to high voltage customers.

Conclusion on the retail supply of electricity to high voltage customers in Czechia

- (537) The Commission, therefore, concludes that the Concentration would not lead to a significantly impede effective competition as a result of horizontal non-coordinated

⁵⁴⁴ Form CO, paras. 3032 *et seq.*

⁵⁴⁵ For example, in E.ON's electricity DSO area, Innogy ranks fourth in terms of diversion ration to attract E.ON's high voltage customers, with several other competitors at similar level. Form CO, para. 3048 and Figure 232.

⁵⁴⁶ Replies to questions 63, 64, 66 of questionnaire Q7 – Competitors (Czechia).

effects arising from the overlap in the activities of the Parties in the market for the retail supply of electricity to high voltage customers in Czechia.

8.2.1.4. Gas distribution activities

- (538) The activities of the Parties do not overlap horizontally as regards of low- and medium-pressure gas distribution pipeline networks operated by DSOs in Czechia or the operation of gas LDSs in Czechia, irrespective of whether the operation of LDSs are in the same or separate product market as DSO networks. Therefore, the Commission will not consider further this market.

8.2.1.5. Retail supply of gas

a. Retail supply of gas to small customers

Market structure

- (539) The Parties are both active in the market for the retail supply of gas to small customers. Innogy is the market leader with a share of [30-40]%. After Innogy, there are four other suppliers (E.ON, CEZ, Bohemia Energy and PP) of approximately comparable size. CEZ is the main electricity incumbent which historical incumbency area fully overlaps with Innogy's gas incumbency area.

Table 7 – Market shares for the retail supply of gas to small customers (national, volume)

%	2018	2017	2016	2015
E.ON	[10-20]	[10-20]	[10-20]	[10-20]
Innogy	[30-40]	[30-40]	[30-40]	[40-50]
<i>Combined</i>	<i>[40-50]</i>	<i>[40-50]</i>	<i>[50-60]</i>	<i>[50-60]</i>
ČEZ	[10-20]	[10-20]	[10-20]	[10-20]
Bohemia Energy	[10-20]	[5-10]	[5-10]	[5-10]
Pražská Plynárenská ("PP")	[10-20]	[10-20]	[10-20]	[10-20]
All other competitors	[0-5]	[0-5]	[0-5]	[0-5]

Source: Reply to RFI 44, Annex 1

The Notifying Party's view

- (540) The Notifying Party submits that there can be no competition concern as (i) there are healthy switching rates in the market which suggests effective competition, (ii) the Parties face competition from existing players as well as new entrants, (iii) the Parties are not close competitors as evidenced by the diversion ratios and (iv) entry in the retail gas is easy.⁵⁴⁷

Commission Assessment

- (541) As further explained below, in the Commission's view the Concentration would significantly impede effective competition as a result of horizontal non-coordinated effects arising from the overlaps in the activities of the Parties in the markets for the retail supply of gas to small customers in Czechia for the following reasons, most of which remaining valid from the Commission's assessment of the retail supply of electricity to low-voltage customers.
- (542) First, the Commission notes that the combined market share of the Parties is high ([40-50]%). Post-merger, the merged entity will be the largest supplier by far.

⁵⁴⁷ Form CO, paras. 3173-3208.

- (543) Evidence collected during the market investigation show that at national level, the Parties are close competitors for the following reasons.
- (544) Both have an incumbency area, E.ON from its activity as an electricity and gas DSO, Innogy from its activity as a gas DSO, which offer them a significant legacy customers portfolio, effective brand recognition (notably through better credibility) and larger ability to approach their existing customer with dual-commodity or retention offers⁵⁴⁸. Moreover where their incumbency areas overlap, E.ON is particularly well-placed to leverage its position in the electricity supply market to low-voltage customers and make gas offers to Innogy's customer⁵⁴⁹. Outside the Prague area, CEZ is the only other electricity supplier with an incumbency area.
- (545) In the area where the incumbency areas overlap, the share of supply is also larger than the Parties' market share. The share of gas supply to small customers in the overlapping area is [40-50]% for Innogy and [20-30]% for E.ON⁵⁵⁰.
- (546) Both have a widespread network of local shops, particularly dense in their incumbency area⁵⁵¹. Market investigation shows that having a widespread and dense sales shop network provide an advantage in order to attract low-voltage customers. Indeed, on sales data submitted by the Notifying Party, the breakdown of new contracts by retail channel shows that Innogy concluded around [40-50]% of new contracts in shops on a national basis⁵⁵². As for E.ON, [...].⁵⁵³ The advantage of having large sales network has been confirmed by competitors during the market investigation: one competitor observes that *"this is one of the disadvantages of small players in the market which generally have difficulties to operate shops/customer offices"* and *"the transaction will give a big competitive advantage to the Parties in view of the customer/distribution offices. As confirmed by the Kantar research, customer offices are important in the retail gas and electricity markets"*.⁵⁵⁴ Another competitor stressed that *"both E.ON and Innogy have an important advantage from their historical network of local offices located across Czechia"*.⁵⁵⁵ On difference between historic network due to DSO legacy and other sales network, one competitor considers that *"suppliers who are also DSO have a big advantage because of their customer's office in the area"* as customers may be submitted to commercial offers when walking into an office for network-related matters.⁵⁵⁶ Another competitor also notes that having selling and distribution offices at the same place is an advantage and that quality of services is, along with prices, one of the two factors to attract customers, and that one of its component is the presence of customers offices.⁵⁵⁷
- (547) Both have the ability to efficiently cross-sell (when a supplier in one commodity offers to its own customers tariffs for the supply of the other commodity), better that

⁵⁴⁸ Q7–Competitors (Czechia) – replies to questions 22, 23 and 24; or minutes of a conference call with a competitor on 29 March 2019, para. 10 (ID4221).

⁵⁴⁹ Response to RFI 51, Tables 5 and 6.

⁵⁵⁰ Response to RFI 51.

⁵⁵¹ E.ON has 31 shops nationally, 21 of which are in its electricity DSO area. Innogy has 41 shops nationally, 38 of which are in its DSO area. Only CEZ has more than the Parties, with [...] shops nationally, [...] of them in its DSO area, next competitors being Centropol with [...] shops only. See response to RFI 56, Annex 1.

⁵⁵² Response to RFI 51, Annex 1, Table 3.

⁵⁵³ Response to RFI 51, Annex 1, Table 1.

⁵⁵⁴ Minutes of a conference call with a competitor on 29 March 2019, para.10 and 27 (ID4221).

⁵⁵⁵ Minutes of a conference call with a competitor on 16 April 2019, para.12 (ID5147).

⁵⁵⁶ Minutes of a conference call with a competitor on 29 March 2019, para.10, 15 and 18 (ID4221).

⁵⁵⁷ Minutes of a conference call with a competitor on 16 April 2019, para.10 and 13 (ID5147).

a supplier that would not hold an incumbency position and a well developed sales network. For low-voltage electricity (and this argument will apply *mutatis mutandis* for small customers in the retail supply of gas) Innogy has the contact details and existing business relationships with many customers due to its activity in gas. This gives Innogy a competitive advantage vis-à-vis most other suppliers in challenging E.ON's incumbent position. As a competitor observed "*Cross-selling is an important as revealed by the current situation of the big players on the market. The big players were historically present in one commodity but are now strong in both.*"⁵⁵⁸ Another competitors observed that "*incumbents have a great advantage in being able to approach clients easily through one commodity and then supply them with the other commodity*".⁵⁵⁹

- (548) The Parties' closeness is also supported by the significant diversion between the two. For example, in Innogy's DSO area, the switching rates from Innogy to E.ON is approximately between [20-30]-[20-30]%. Most customers switch from Innogy to CEZ which can be explained by the fact that CEZ's electricity DSO area overlaps to a very large, and larger than E.ON's DSO area, with Innogy.⁵⁶⁰ The respondents to the market investigation confirmed that the Parties are seen as close competitors⁵⁶¹ and that E.ON and Innogy were aggressively competing in one commodity by growing on the back of the other commodity's business.⁵⁶²
- (549) At national level, barriers to entry subsist for competitors that are trying to match the Parties' advantage inherited from their incumbency position. For example, one competitor had to close one of its only three sales offices as there was no sufficient scale effect to attract enough customers and balance the costs of the office.⁵⁶³
- (550) This is all the more important in view of the fact that dual offering of gas and electricity are very common in Czechia. A strong presence or a well-known brand in one energy commodity (say, gas) is typically seen as an important advantage to grow also in the sales of the other commodity (say, electricity). The importance of dual offering is confirmed by the market investigation, as one competitor observed "[m]any customers are looking for dual commodity offers so suppliers provide the two contracts at once".⁵⁶⁴ It is also supported by [...].⁵⁶⁵

Conclusion on the retail supply of small gas customers in Czechia

- (551) The Commission, therefore, concludes that the Concentration would significantly impede effective competition as a result of horizontal non-coordinated effects arising from the overlap in the activities of the Parties in the market for the retail supply of gas to small customers in Czechia.

b. Retail supply of gas to large customers

- (552) The Parties are active in the retail supply of gas to large customers and are the two largest suppliers in the market. Innogy is the main incumbent and has recently gained market share again.

⁵⁵⁸ Minutes of a conference call with a competitor on 29 March 2019, para.18 (ID4221).

⁵⁵⁹ Minutes of a conference call with a competitor on 10 April 2019, para. 19 (ID5000).

⁵⁶⁰ Response to RFI 51.

⁵⁶¹ Replies to questions 22, 23, 24 of questionnaire Q7 – Competitors (Czechia).

⁵⁶² Minutes of a conference call with a competitor on 29 March 2019, paras. 19, 20 (ID4221).

⁵⁶³ Minutes of a conference call with a competitor on 29 March 2019, para. 11 (ID4221).

⁵⁶⁴ Minutes of a conference call with a competitor on 16 April 2019 (ID5147).

⁵⁶⁵ Response to RFI 51.

Table 8 – Market shares for the retail supply of gas to large customers at national level (by volume)

%	2018	2017	2016	2015
E.ON	[5-10]	[5-10]	[5-10]	[5-10]
Innogy	[30-40]	[20-30]	[30-40]	[40-50]
<i>Combined</i>	<i>[30-40]</i>	<i>[30-40]</i>	<i>[40-50]</i>	<i>[50-60]</i>
ČEZ	[5-10]	[5-10]	[5-10]	[5-10]
Pražská Plynárenská	[5-10]	[5-10]	[5-10]	[5-10]
VEMEX	[5-10]	[5-10]	[5-10]	[10-20]
Lumius	[5-10]	[5-10]	[5-10]	[5-10]
Bohemia Energy	[0-5]	[0-5]	[0-5]	[0-5]
EPH	[0-5]	[0-5]	[0-5]	[0-5]
All other competitors	[0-5]	[0-5]	[0-5]	[0-5]

Source: Reply to RFI 44, Annex 1.

The Notifying Party's view

- (553) The Notifying Party submits that there can be no competition concern as (i) switching is prevalent in the market and supported by competitive procurement processes, (ii) the Parties face competition from existing players and new entrants, (iii) the Parties are not close competitors as evidenced by the diversion ratio analysis and (iv) entry in the retail gas market is generally facilitated by a liquid wholesale market.⁵⁶⁶
- (554) The Notifying Party further submits that the combined national market share overstates the Parties' competitive position as price is the key consideration.⁵⁶⁷

Commission assessment

- (555) For the reasons set out below, the Commission concludes that the Concentration would significantly impede effective competition as a result of horizontal non-coordinated effects arising from the overlap in the activities of the Parties in the market for the retail supply of gas to large customers in Czechia.
- (556) First, based on market shares, the merger combines that number one and two in the market becoming by a distance the largest player for the supply of retail gas to large customers. The merged entity becomes more than [...] times bigger than its next competitor with a market share of [30-40]%. Although the market share of Innogy has decreased between 2015 and 2017, it remains the largest supplier by some distance and the figures in the table above suggest that in 2018 Innogy has inverted the negative trend and regained some market share.⁵⁶⁸
- (557) Second, the diversion ratios between the Parties indicate closeness to some degree, with E.ON being the most successful competitor to attract Innogy's large gas customers with a [20-30]% average diversion ration, before Praszka Plynárenská (the

⁵⁶⁶ Form CO, paras. 3210-3239.

⁵⁶⁷ Form CO, paras. 3215-3224.

⁵⁶⁸ Also see the Response to Commission decision pursuant to Article 6(1)(c) of Council Regulation (EC) No 139/2004 with respect to the Czech Republic, Hungary and Slovakia, Figures 6 and 7, where the Parties are in their respective gas DSO area the largest acquirer of new customers, E.ON being second to Innogy in its DSO area.

other gas incumbent, with [10-20]%) and CEZ (an electricity incumbent, with [10-20]%)⁵⁶⁹.

- (558) Third, the Commission notes that the vast majority of respondents to the market investigation considered E.ON and Innogy to be close competitors in the retail supply of gas to large customers.⁵⁷⁰ One market participant indicated that it is difficult to compete for large gas customers without having access to big volumes of gas on wholesale trade⁵⁷¹, which Innogy and E.ON have.
- (559) In view of the Parties' combined high market shares, the diversion ratios and the results of the market investigation, the Commission considers that smaller competitors are unlikely to be able to exert sufficient competitive pressure on the combined entity for the supply of retail gas to large customers.

Conclusion on the retail supply of gas to large customers in Czechia

- (560) The Commission, therefore, concludes that the Concentration would significantly impede effective competition as a result of horizontal non-coordinated effects arising from the overlap in the activities of the Parties in the market for the retail supply of gas to large customers in Czechia.

8.2.1.6. Generation of heat

- (561) The activities of the Parties do not overlap horizontally as regards the supply of district heating in Czechia. Therefore, this market is not further discussed.

8.2.2. *Conclusion on horizontal non coordinated effects in Czechia*

- (562) For the reasons set out above the Commission considers that as a result of horizontal non-coordinated effects arising from the overlap in the activities of the Parties, the Concentration would significantly impede effective competition in the markets for the retail supply of electricity to customers connected to the low-voltage network and the retail supply of gas to both small customers and large customers in Czechia.

8.2.3. *Vertical non-coordinated effects*

8.2.3.1. Distribution of electricity in lower voltage networks operated by DSOs (upstream)⁵⁷² - generation and wholesale supply of electricity (downstream)

- (563) The distribution of electricity at lower voltage networks operated by DSOs are vertically affected markets in relation to the generation and wholesale supply of electricity in Czechia, as the combined market shares of the merged entity would be above 30% in distribution networks (natural monopolies). The Notifying Party submits that only minor generation units directly connected to E.ON's distribution network.
- (564) Due to the DSO being a natural monopolist, the ability to foreclose competitors on the downstream market is not changed by the merger the Parties as DSOs are local monopolists on the upstream market pre- and post-merger. Moreover, the vertical link between the upstream and downstream market are already pre-existing. The Commission considers that the incentive to foreclose competitors on the downstream

⁵⁶⁹ Form CO, Figure 261 and para. 3231.

⁵⁷⁰ Replies to questions 63, 64, 66 of questionnaire Q7 – Competitors (Czechia).

⁵⁷¹ Minutes of a conference call with a competitor, 16 April 2019, para.17 (ID5147).

⁵⁷² Given the small activities of the Parties in the operation of electricity LDSs, no separate assessment for LDSs is carried as the competition impact will not change irrespective of whether LDSs are assessed as a separate market (and vertical link) or as part of the operation of a DSO network.

market does not materially change due to the merger and would be very limited overall, because of the small market position of the Parties downstream.

- (565) Second, although the Concentration could change the incentives of the Merged Entity to foreclose its rivals, as the merged entity would enjoy higher market shares in the downstream market, the Commitments offered by the Notifying Party in the context of the Concentration ensure that the Merged Entity's market share in the downstream market for the generation and wholesale supply of electricity will remain unchanged, therefore the Merged Entity's incentives will remain unchanged.
- (566) Moreover, the electricity distribution grid monopolies are regulated, being subject to unbundling, regulated network access, and regulated network tariff regimes.⁵⁷³
- (567) The Commission considers that E.ON does not have the ability to foreclose competitors on the upstream market, as the market position of E.ON is very small, [0-5]% (or [0-5]% based on generation only) in generation and wholesale supply of electricity. Again, as a result of the commitments, the Merged Entity's market share in the downstream market for the generation and wholesale supply of electricity will be equal to that of pre-Concentration and therefore the incentives remain unchanged.
- (568) The Commission therefore concludes that the Concentration would not significantly impede effective competition as a result of vertical non-coordinated effects arising from the verticals link between the upstream market for the generation and wholesale supply of electricity and the downstream markets for the operation of lower voltage distribution networks operated by DSOs in Czechia.
- 8.2.3.2. Distribution of electricity at lower voltage networks operated by DSOs (upstream)⁵⁷⁴ – retail supply of electricity (downstream)
- (569) The distribution of electricity at lower voltage networks operated by DSOs are vertically affected markets in relation to the retail supply of electricity in Czechia, as the combined market shares of the merged entity would be above 30% in distribution networks (natural monopolies).
- (570) The reasoning below applies both to the retail supply of electricity to low voltage customers as well as high voltage customers (the combined market shares on both markets is below 30%).
- (571) The merger does not change the ability of the Parties to foreclose its rivals downstream but it could change its incentives because as a result of the Concentration the merged entity would increase its market shares in the downstream market. However, for the reasons set out below, the Commission considers that the ability of the merged entity to foreclose its rivals would be limited and the incentives are not materially strengthened by the Concentration, also taking into account the effect of the Commitments.
- (572) First, the Notifying Party submits that the regulatory measures provide protection against any vertical foreclosure, meaning that E.ON would not have the ability to engage in any foreclosure strategy.⁵⁷⁵

⁵⁷³ Form CO, para. 2884.

⁵⁷⁴ Given the small activities of the Parties in the operation of electricity LDSs, no separate assessment for LDSs is carried as the competition impact will not change irrespective of whether LDSs are assessed as a separate market (and vertical link) or as part of the operation of a DSO network.

⁵⁷⁵ Form CO, para. 3326.

- (573) The regulatory framework ensures that suppliers have non-discriminatory access to distribution networks, the price for distribution is regulated and end users have a free choice of the electricity supplier no matter who owns or operates the distribution network to which they are connected.⁵⁷⁶
- (574) Electricity distribution activities are subject to licensing under the Energy Act. Distribution licences are awarded for an indefinite period and specify the area in which each DSO is licensed to operate. These areas do not overlap. Ownership of, or right of use to, a distribution network infrastructure is a pre-requisite to being awarded a distribution licence.⁵⁷⁷
- (575) Furthermore, the vertical link is pre-existing and not as a result of the Concentration, given that E.ON has a vertical link between its distribution network and its retail activities, whereas Innogy does not operate an electricity DSO in the Czechia.
- (576) In view of the above, the Commission considers that even post-merger input foreclosure effects are unlikely to arise.
- (577) Second, although the Concentration could change the incentives of the Merged Entity to foreclose its rivals, as the merged entity would enjoy higher market shares in the downstream market, as a result of the commitments, the Merged Entity's market share in the downstream market for the retail supply of electricity to low voltage customers and high voltage customers will be equal to that of pre-Concentration and therefore the incentives remain unchanged.
- (578) Customer foreclosure can only occur when a supplier integrates with an important customer in the downstream market and there are alternative (competing) suppliers for the downstream market. In this case, the integrated entity may stop purchasing from the rival upstream or reduce significantly the volumes purchased. Since each distribution network constitutes a natural monopoly, no actual or potential rival in the upstream market (distribution network) can be foreclosed.
- (579) The Commission therefore concludes that the Concentration would not significantly impede effective competition as a result of vertical non-coordinated effects arising from vertical links between the upstream markets for the operation of lower voltage distribution networks operated by DSOs and the downstream markets for the retail supply of electricity in Czechia.
- 8.2.3.3. Distribution of electricity at lower voltage networks operated by DSOs (upstream) – operation of electricity local distribution systems (downstream)
- (580) For completeness, if LDSs were considered a separate market from the operation of DSO networks, the vertical link between these markets is assessed.
- (581) The distribution of electricity at lower voltage networks operated by DSOs are vertically affected markets in relation to the operation of electricity local distribution systems in Czechia, and vice versa, as the combined market shares of the merged entity would be above 30% in both distribution networks (both being natural monopolies).
- (582) The Parties have only limited activities in the operation of electricity local distribution systems.

⁵⁷⁶ Form CO, para.3317.

⁵⁷⁷ Form CO, para. 2926.

- (583) E.ON will be a natural monopolist on the local upstream market for DSO as well as in the respective downstream market for LDS. The merger will not increase the ability to foreclose, as neither on the upstream nor on the downstream monopoly markets competitors that could be foreclosed.
- (584) The Commission therefore concludes that the Concentration would not significantly impede effective competition as a result of vertical non-coordinated effects arising from vertical links between the upstream markets for the distribution of electricity at lower voltage networks operated by DSOs and the downstream markets for the operation of local gas distribution systems in Czechia.
- 8.2.3.4. Downstream wholesale supply of gas (downstream) – distribution of gas (upstream)
578
- (585) The distribution of gas at lower pressure networks operated by DSOs are vertically affected markets in relation to the market for the downstream wholesale supply of gas in Czechia, as the combined market shares of the merged entity would be above 30% in distribution networks (natural monopolies).⁵⁷⁹
- (586) Due to the DSO being a natural monopolist, the ability to foreclose competitors on the downstream market is not changed by the merger the Parties as DSOs are local monopolists on the upstream market pre- and post-merger. Moreover, the vertical link between the upstream and downstream market are already pre-existing. The Commission considers that the incentive to foreclose competitors on the downstream market does not materially change due to the merger and would be very limited overall, because of the small market position of the Parties downstream.
- (587) Second, although the Concentration could change the incentives of the Merged Entity to foreclose its rivals, as the merged entity would enjoy higher market shares in the downstream market, as a result of the commitments, the Merged Entity's market share in the downstream market for the generation and wholesale supply of electricity will be equal to that of pre-Concentration and therefore the incentives remain unchanged.
- (588) Moreover, the gas distribution grid distribution monopolies are regulated, being subject to unbundling, regulated network access, and regulated network tariff regimes.⁵⁸⁰
- (589) The Commission considers that E.ON does not have the ability to foreclose competitors on the upstream market, as the market position of E.ON is very small, (approximately [0-5]%) in the downstream wholesale supply of gas. Again, as a result of the commitments, the Merged Entity's market share in the downstream market for the generation and wholesale supply of electricity will be equal to that of pre-Concentration and therefore the incentives remain unchanged.
- (590) The Commission therefore concludes that the Concentration would not significantly impede effective competition as a result of vertical non-coordinated effects arising from vertical links between the upstream markets for downstream wholesale supply

⁵⁷⁸ Given the small activities of the Parties in the operation of gas LDSs, no separate assessment for LDSs is carried as the competition impact will not change irrespective of whether LDSs are assessed as a separate market (and vertical link) or as part of the operation of a DSO network.

⁵⁷⁹ It is recalled that both E.ON and Innogy are a gas DSO, but it is foreseen that Macquarie will acquire Innogy's gas DSO activities (see footnote 434).

⁵⁸⁰ Form CO, para. 2884.

of gas and the distribution of gas in lower pressure networks operated by DSOs in Czechia.

8.2.3.5. Downstream wholesale supply of gas (upstream) – retail supply of gas (downstream)

- (591) The market for the retail supply of gas is vertically affected markets in relation to the market for upstream market for the downstream wholesale supply of gas in Czechia, as the combined market shares of the merged entity would be above 30% in both retail markets for the supply of gas (to small customers, respectively large customers).
- (592) The reasoning below applies both to the retail supply of gas to small customers as well as to large customers.
- (593) First, the Parties do not have the ability to foreclose competitors on the downstream markets by engaging in input foreclosure strategies, as the Parties do not have market power on the upstream market for the downstream wholesale supply of gas in view of the minor combined market position of the Parties (approximately [0-5]%) post-merger. Retail suppliers on the downstream markets would have ample alternative providers from which they can procure electricity on the wholesale market.
- (594) Customer foreclosure can occur when a supplier integrates with an important customer in the downstream market and stops or significantly reduces the purchasing from the competitors on the upstream market. However, the Commission considers that neither the ability nor the incentives to engage in customer foreclosure change materially due to the merger. First, the vertical links are pre-existing and not established by the merger.
- (595) Second, although the Concentration could change the incentives of the Merged Entity to foreclose its rivals, as the merged entity would enjoy higher market shares both in the upstream and downstream markets. However, the Commission considers the Commitments offered by the Parties in the context of the Concentration ensure that the Merged Entity's market share in the downstream market for the generation and wholesale supply will remain unchanged and therefore the incentives remain unchanged.
- (596) The Commission therefore concludes that the Concentration would not significantly impede effective competition as a result of vertical non-coordinated effects arising from vertical links between the upstream markets for downstream wholesale supply of gas and the retail supply of gas in Czechia.

8.2.3.6. Distribution of gas at lower pressure networks operated by DSOs (upstream)⁵⁸¹ – retail supply of gas (downstream)

- (597) The distribution of gas at lower pressure networks operated by DSOs are vertically affected markets in relation to the retail supply of gas in Czechia, as the combined market shares of the merged entity would be above 30% in distribution networks (natural monopolies), as well as in both retail markets for the supply of gas (both to small and large customers).
- (598) The reasoning below applies both to the retail supply of gas to small customers as well as to large customers.

⁵⁸¹ Given the small activities of the Parties in the operation of electricity LDSs, no separate assessment for LDSs is carried as the competition impact will not change irrespective of whether LDSs are assessed as a separate market (and vertical link) or as part of the operation of a DSO network.

- (599) First, the merger does not change the ability of the Parties to foreclose its rivals downstream but it could change its incentives because as a result of the Concentration the merged entity would increase its market shares in the downstream market. However, for the reasons set out below, the Commission considers that the ability of the merged entity to foreclose its rivals would be limited and the incentives are not materially strengthened by the Concentration, also taking into account the effect of the Commitments.
- (600) The Notifying Party submits that the regulatory measures provide protection against any vertical foreclosure, meaning that the Notifying Party would not have the ability to engage in any foreclosure strategy.
- (601) Gas distribution activities are subject to licensing under the Energy Act. Distribution licences are awarded for an indefinite period and specify the area in which each DSO is licensed to operate. These areas do not overlap. Ownership or right of use of a distribution network infrastructure is a pre-requisite to being awarded a distribution licence.⁵⁸²
- (602) In view of the above, the Commission considers that even post-merger input foreclosure effects are unlikely to arise.
- (603) Second, although the Concentration could change the incentives of the Merged Entity to foreclose its rivals, as the merged entity would enjoy higher market shares in the downstream market, as a result of the commitments, the Merged Entity's market share in the downstream market for the retail supply of electricity to low voltage customers and high voltage customers will be equal to that of pre-Concentration and therefore the incentives remain unchanged.
- (604) Customer foreclosure can only occur when a supplier integrates with an important customer in the downstream market and there are alternative (competing) suppliers for the downstream market. In this case, the integrated entity may stop purchasing from the rival upstream or reduce significantly the volumes purchased. Since each distribution network constitutes a natural monopoly, no actual or potential rival in the upstream market (distribution network) can be foreclosed.
- (605) The Commission therefore concludes that the Concentration would not significantly impede effective competition as a result of vertical non-coordinated effects arising from vertical links between the upstream markets for the distribution of gas at lower pressure networks operated by DSOs and the downstream markets for the retail supply of gas in Czechia.
- 8.2.3.7. Distribution of gas at lower pressure networks operated by DSOs (upstream) – operation of gas local distribution systems (downstream)
- (606) For completeness, if LDSs were considered a separate market from the operation of DSO networks, the vertical link between these markets is assessed.
- (607) The distribution of gas at lower pressure networks operated by DSOs are vertically affected markets in relation to the operation of gas local distribution systems in Czechia, and vice versa, as the combined market shares of the merged entity would be above 30% in both distribution networks (both being natural monopolies).
- (608) The Parties have only limited activities in the operation of gas local distribution systems.

⁵⁸²

Form CO, para. 3080.

- (609) First, the Notifying Party will be a natural monopolist on the local upstream market for DSO as well as in the respective downstream market for LDS. The merger will not increase the ability to foreclose, as neither on the upstream nor on the downstream monopoly markets competitors that could be foreclosed.
- (610) Second, as a result of the commitments, the Merged Entity's position in the downstream market for the operation of gas local distribution systems will be equal to that of pre-Concentration and therefore the incentives remain unchanged.
- (611) The Commission therefore concludes that the Concentration would not significantly impede effective competition as a result of vertical non-coordinated effects arising from vertical links between the upstream markets for the distribution of gas at lower pressure networks operated by DSOs and the downstream markets for the operation of local gas distribution systems in Czechia.

8.2.3.8. Heat generation (upstream) – district heating (downstream)

- (612) The merger results in a vertically affected link as the supply of district heating is a natural monopoly and, where active, the Parties have a share of 100% of the district heating activities in a network. The Concentration is unlikely to affect that link as the increase in the upstream heat generation market is marginal (combined share [0-5]%).
- (613) The Parties are local monopolists pre- and post-merger, giving rise to vertically affected markets with regard to the market for heat generation.
- (614) The Commission is of the view that the Notifying Party does not have the ability to foreclose competitors on the downstream market, as district heating suppliers are natural monopolists and there are no competing customers to foreclose.
- (615) With regard to input foreclosure for competitors on the upstream market, the Commission notes that the ability to foreclose does not change due to the merger and also the incentives to engage in such foreclosure strategy are not affected by the merger, as E.ON has no and Innogy only negligible activities in the supply of gas to power plants.
- (616) Second, although the Concentration could change the incentives of the Merged Entity to foreclose its rivals, as the merged entity would enjoy higher market shares in the downstream market, as a result of the commitments, the Merged Entity's market share in the downstream market for the retail supply of electricity to low voltage customers and high voltage customers will be equal to that of pre-Concentration and therefore the incentives remain unchanged
- (617) The Commission therefore concludes that the Concentration would not significantly impede effective competition as a result of vertical non-coordinated effects arising from vertical links between the upstream markets for the retail supply of gas to power plants and the downstream markets for the retail supply of gas in Czechia.

8.3. Conclusion on Czechia

- (618) For the reasons set out above, the Commission considers that as a result of horizontal non-coordinated effects arising from the overlap in the activities of the Parties, the Concentration would significantly impede effective competition in the markets for the retail supply of electricity to low voltage customers, the retail supply of gas to small customers and the retail supply of gas to large customers.

9. HUNGARY

- (619) In Hungary, both E.ON and Innogy are active in the generation and wholesale supply of electricity, in the distribution of electricity, in the retail supply of electricity and

gas, in the provision of street lighting and other lighting services, in transformers,⁵⁸³ in services provided to other networks,⁵⁸⁴ in gas pressure regulators,⁵⁸⁵ in metering,⁵⁸⁶ in e-mobility services,⁵⁸⁷ in PV systems,⁵⁸⁸ in energy auditing⁵⁸⁹ and in the sales of materials.⁵⁹⁰

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- ⁵⁸³ E.ON and Innogy's DSOs install, maintain, lease and provide other services related to transformer stations (also known as substations), transformer devices and other related assets such as pylons or cables, which are electrical devices that transfer electricity between two or more circuits through electromagnetic induction. These services can be performed by any entity that has the requisite technical capabilities. E.ON's revenues attributable to this activity in 2017 amounted to approximately EUR [...], while Innogy's activities in relation to transformers, generated approximately EUR [...] in revenue in 2017. The combined market shares of the Parties are [0-5]% under any plausible market definition and the increment brought by E.ON is negligible. The Commission will therefore not consider further this plausible market.
- ⁵⁸⁴ E.ON and Innogy's DSOs also provide certain services to "foreign" networks (i.e. non-E.ON/Innogy owned networks and network assets). E.ON and Innogy's services are provided to grids and transformer stations within privately owned industrial estates. The services provided include maintenance, operation and examination of the relevant assets (e.g. pylons and cables, transformer stations). These activities can be performed by any company with the relevant technical capability. E.ON's revenues attributable to this activity in 2017 amounted to approximately EUR [...], while Innogy's activities generated approximately EUR [...] in revenue in 2017. The combined market shares of the Parties are [0-5]% under any plausible market definition. The Commission will therefore not consider further this plausible market.
- ⁵⁸⁵ E.ON and Innogy are also active in relation to installation and maintenance of third-party owned gas pressure regulators. E.ON only provides these services to customers located within E.ON's distribution network and generated a turnover in 2018 of approximately EUR [...] (E.ON reply to RFI 66). Innogy supplies these services to SME and Large Customers on a national basis. These services generated less than EUR [...] income for Innogy in 2017. The combined market shares of the Parties are [0-5]% under any plausible market definition. The Commission will therefore not consider further this plausible market.
- ⁵⁸⁶ Metering activities in Hungary are carried out as part of a core and mandatory activity of each DSO in its territory, with each DSO having a statutory monopoly on metering services within its licence area. The Parties' activities are limited to their DSO territories. These obligations apply equally to all DSOs across Hungary. Customers obtain metering services only from their gas/electricity DSO and therefore do not exercise choice between metering suppliers when obtaining metering services. Since customers have no choice which DSO they are connected to, customers also have no choice regarding the supplier of their meter. E.ON and Innogy (in their capacity as DSOs) are mandated by regulation to provide such services to customers within their respective DSO territories. As a result, the activities of the Parties do not overlap.
- ⁵⁸⁷ The Parties' activities overlap in the wholesale supply of EV Charging Stations, in the retail supply of private EV Charging Stations, and in the installation and operation of public EV Charging Stations. The Commission has not previously analysed these markets in Hungary. However, in line with the assessment undertaken for the same product markets in Germany, and in view of the evidence collected during the market investigation, the Commission considers that i) wholesale supply of EV Charging Stations and retail supply of private EV Charging Stations can be plausibly considered as separate markets also in Hungary with (at least) a national geographic scope, and that ii). the markets for installation of public EV Charging Stations can be plausibly distinguished also in Hungary between the installation and operation of public EV Charging Stations on- versus off-motorways, with a national or a sub-national geographic scope. As no affected markets arise under any of these plausible market definition in Hungary for all above-mentioned markets, the exact definition is left open. In particular, no concerns arise for the installation and operation of on-motorways EV Charging Stations in Hungary, as there are no pairs of EV fast Charging Stations or pairs of EV ultra-fast Charging Stations, located within a 50 km driving distance on motorways, each station of the pair being owned by a different Party (see RFI 66, answer to question 19).
- ⁵⁸⁸ E.ON and Innogy are both active in Hungary in relation to the distribution of PV modules, PV systems, system integration services and associated services (such as planning etc.). E.ON provides PV modules and PV systems to Residential Customers and SME E.ON does not manufacture PV cells, modules or systems; or distribute PV cells, modules or systems on the wholesale level. Innogy distributes PV modules and PV systems to Residential Customers and to SME Customers. The Parties submit that

9.1. Market Definition

(620) On the legal framework and general principles of market definition, see recital (34).

9.1.1. Electricity generation and wholesale supply of electricity

9.1.1.1. Product and geographic market definition

(621) The Commission has held in its previous decisional practice that the relevant market encompasses the production of electricity at power stations as well as electricity imported into the relevant geographic area through interconnectors and electricity bought and sold through bilateral agreements, regulated market places or power exchanges, including day-ahead, intra-day and spot market platforms.⁵⁹¹ The Commission has also not drawn a distinction between different sources of energy (such as electricity from conventional sources vs electricity from renewable resources).⁵⁹² In the E.ON/MOL Decision, the Commission's market investigation indicated that the provision of balancing energy⁵⁹³ constituted a separate market in Hungary.

there are approximately 60 competitors active in this activity in Hungary. No affected markets arise under any plausible market definition. The Commission will therefore not consider further this plausible market.

⁵⁸⁹ Legislation in Hungary requires certain non-Residential Customers to purchase an energy audit or "energy expert" service, from which reporting obligations require the customer to produce various statistics. E.ON provides these services to [...] of its own customers. E.ON's revenue attributable to this activity amounted to EUR [...] in 2017. Innogy provides these services to [...] customers nationally. Innogy's revenues attributable to this activity amounted to EUR [...]. The combined market shares of the Parties are [0-5]% under any plausible market definition. The Commission will therefore not consider further this plausible market.

⁵⁹⁰ E.ON and Innogy are both active in Hungary in relation to the sales of miscellaneous materials used in electricity and gas works, such as cables, insulators, and connecting elements, etc. E.ON operates an online store selling materials that can be used for electric and gas related services under the name E.ON Gridshop. Innogy is also active in relation to selling energy materials to contractors. Innogy sells materials that can be used for electric services to its own contractors and affiliated companies. Similar materials can be obtained from other online and offline retailers. The combined market shares of the Parties are [0-5]% under any plausible market definition. The Commission will therefore not consider further this plausible market.

⁵⁹¹ COMP/M.8687 – *Prisko/OKD Nastupnicka*, paras. 55 et seq.; COMP/M.6984 – *EPH/Stredoslovenska Energetika*, para. 15; COMP/M.8056 – *EPH/PPF Investments/Vattenfall Generation/Vattenfall Mining*, para. 13; COMP/M.5224 – *EDF/British Energy*, para. 16-18; COMP/M.3268 – *Sydskraft/Grange*, paras. 19-20.

⁵⁹² COMP/M.8270 – *EDF/CDC/RTE*, para. 13; COMP/M.8056 – *EPH/PPF Investments/Vattenfall Generation/Vattenfall Mining*, para. 14 et seq.; COMP/M.5467 – *RWE/Essent*, para. 24; COMP/M.7850 – *EDF/CGN/NNB Group of Companies*, para. 54; COMP/M.4517 – *Iberdrola/Scottish Power*, para. 11.

⁵⁹³ Innogy provides only primary balancing services while E.ON provides only secondary and tertiary balancing services. [Description of E.ON activities]. E.ON does not provide primary balancing services. [Description of Innogy activities]. Not all generators can participate in the balancing energy market because of the specific characteristics of the provision of balancing power: the need to adjust production within short notice, a high degree of flexibility, available capacity and strong technical and financial requirements. These characteristics restrict supply-side substitutability. In Hungary, MAVIR obtains the balancing energy it needs from BSPs (balancing service providers), which are generators qualified to provide the different types of balancing services (primary, secondary or tertiary). The Parties' balancing activities do not horizontally overlap on the basis of the narrowest plausible market definition and in a potential market encompassing all types of balancing services the combined market shares of the Parties would remain below [10-20]% (E.ON's Reply to RFI 66). Therefore these markets will not be further considered in this Decision.

- (622) The Commission has considered in previous cases that the market for electricity generation and wholesale supply of electricity is national in scope.⁵⁹⁴
- (623) The Notifying Party agrees with this market definition which is then retained for the purpose of this Decision.

9.1.1.2. Conclusion on market definition

- (624) For the purposes of this Decision, the market for electricity generation and wholesale supply of electricity will be regarded as a separate product market and the market will be regarded national in scope.

9.1.2. *Electricity distribution activities*

- (625) Transportation of electricity in Hungary involves two types of networks: transmission networks (operated by TSOs) for high voltage levels and distribution networks (operated by DSOs) for lower voltage levels. The Parties are not active as TSOs in Hungary. MVM, the state-owned power company, is the sole owner and operator of the Hungarian transmission network via MAVIR.⁵⁹⁵

9.1.2.1. Product and geographic market definition

- (626) In previous decisions, the Commission has identified two separate markets for the transportation of electricity: transmission and distribution.⁵⁹⁶
- (627) In relation to distribution networks, the Commission has in the past consistently defined the operation and management of each low voltage network (distribution of electricity) as a separate (product and geographic) relevant market. As distribution networks cannot be economically duplicated, there is only one network in each area and the network operator (DSO) is de facto monopolist in the supply of distribution services in that area.⁵⁹⁷ The Commission has previously found the geographic market of electricity distribution to be sub-national in scope and in line with the distribution network regions, such that the region for each network constitutes a distinct relevant geographic market.⁵⁹⁸
- (628) The Notifying Party concurs with the Commission's decisional practice as regards the product market definition and the geographic scope of the market for distribution networks for lower voltage levels operated by DSOs.
- (629) The evidence in the Commission's file has not provided any indication that would suggest that departing from the Commission's decisional practice would be appropriate.
- (630) For the purposes of this Decision, distribution networks for lower voltage levels operated by DSOs will be regarded as a separate product market and the market will be regarded sub-national in scope and in line with the distribution network regions, such that the region for each network constitutes a distinct relevant geographic market.

⁵⁹⁴ COMP/M.3696 – *E.ON/MOL*, para. 256.

⁵⁹⁵ Form CO, para. 3440.

⁵⁹⁶ COMP/M.7927 – *EPH/ENEL/SE*, para. 21; COMP/M.5467 – *RWE/Essent*, para. 179; COMP/M.4238 – *E.ON/PRAZSKÁ PLYNÁRENSKÁ*, para. 18.

⁵⁹⁷ COMP/M.3696 – *E.ON/MOL*, para. 215.

⁵⁹⁸ COMP/M.3696 – *E.ON/MOL*, para. 254.

9.1.2.2. Conclusion on market definition

(631) For the purposes of this Decision, distribution networks for lower voltage levels operated by DSOs will be regarded as a separate product market and the market will be regarded sub-national in scope and in line with the distribution network regions, such that the region for each network constitutes a distinct relevant geographic market.

9.1.3. Retail supply of electricity

(632) In Hungary, the market for the retail supply of electricity is characterised by a dual structure with both regulated and liberalised segments. Residential customers, small industrial/commercial customers with a connection capacity of less than 3*63 A, as well as certain municipal customers⁵⁹⁹ are eligible for the so-called universal service ("USP-Eligible customers"). The USP-Eligible customers have the right but not the obligation to procure their electricity needs using the USP Offering.

(633) The USP Offering can be provided only by the universal service providers ("USPs") licenced by the Hungarian Energy and Public Utility Regulatory Authority ("HEA"). There are currently three licensed USPs: the Parties and NKM, a state-owned energy company. There is no tendering process for USP licences, which are simply granted on the basis of financial and technical capabilities to provide the service, therefore the former public utility service providers hold the USP licences. The USP licenses are not limited in time. While NKM has a national USP licence, the USP licences of the Parties are limited to their respective DSO regions.⁶⁰⁰

Figure 15 - Hungarian electricity DSOs



Source: Form CO paragraph 3443

⁵⁹⁹ The following municipal customers are eligible for the universal service ("USP Offering"): (i) municipalities and their institutions; (ii) state authorities and their institutions; and (iii) public institutions maintained by a church (e.g. schools, hospitals, homes for the elderly, etc.).

⁶⁰⁰ There are six electricity distribution networks in Hungary, owned by three companies, the Parties (E.ON owns three networks and Innogy owns two) and NKM.

- (634) USPs are obliged to supply USP-Eligible customers at the regulated (capped) price and to comply with other requirements such as acting as a provider of last resort for USP-Eligible customers and complying with prescribed service quality requirements.
- (635) Non-USP eligible customers can be served only with competitive offers. The prices of these are not regulated and are therefore determined by the market. Suppliers have to apply for a licence in order to be able to supply customers on a competitive offer, this procedure is however straightforward and not onerous.⁶⁰¹

9.1.3.1. Product market definition

The Commission's decisional practice

- (636) As already described in Section 7.1.3.2, the Commission has defined in its previous decisions the retail supply of electricity to final customers as a separate relevant product market.
- (637) Specifically with regard to Hungary, the Commission has further sub-segmented the retail electricity market into (i) residential customers, (ii) small commercial and industrial customers and (iii) medium and large commercial and industrial customers (with an average annual electricity consumption above 0.5 GWh).⁶⁰²

The Notifying Party's view

- (638) The Notifying Party agrees with the Commission's decisional practice in that it is appropriate to distinguish between three broad categories of retail customers in Hungary, namely residential customers, small industrial/commercial customers ("SME customers") and large industrial/commercial customers ("large industrial customers"). However, it is of the view that due to the regulatory changes, further sub-segmentation is warranted.
- (639) Based on the current regulatory framework and the different consumption profiles, the Notifying Party submits that retail electricity markets in Hungary should be analysed by distinguishing (i) residential customers, (ii) SME customers serviced by USP offerings ("USP-SME customers"), (iii) SME customers serviced by competitive offerings ("Competitive-SME customers") and (iv) large industrial customers with an average annual electricity consumption of more than 0.5 GWh.⁶⁰³
- (640) With regard to the distinction of USP-SME and Competitive-SME customers, the Notifying Party submits that Competitive-SME customers consume a higher volume of electricity, pay lower prices and that there is not a strong correlation between switching from USP-Eligible SME customers to the competitive offering or USP offering and changes in the relative.⁶⁰⁴
- (641) Finally, with regard to the threshold separating SME and large industrial customers, the Notifying Party submits that although in its view the 0.5 GWh per annum consumption level is the appropriate threshold, it notes that adjusting this threshold

⁶⁰¹ In order to apply for and receive the licence, the applicant needs to (i) submit a two-year audited business plan; (ii) if the applicant is registered abroad, provide its home country electricity trading licence, its articles of association (and, in the event of a change to its legal status, the underlying documents); (iii) submit terms of business for approval and (iv) set up and operate customer services in its main office.

⁶⁰² COMP/M.3696 – *E.ON/MOL*, paras. 236-250.

⁶⁰³ Form CO, paras. 3523-3527.

⁶⁰⁴ Form CO, paras. 3558-3572.

to 1 GWh per annum makes no material difference to the Parties' market position or the relevant analysis.⁶⁰⁵

The Commission's assessment

(642) In line with its previous decisional practice, the Commission takes the view that it is appropriate to distinguish the retail supply of electricity between (i) residential (ii) SMEs and (iii) large commercial and industrial customers (with an average annual electricity consumption above 0.5 GWh). For the reason set out below, and in line with the market definition put forward by the Notifying Party, the Commission considers that the SME market should be further segmented in (a) SME customers serviced by USP offerings ("USP-SME customers"), and (b) SME customers serviced by competitive offerings ("Competitive-SME customers").

a. Residential customers

(643) First, within the current regulatory framework, residential customers are distinguished from any type of SME customers as they are considered more vulnerable. This is apparent in the different price caps used for the USP offerings of residential and SME customers; for example, considering the A1 tariff⁶⁰⁶, the regulated USP offering prices for SME customers are approximately 40% higher than for residential customers.⁶⁰⁷ Consequently, the margins achieved on the two segments differ significantly.⁶⁰⁸ While within the USP offering residential and SME customers are entitled to the same service level, residential customers are eligible to certain guaranteed service levels even when opting out of the USP offering.

(644) Second, and not irrespective of the regulatory framework, the competitive landscape seems to be different regarding residential and SME customers. Indeed, currently only the suppliers awarded USP licences supply residential customers to a considerable extent, while more competitors are present on the SME segment. The majority of respondents to the market investigation also submitted that the competitive conditions of the two segments materially differ.⁶⁰⁹

(645) Finally, the Commission takes the view that it is not necessary to further sub-segment the market for the retail supply of electricity to residential customers into customers serviced by USP offering on the one hand and competitive offering on the other hand because currently only approximately 0.3% of customers are supplied on a competitive offer.⁶¹⁰ It should be further noted that E.ON no longer supplies residential customers on a competitive offer.⁶¹¹ The small number of customers

⁶⁰⁵ Supplemental response to the Commissions' theories of harm with respect to Hungary, paras. 51-52.

⁶⁰⁶ The A1 tariff is a standard tariff which provides a set price for electricity regardless of when the electricity was consumed. It is split into two blocks (A1 I. and A1 II.) with different pricing below and above a consumption of 1320 kWh/a (Form CO, footnote 2443).

⁶⁰⁷ In particular, A1 II. tariffs of E.ON and Innogy are 37.75 Ft/kWh and 37.55 Ft/kWh for residential customers and 54.06 Ft/kWh and 53.73 Ft/kWh for SME customers. (Information available at the Parties' websites (<https://www.eon.hu/hu/lakossagi/aram/arak.html>, https://www.eon.hu/hu/uzleti/aram/arak-tarifadijak.html#Egyetemes_szolgaltat_s and <https://elmuemasz.hu/egyetemes-szolgaltatas/szolgaltatasok/villamos-energia/villamos-energia-tarifak>, last downloaded on 27 May 2019).

⁶⁰⁸ The Parties' median gross margin in 2017 was –[...] EUR/MWh for residential and [...] EUR/MWh for SME customers (Form CO, Table 288).

⁶⁰⁹ Replies to questionnaire Q9 – Competitors (Hungary), question 12.

⁶¹⁰ Form CO, Table 277.

⁶¹¹ Reply to the 6(1)(c) decision, footnote 50.

supplied under competitive offer is not the result of switching between USP and competitive offering. [...].

- (646) For the purposes of this Decision, the retail supply of electricity to residential customers will be regarded as a separate product market.

b. Competitive Customers vs USP Customers

- (647) The Commission considers it appropriate to segment the SME market into USP and competitive offers as there are significant differences between the two groups.
- (648) First, USP regulation applies to small SMEs - customers with a connection capacity of less than 3*63 A, and therefore the annual consumption of USP SME customers is on average significantly lower than that of competitive SME customers.⁶¹²
- (649) Second, as shown in Figure 16 below, the [...] majority of competitive SME customers pay less than the USP-SME customer rates,⁶¹³ and the median price for USP-SME Customers is [...] above the median price for Competitive-SME Customers for different consumption levels.

Figure 16 - Interquartile range of electricity prices paid by SME Customers, 2017

[Price ranges]

Source: Form CO, paragraph 3565

- (650) Third, the competitive landscape differs significantly between SME USP-Customers and SME-Competitive customers. Given that a USP license is required to serve USP customers, only USP providers with a USP license are active in the retail supply of electricity to SME-USP customers and customers wishing to switch to competitors not having a USP license, has to opt out of the USP offers. On the contrary, competitive-SME customers can choose among a wider number of suppliers.⁶¹⁴
- (651) Fourth, if USP and competitive tariffs were to be part of the same relevant market, one would expect to observe switching from USP tariffs to competitive offers when the relative prices of the two changes.⁶¹⁵ However, this does not seem to be the case. [Description of evidence of switching levels following a price change].

Figure 17 - E.ON's relative energy price of Competitive Tariff/USP Tariff and E.ON's switching rate from USP Tariff to the Competitive Tariff in E.ON's DSO area, electricity SME Customers, 2015 – 2017

[Relative prices and switching rates for specific tariffs]

Source: Form CO, paragraph 3569

- (652) Finally, the Commission takes the view that for the purpose of the present analysis the question of the upper threshold of the SME customer market can be left open, as the Commission considers at this stage that the Concentration significantly impedes effective competition irrespective of whether the annual consumption threshold distinguishing SME and large industrial customers is 0.5 GWh or 1 GWh.
- (653) For the purposes of this Decision, the retail supply of electricity to USP-SME customers and the retail supply of electricity to SME-Competitive customers will be regarded as separate product markets.

⁶¹² Almost [...] % of Competitive-SME customers have an annual electricity consumption above [...] MWh, whereas [...] % of USP-SME customers have an annual consumption below this threshold (Form CO, para. 3560 and figure 272).

⁶¹³ Form CO, para. 3563 and figures 273-275.

⁶¹⁴ See section 9.1.3

⁶¹⁵ Form CO, para. 3569 and figures 276-277.

c. Large industrial customers

- (654) The Commission takes the view that the retail supply of electricity to large industrial customers constitutes a separate relevant product market in Hungary for the following reasons.
- (655) First, the procurement process of these customers is different as they source electricity to a large extent via tenders and RFQs. Indeed all respondents to the market investigation indicated that this is their method of selecting their electricity supplier.⁶¹⁶ Consequently, large industrial customers are supplied on an individualised basis and not with standard offerings.⁶¹⁷ All large industrial customers responding to the market investigation indicated that offers designed for this customer segment significantly differ from those for SME customers and the large majority stated that it is not conceivable that it switches to an offering targeting SME customers.⁶¹⁸
- (656) Second, the consumption of large industrial customers is significantly higher than that of SME customers⁶¹⁹ and – as one large industrial customer responding to the market investigation submitted – the consumption curve is much more predictable.⁶²⁰
- (657) Third, the electricity prices⁶²¹ and thus the margins⁶²² achieved by the suppliers differ significantly between SME and large industrial customers.
- (658) Finally, competitors responding to the market investigation indicated that the competitive conditions of supplying large industrial customers differ from those regarding the supply of SME customers.⁶²³ While large industrial customers typically select their supplier based on individualised tender offers, SME select their supplier based on standardised price offers.⁶²⁴
- (659) For the purposes of this Decision, the retail supply of electricity to large industrial customers will be regarded as a separate product market.

9.1.3.2. Geographic market definition

The Commission's decisional practice

- (660) The Commission has previously defined the market for the retail supply of electricity to businesses in Hungary as national while the retail supply to residential customers has been considered as sub-national in scope with each DSO area constituting a distinct relevant geographic market.⁶²⁵

⁶¹⁶ Replies to questionnaire Q10 – Customers (Hungary), question 5. For the sake of completeness, the Commission notes that the Notifying Party estimates that [90-100]% of the large industrial customers procure their electricity via competitive process (Form CO, para. 3576).

⁶¹⁷ Replies to questionnaire Q9 – Competitors (Hungary), question 20.

⁶¹⁸ Replies to questionnaire Q10 – Customers (Hungary), question 7.

⁶¹⁹ In 2017, the median annual electricity consumption of the Parties' Competitive-SME and large industrial customers were [...] MWh and [...] MWh, respectively (Form CO, Table 296).

⁶²⁰ Replies to questionnaire Q10 – Customers (Hungary), question 7.

⁶²¹ The median prices of the Parties Competitive-SME and large industrial customers were respectively [...] EUR/MWh and [...] EUR/MWh (Form CO, Table 296).

⁶²² The median gross margins on the Parties Competitive-SME and large industrial customers were respectively [...] EUR/MWh and [...] EUR/MWh (Form CO, Table 296).

⁶²³ Replies to questionnaire Q9 – Competitors (Hungary), question 19.

⁶²⁴ Replies to questionnaire Q9 – Competitors (Hungary), question 20.

⁶²⁵ COMP/M.3696 – *E.ON/MOL*, paras. 272-279.

The Notifying Party's view

- (661) The Notifying Party submits that the geographic scope of the markets for the retail supply of electricity to residential customers and USP-SME customers depends on the scope of the USP licence that each USP has been granted and as such is limited to the DSO territories.⁶²⁶
- (662) The Notifying Party further notes that the national scope of NKM's licence does not indicate national markets [...].⁶²⁷ The Notifying Party submits that this change has simply created differing conditions for competition in each DSO area as opposed to creating national competition: monopoly in the NKM DSO area, while duopolies in the Parties' DSO area.⁶²⁸
- (663) The Notifying Party further argues that the fact that competitive offerings to residential customers are not limited geographically does not point towards a nationally defined market as the low number of residential customers served competitive offers shows that competitive offers are no longer a plausible alternative for residential customers.⁶²⁹
- (664) The Notifying Party also submits that while the USP regulation is set at a national level, it also defines sub-national areas on the basis of DSO areas.⁶³⁰
- (665) As for the market for the retail supply of electricity to Competitive-SME customers, the Notifying Party submits that it is national in scope for the following reasons. First, competitive providers target customers across the country and not in specific regions. The Notifying Party notes that the Parties' pricing [...] and their electricity prices are [...] across DSO areas.⁶³¹ Second, the market can be characterised by the same incumbent/entry structure and dynamics across all regions, only the identity of the players differs. In addition, there is a number of players who have entered at a national level and have imposed uniform constraint on all incumbents. Finally, the Notifying Party submits that there are no regulatory or other restrictions as to the territories where Competitive-SME customers can purchase their electricity.⁶³²
- (666) With regard to the retail supply of electricity to large industrial customers, the Notifying Party submits that the market is national in scope for the same reasons as described regarding the Competitive-SME customers segment.⁶³³

The Commission's assessment

a. Residential Customers

- (667) The Commission takes the view that the market for the supply of electricity to residential customers is under the current market structure narrower than national, and each of the three DSO areas constitute a separate geographic market.
- (668) The geographic market for supply of electricity to residential customers in Hungary is intrinsically linked to the scope of the USP Licence. Residential customers can only source electricity from the USP provider(s) active in their own area and the USP licences have in general a regional scope. E.ON and Innogy have licences to operate

⁶²⁶ Form CO, para. 3582.

⁶²⁷ Reply to the 6(1)(c) decision, para. 108.

⁶²⁸ Reply to the 6(1)(c) decision, para. 110.

⁶²⁹ Reply to the 6(1)(c) decision, para. 110.

⁶³⁰ Reply to the 6(1)(c) decision, para. 111.

⁶³¹ Form CO, paras. 3584 and 3587.

⁶³² Form CO, para. 3586.

⁶³³ Form CO, paras. 3588-3590.

in different (geographically not overlapping) regions. While NKM license is national in scope, in reality, given that regulation imposes similar prices and quality of service to all USP providers, [...].⁶³⁴

- (669) Therefore, in practice each of E.ON, Innogy and NKM holds *de facto* a monopoly position in the supply of electricity to USP residential customers in their own DSO region. For the purposes of this Decision, the market for the retail supply of electricity to residential customers will be regarded as sub-national in scope and in line with the DSOs regions, such that the region for each DSO constitutes a distinct relevant geographic market.

b. USP-SME Customers

- (670) The Commission takes the view that the market for the supply of electricity to USP-SME customers is under the current market structure narrower than national, with each of the three DSO areas constituting a separate geographic market
- (671) The same arguments set out in recital (668) applies to the supply of electricity to USP-SME customers. Each of the USP providers is *de facto* monopolist in its own DSO region and is essentially not active in other regions. For the purposes of this Decision, the market for the retail supply of electricity to USP-SME customers will be regarded sub-national in scope and in line with the DSOs regions, such that the region for each DSO constitutes a distinct relevant geographic market.

c. Competitive-SME Customers

- (672) The Commission takes the view that the market for the retail supply of electricity to Competitive-SME customers in Hungary is national in scope.
- (673) The Commission considers that the conditions of competition are sufficiently homogeneous to conclude that the market is national.
- (674) First, all suppliers responding to the market investigation indicated that they are active as a retailer across the whole or most of Hungary⁶³⁵ and are uniformly present across the country.⁶³⁶
- (675) Second, prices do not differ to any significant extent between the different DSO areas. Competitors responding to the market investigation submitted that all their products to SME customers have the same net prices across the country⁶³⁷ and that their sales strategy does not differ by area.⁶³⁸ [...].⁶³⁹
- (676) Furthermore, in the market investigation only a very small fraction of the respondents to the questionnaire considered the local presence of the supplier as an important criterion, indicating demand-side substitutability as customers consider feasible to change to suppliers even if they do not have a strong local presence.⁶⁴⁰
- (677) For the purposes of this Decision, the market for the retail supply of electricity to Competitive-SME customers will be regarded national in scope.

⁶³⁴ Form CO, para. 3583.

⁶³⁵ Replies to questionnaire Q9 – Competitors (Hungary), question 23.

⁶³⁶ Replies to questionnaire Q9 – Competitors (Hungary), question 23.

⁶³⁷ Replies to questionnaire Q9 – Competitors (Hungary), question 25.

⁶³⁸ Replies to questionnaire Q9 – Competitors (Hungary), question 28.

⁶³⁹ [...] (Form CO, para. 3584).

⁶⁴⁰ Response to SME/micro-business questionnaire.

d. Large industrial customers

- (678) The Commission takes the view that in line with its precedents, the market for the retail supply of electricity to large industrial customers in Hungary is national in scope.
- (679) Competitors responding to the market investigation indicated that they are active as a retailer across the whole or most of Hungary⁶⁴¹ and are uniformly present across the country.⁶⁴² Furthermore, the majority of competitors responding to the market investigation submitted that all their products to large industrial customers have the same net prices across the country⁶⁴³ and that their sales strategy does not differ by area.⁶⁴⁴
- (680) Moreover, the majority of large industrial customers responding to the market investigation indicated that they procure electricity on a national basis.⁶⁴⁵
- (681) For the purposes of this Decision, the market for the retail supply of electricity to large industrial customers will be regarded national in scope.

9.1.3.3. Conclusion on market definition

- (682) For the purposes of this Decision, the market for the retail supply of electricity to residential customers will be regarded as a separate product market and the market will be regarded as sub-national in scope and in line with the DSOs regions, such that the region for each DSO constitutes a distinct relevant geographic market. The market for the retail supply of electricity to USP-SME customers will be regarded as a separate product market and the market will be regarded sub-national in scope and in line with the DSOs regions, such that the region for each DSO constitutes a distinct relevant geographic market. The market for the retail supply of electricity to Competitive-SME customers will be regarded as a separate product market and the market will be regarded national in scope. The market for the retail supply of electricity to large industrial customers will be regarded as a separate product market and the market will be regarded national in scope.

9.1.4. *Distribution of gas [Gas networks]*

- (683) There are two gas TSOs in Hungary, FGSZ (owned by MOL Nyrt. (“MOL”)) and Hungarian Gas Transit (owned by the Hungarian state via Magyar Gáz Tranzit Zrt. (“MGT”)). MGT is responsible for the Slovakia-Hungary interconnector gas pipeline transit system. The Parties are not active as TSOs in Hungary.
- (684) There are five major gas DSOs operating in Hungary, owned by three utility companies, namely E.ON (EKO and EDD), MET (TIGÁZ) and NKM (FŐGÁZ and ÉGÁZ-DÉGÁZ). Innogy does not operate any gas distribution networks in Hungary, so there is no overlap between the activities of the Parties.
- (685) In relation to distribution networks, and similarly to the distribution of electricity the Commission has consistently found that the market for gas distribution networks is a natural monopoly.⁶⁴⁶ Each gas network is therefore a separate (product and geographic) market as, for any given customer, distribution through one network is

⁶⁴¹ Replies to questionnaire Q9 – Competitors (Hungary), question 23.

⁶⁴² Replies to questionnaire Q9 – Competitors (Hungary), question 23.

⁶⁴³ Replies to questionnaire Q9 – Competitors (Hungary), question 26.

⁶⁴⁴ Replies to questionnaire Q9 – Competitors (Hungary), question 28.

⁶⁴⁵ Replies to questionnaire Q10 – Large customers (Hungary), question 13.

⁶⁴⁶ COMP/M.7778 – Vattenfall/Engie/Gasag, para. 47.

not substitutable with distribution through another. The Commission has previously found the geographic market for gas distribution networks to be sub-national in scope and limited to the relevant distribution network regions, such that the region for each network constitutes a distinct relevant geographic market.⁶⁴⁷

- (686) The Notifying Party concurs with the Commission's decisional practice which is then retained for the purposes of this Decision.

9.1.4.1. Conclusion on *market* definition

- (687) For the purposes of this Decision, distribution networks for gas operated by DSOs will be regarded as a separate product market and the market will be regarded sub-national in scope and in line with the distribution network regions, such that the region for each network constitutes a distinct relevant geographic market.

9.1.5. *Retail supply of gas*

- (688) Similarly to the retail supply of electricity, retail gas markets have also been characterised by a dual structure with both regulated and liberalised segments. The USP Offering may be provided to USP-Eligible Customers in the service areas specified in the operating licence by authorised USP Providers. For gas, USP-Eligible Customers include residential customers and non-residential customers with a purchased capacity not exceeding 20 m³/hour.
- (689) USPs are obliged to supply USP-Eligible customers at the regulated (capped) price and to comply with prescribed service quality requirements. Non-USP eligible customers can be served only with competitive offers. The prices of these are not regulated and therefore determined by the market.
- (690) E.ON and Innogy are both only active in retail supply of gas on the Competitive Offering and are not active as USP suppliers.

9.1.5.1. Product market definition

The Commission's decisional practice

- (691) In previous cases, the Commission has distinguished the following retail gas markets in Hungary⁶⁴⁸: (i) Household/residential customers; (ii) Small industrial and commercial customers (SMEs customers); (iii) Large industrial customers; and (iv) Gas-fired large electricity power plants (installed electricity production capacity above 50 MW).⁶⁴⁹
- (692) The Commission's most recent decision concerning retail gas markets in Hungary distinguished small and large industrial customers on the basis of a gas capacity threshold of 500 m³/h⁶⁵⁰.

The Notifying Party's view

- (693) The Notifying Party submits that in light of the significant changes to the regulatory environment and structure of the retail markets in Hungary, the retail gas supply market in Hungary is better represented by the following market delineation: (i) Residential customers (ii) Industrial/commercial and municipal customers serviced

⁶⁴⁷ COMP/M.7778 – *Vattenfall/Engie/Gasag*, para. 47.

⁶⁴⁸ COMP/M.3696 – *E.ON/MOL*, para. 141; COMP/M.7602 – *Deutsche Telekom Group/MET Holding/JV*, paras. 10 et seq.

⁶⁴⁹ The Parties are not active as suppliers of Gas-fired large electricity Power Plants (E.ON's reply to RFI 66).

⁶⁵⁰ COMP/M.7602 – *Deutsche Telekom Group/MET Holding/JV*, paras. 10 et seq.

by USP Providers (“USP-SME Customers”); (iii) Industrial/commercial and municipal customers serviced by Competitive Providers with a gas capacity below 500 m³/hour (“Competitive-SME Customers”); (iv) Industrial/commercial customers serviced by Competitive Providers with a gas capacity over 500 m³/hour (“Large Customers”); and (v) Gas-fired large electricity power plants serviced by Competitive Providers (being Non-USP Eligible) with installed electricity production capacity above 50 MW (“Gas Power Plants”).

- (694) Therefore, the Notifying Party mostly concurs with the Commission’s decisional practice as regards retail supply of gas, but proposes to distinguish between small industrial and commercial customers serviced by USP and between small industrial and commercial customers serviced by competitive providers.

The Commission's assessment

- (695) The evidence in the Commission's file has not provided any indication that would suggest that departing from the Commission's decisional practice would be appropriate.
- (696) With regards to the distinction proposed by the Notifying Party between USP-SME Customers and Competitive-SME Customers, the exact market definition can be left open, as the competitive assessment would not change. E.ON and Innogy are both only active in retail supply of gas on the Competitive Offering and are not active as USP gas suppliers. On a cautious basis, for the purposes of this Decision, the Commission considers the retail supply of gas to Competitive-SMEs as a separate product market. As the Commission considers that the Concentration does not raise competition concerns in this market, the same finding would also apply to a hypothetical market encompassing both USP-SME Customers and Competitive-SME customers, given that the Parties would inevitably have a smaller position on this hypothetical market.
- (697) For the purposes of this Decision, the retail supply of gas to competitive-SME customers and the retail supply of gas to large industrial customers will be regarded as separate product market.

9.1.5.2. Geographic market definition

The Commission's decisional practice

- (698) The Commission has previously found that the market for the retail supply of gas to end-users in Hungary is national in scope.⁶⁵¹ The GVH has also defined the Hungarian retail supply of gas to end-users as national in scope.⁶⁵²

The Notifying Party's view

- (699) The Notifying Party is of the view that the markets for retail supply of gas to Competitive-SME Customers and Large Customers are national in scope and therefore it concurs with the Commission’s decisional practice.

The Commission's assessment

- (700) The evidence in the Commission's file has not provided any indication that would suggest that departing from the Commission's decisional practice would be appropriate.

⁶⁵¹ COMP/M.3696 – *E.ON/MOL*, paras. 131 et seq.

⁶⁵² Case number VJ/31/2013, para. 72.

- (701) The market investigation also supports that the market for the supply of gas to Large Customers and Competitive-SMEs are national in scope. All suppliers of gas are active across the whole or most of Hungary⁶⁵³ and are uniformly present across the country.⁶⁵⁴ All respondents to the market investigation indicated that they have the same net prices for gas supplied to Competitive-SME customers and to Large Customers across the country⁶⁵⁵. All competitors confirmed that they have similar sales strategy, use the same sales channels, have similar size of sales force and use the same type and intensity of advertising across the country⁶⁵⁶. The overwhelming majority of large customers procure electricity on a national basis. Replies to questionnaire Q10 – Large customers (Hungary), question 13.
- (702) For the purposes of this Decision, the market of gas supply to Competitive-SMEs Customers and Large Customers will be regarded national in scope.
- (703) The Concentration does not give rise to a horizontally affected market as regards the retail supply of gas in Hungary irrespective of the final product market definition retained due to the limited activities of the Parties. Therefore, the Commission will not consider further these markets.

9.1.5.3. Conclusion on market definition

- (704) For the purposes of this Decision, the market for the retail supply of gas to competitive-SME customers will be regarded as a separate product market and the market will be regarded national in scope. The market for the retail supply of gas to large industrial customers will be regarded as a separate product market and the market will be regarded national in scope.

9.1.6. *Street lighting*

- (705) Street lighting services include construction, operation/maintenance, disbursement management and/or renewal/modernisation of street lights in a specific municipality. In Hungary, the construction and operation of street lights can be carried out by third parties, with the latter requiring a specific licence from Hungarian Energy and Public Utility Regulatory Authority (“HEA”). Street lighting services are contracted in service agreements with municipalities. The street lights can be either owned by the municipality or a third party, and ownership of the street lights is not required for the provision of these services. The supply of electricity is not included and is procured separately by the municipality.
- (706) The contract duration depends on the services offered, varying between [...] for pure maintenance and operation contracts and with a [...] in the case of maintenance and renewal/modernisation contracts.

9.1.6.1. Product market definition

The Commission's decisional practice

- (707) The Commission has not previously analysed the market for Street lighting in Hungary.

⁶⁵³ Replies to questionnaire Q9 – Competitors (Hungary), question 81.

⁶⁵⁴ Replies to questionnaire Q9 – Competitors (Hungary), question 81.

⁶⁵⁵ Replies to questionnaire Q9 – Competitors (Hungary), questions 83 and 84.

⁶⁵⁶ Replies to questionnaire Q9 – Competitors (Hungary), question 86.

- (708) In previous cases, the Commission has considered that Street lighting may constitute a separate product market in Germany but left the exact definition ultimately open.⁶⁵⁷

The Notifying Party's view

- (709) The Notifying Party submits that the relevant product market encompasses the construction, operation/maintenance and renewal/modernisation of street lights.
- (710) On the demand and supply side, the same market participants are active in the provision of these services and the services are regularly offered and procured in bundles.

The Commission's assessment

- (711) The market investigation confirmed that there exist a high degree of supply side substitutability. The majority of the respondents to the market investigation confirmed that they offer all services related to street lighting such as construction, operation, maintenance, renewal or modernization of streetlights. The only competitor that indicated is not active in all segments, confirmed that offer several services to its customers. There is no evidence on the Commission's file that suggest that significant barriers exist to expand activities and offer different services related to street lighting.
- (712) The Commission considers that due to the high degree of supply side substitutability, it is not appropriate to further sub-segment the market for street lighting.
- (713) For the purposes of this Decision, Street lighting activities will be regarded as a separate product market.

9.1.6.2. Geographic market definition

The Commission's decisional practice

- (714) The Commission has not previously analysed the market for Street lighting in Hungary.
- (715) In previous cases, the Commission left open the geographic scope of a market for Street lighting in Germany.⁶⁵⁸

The Notifying Party's view

- (716) The Notifying Party submits that the market for street lighting is national in scope, as there is national tendering and the requirements for street lighting are equivalent in all regions in Hungary.

The Commission's assessment

- (717) The market investigation also supports a national market. Competitors are active across the country. Prices are tailored to each project and there is no price differentiation across different parts of Hungary.⁶⁵⁹
- (718) The Commission considers that the market for Street Lighting is national in scope given that competitors are equally active across the country, prices are similar across the country and there are no significant barriers to offer services across the country.
- (719) For the purposes of this Decision, the market of Street lighting in Hungary will be regarded national in scope.

⁶⁵⁷ COMP/M.5467 – *RWE/Essent*, paras. 429 et seq.

⁶⁵⁸ COMP/M.5467 – *RWE/Essent*, paras. 432 et seq.

⁶⁵⁹ Replies to questionnaire 11 – Street Lighting competitors (Hungary), questions 6 and 7.

9.1.6.3. Conclusion on market definition

(720) For the purposes of this Decision, Street lighting activities will be regarded as a separate product market and the market will be regarded national in scope.

9.2. Competitive assessment

9.2.1. Retail supply of electricity

9.2.1.1. Retail supply of electricity to residential customers

a. Market shares

(721) As discussed in the market definition Section, each DSO area is a separate relevant market. In the E.ON's DSO area, E.ON has a share of [90-100]% but Innogy is not present.

Table 9 – Market shares for the retail supply of electricity to residential customers in E.ON's DSO area (volume)

%	2015	2016	2017	2018
E.ON	[90-100]	[90-100]	[90-100]	[90-100]
Innogy	[0-5]	[0-5]	[0-5]	[0-5]
<i>Combined</i>	<i>[90-100]</i>	<i>[90-100]</i>	<i>[90-100]</i>	<i>[90-100]</i>
MVM/NKM ⁶⁶⁰	[0-5]	[0-5]	[0-5]	[0-5]
Magyar Telekom	[0-5]	[0-5]	[0-5]	[0-5]
Others	[0-5]	[0-5]	[0-5]	[0-5]
Total	100	100	100	100

Source: Annex 1 of the Notifying Party's reply to RFI 44

(722) Similarly, Innogy serves almost all USP residential customers in its own DSO area whilst E.ON has only a negligible presence.⁶⁶¹

⁶⁶⁰ As of 23 May 2018 – when Government Regulation No. 94/2018 (V.22) entered into force – MVM and NKM are controlled by the same government entity, namely the Minister Responsible for Managing State Assets (“a nemzeti vagyon kezeléséért felelős tárca nélküli miniszter”). Consecutively, and in line with paras. 192-194 of the Consolidated Jurisdictional Notice, the Commission considers that MVM and NKM belong to the same economic unit, having the same independent power of decision. For consistency reasons, the market shares of MVM and NKM are projected together throughout the presented years in the market shares tables.

⁶⁶¹ E.ON sales in Innogy's area are from competitive offers. However, E.ON is no longer supplying residential customers with competitive tariffs in Hungary.

Table 10 – Market shares for the retail supply of electricity to residential customers in Innogy's DSO area (volume)

%	2015	2016	2017	2018
E.ON	[0-5]	[0-5]	[0-5]	[0-5]
Innogy	[90-100]	[90-100]	[90-100]	[90-100]
<i>Combined</i>	<i>[90-100]</i>	<i>[90-100]</i>	<i>[90-100]</i>	<i>[90-100]</i>
MVM/NKM	[0-5]	[0-5]	[0-5]	[0-5]
Others	[0-5]	[0-5]	[0-5]	[0-5]
Total	100	100	100	100

Source: Annex 1 of the Notifying Party's reply to RFI 44

(723) In NKM DSO area, the Parties are barely present with very negligible sales.

Table 11 – Market shares for the retail supply of electricity to residential customers in NKM's DSO area (volume)

%	2017	2018
E.ON	[0-5]	[0-5]
Innogy	[0-5]	[0-5]
<i>Combined</i>	<i>[0-5]</i>	<i>[0-5]</i>
Total	100	100

Source: Annex 1 of the Notifying Party's reply to RFI 52

b. Horizontal non-coordinated effects

The Notifying Party's view

(724) The Notifying Party submits that in view of the geographic limitation of the Parties' USP licences, the Concentration leads to effectively no overlap between the Parties with regard to the retail supply of electricity to residential customers.⁶⁶² It states that the Parties are not imposing any competitive constraint one another, nor will they in the foreseeable future,⁶⁶³ therefore the Concentration does not raise any competition concern.⁶⁶⁴

(725) The Notifying Party further notes that while the Parties can compete for residential customers via competitive offerings, the extensive regulation prevents such competition.⁶⁶⁵ In this regard the Notifying Party submits that it has terminated its

⁶⁶² Form CO, para. 3596; reply to 6(1)(c) decision, para. 116.

⁶⁶³ Reply to the 6(1)(c) decision, para. 117.

⁶⁶⁴ Reply to the 6(1)(c) decision, para. 116.

⁶⁶⁵ Form CO, para. 3596; reply to the 6(1)(c) decision, para. 116; supplemental response to Commission's theories of harm with respect to Hungary, para. 5.

competitive offers to residential customers, and it states that [...].⁶⁶⁶ The Notifying Party further notes that switching to competitive offers has historically been in effect non-existent and that [...].⁶⁶⁷ It also argues that any supplier could potentially supply residential customers opting out of the USP offers.⁶⁶⁸

- (726) The Notifying Party submits that NKM – having a national USP licence – can and does to a limited extent compete with the Parties for residential customers,⁶⁶⁹ but notes that this is not attributable to NKM’s strategy, but rather to a recent amendment to the regulatory framework in Hungary.⁶⁷⁰ Furthermore, it submits that in light of the fact that price and services are guaranteed for residential customers on USP Offerings, the Parties have observed very limited switching.⁶⁷¹ The Notifying Party further argues that the limited number of USP residential customers serviced by NKM in the Parties’ DSO areas does not translate to genuine competition as the price and the service level is regulated.⁶⁷²
- (727) The Notifying Party further notes that there is no evidence that a national USP licence would be granted to the other players as in order for such licence to be granted the requesting party must have a customer service infrastructure in place sufficient to cover the entire nation. No supplier, but for NKM, can currently offer such a coverage and therefore entry is unlikely and it would in any case take significant time to materialise.⁶⁷³
- (728) The Notifying Party submits that there is no competition on service levels for residential customers in Hungary as service levels are guaranteed by law even when customers are opting out of the USP offering, and as the required service level is already financially burdensome on the suppliers at the regulated price level.⁶⁷⁴

The Commission's assessment

- (729) The activities of the Parties overlap to a very limited extent and do not give rise to an affected market. Moreover, the Commission considers that under the current regulatory framework, the Parties do not compete with each other for the following reasons.
- (730) First, it should be noted that the tight price regulation⁶⁷⁵ effectively removed competitive offers from the market of retail supply of electricity to residential customers. [0-5]% of customers are currently serviced on a competitive offer and the switching rate from USP to competitive offers has been consistently low – under [...] % - during the last three years in both the E.ON and Innogy DSO areas.⁶⁷⁶

⁶⁶⁶ Reply to the 6(1)(c) decision, para. 124.

⁶⁶⁷ Reply to the 6(1)(c) decision, paras. 128-130.

⁶⁶⁸ Reply to the 6(1)(c) decision, para. 131.

⁶⁶⁹ Form CO, paras. 3597-3599.

⁶⁷⁰ Reply to the 6(1)(c) decision, para. 118. In 2017 the USP Licence of NKM, the state-owned electricity USP Provider, was amended to cover the whole country, as opposed to being limited to a specific DSO territory.

⁶⁷¹ Form CO, paras. 3597-3599; supplemental response to Commission’s theories of harm with respect to Hungary, para. 7.

⁶⁷² Reply to the 6(1)(c) decision, para. 122.

⁶⁷³ Reply to the 6(1)(c) decision, para. 120.

⁶⁷⁴ Reply to the 6(1)(c) decision, paras. 133-136; supplemental response to Commission’s theories of harm with respect to Hungary, para. 6.

⁶⁷⁵ On the basis of a profile of an annual average consumption of [...] kWh and the 2018 residential customer prices, the Notifying Party estimates that a price increase of [...] % would be necessary in order to allow a non-negative margin (Form CO, Table 284).

⁶⁷⁶ Annex 2 of supplemental response to Commission’s theories of harm with respect to Hungary, Table 1.

Indeed, when E.ON terminated its competitive offers to residential customers, at least [...] %⁶⁷⁷ of the customers chose the USP offer as opposed to the competitive offer of another supplier.⁶⁷⁸

- (731) Second, based on the geographic scope of their USP licence bound to their respective DSO areas, the Parties' activities do not overlap with regard to USP offers. Even NKM's national activities bring competition to the market only to a limited extent; as of June 2018, NKM was able to attract only [...] customers (below [0-5]%) in the E.ON DSO area and [...] customers (below [0-5]%) in the Innogy DSO area.⁶⁷⁹ This shows that in view of the regulated prices, as well as the regulated service level,⁶⁸⁰ residential customers are unwilling to change customers.
- (732) Therefore, the Commission considers that the current regulatory framework effectively prevents competition between the suppliers and hence the Parties.
- (733) The Commission has also considered whether the Concentration would significantly impede effective competition on the retail residential electricity market by eliminating future competition between the Parties.
- (734) In this regard, the Commission notes that the new Electricity Directive⁶⁸¹ has a clear aim of reducing the scope of price regulation. According to Article 5(1) of the new Electricity Directive “[e]lectricity suppliers shall be free to determine the price at which they supply electricity to customers. Member States shall take appropriate actions to ensure effective competition between electricity suppliers.”
- (735) The new Electricity Directive distinguishes two types of exemptions from the general rule of market-based supply prices. So-called “social tariffs” on the one hand, aim at the protection of energy poor or vulnerable household customers. The price setting shall (i) pursue a general economic interest and not go beyond what is necessary to achieve that general economic interest; (ii) be clearly defined, transparent, non-discriminatory and verifiable; (iii) guarantee equal access for Union electricity undertakings to customers; (iv) be limited in time and proportionate as regards their beneficiaries and (v) not result in additional costs for market participants in a discriminatory way.⁶⁸²
- (736) On the other hand, “blanket regulation” can be applied to households and microbusinesses not benefiting from a social tariff for the purpose of a transition period to establish effective competition for electricity supply contracts between suppliers, and to achieve fully effective market-based retail pricing.⁶⁸³ Such blanket regulation shall (i) be accompanied by a set of measures to achieve effective competition and a methodology for assessing progress with regard to those measures; (ii) be set using a methodology that ensures non-discriminatory treatment of suppliers; (iii) be set at a price that is above cost, at a level where effective price

⁶⁷⁷ [...], such as the proportion of the customers choosing the USP offer is higher than 90% (reply to the 6(1)(c) decision, footnote 52).

⁶⁷⁸ Reply to the 6(1)(c) decision, para. 125.

⁶⁷⁹ Form CO, Tables 297 and 298.

⁶⁸⁰ Such as the availability of walk-in shops and call centre services, contracting obligations, etc. (Form CO, Table 281).

⁶⁸¹ The revised Directive of the European Parliament and of the Council on common rules for the internal market in electricity was approved by the European Parliament on 26 March 2019. Following the parliamentary approval, the Council of Ministers of the EU have to formally approve the text of the Directive, after which the new law will be published in the Official Journal of the European Union.

⁶⁸² Article 5(4) of the new Electricity Directive.

⁶⁸³ Article 5(6) of the new Electricity Directive.

competition can occur; (iv) be designed to minimise any negative impact on the wholesale electricity market; (v) ensure that all beneficiaries have the possibility to choose competitive market offers and are directly informed of the availability of offers and savings on the competitive market, and shall ensure that they are provided with assistance to switch to a market-based offer, (vi) ensure that all beneficiaries are entitled to, and are offered to, have smart meters installed at no extra upfront cost to the customer, are directly informed of the possibility to install smart meters and are provided with necessary assistance; and (vii) not lead to direct cross-subsidisation between customers supplied at free market prices and those supplied at regulated supply prices.⁶⁸⁴

- (737) The Commission considers that as the Member States have to transpose the new Electricity Directive by the end of 2020, its impact on the Hungarian retail electricity regulation and thus on the market for the supply of electricity to residential customers should be taken into account in the analysis of the Concentration.
- (738) In the framework of the new Electricity Directive, the current regulation in Hungary can be considered as a blanket price regulation, as it is applicable to all households, without taken into account their vulnerability or energy poverty. Subsequently, and in line with Article 5(7) of the new Electricity Directive, it can be maintained only for a transition period and that during the transitional period the price cap has to be adjusted to a level that allows for competition to take place.
- (739) The Commission therefore considers that after the transposition of the new Electricity Directive⁶⁸⁵, regulation may no longer completely prevent competition in the market for the retail supply of electricity to residential customers in Hungary. Indeed, according to its Article 5, the directive opens the way, after proper reporting on the necessity and proportionality of public intervention in the price setting for the supply of electricity, to a legislative proposal by 31 December 2025 for the purpose of achieving market-based retail pricing of electricity. Also, although Member States can maintain a price regulation in place during the transitional period, the price cap should be fixed at a level where effective price competition can occur.
- (740) However, the Commission considers that in this future competition framework, the Parties will not have any significant advantage with regards to other competitors to expand beyond their DSO areas. [...].⁶⁸⁶
- (741) On the basis of the market investigation, the Commission considers that a physical presence with shops and sales force on the ground,⁶⁸⁷ a well-known brand, and customer contact details are all important factors to successfully operate as a retailer. The Parties have an established presence, a strong brand and a large base of residential customers in their historical areas. However, outside their DSO areas they would need to do significant investments to create a network of walk-in shops and sales forces, they may also need to invest in marketing activities as it is unclear whether their brand is as strong as it is in its own area, and, as any new entrant, they would lack contact details to approach customers as they are not active in the supply

⁶⁸⁴ Article 5(7) of the new Electricity Directive.

⁶⁸⁵ DIRECTIVE (EU) 2019/944 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 5 June 2019 on common rules for the internal market for electricity and amending Directive 2012/27/EU (recast).

⁶⁸⁶ Email from Linklaters, 21 June 2019, 21:10, and RFI 62 to Innogy.

⁶⁸⁷ A competitor indicated that customers in Hungary prefer personal contact, therefore physical shops are important. Minutes of a conference call with a competitor, 26 March 2019 (ID3769), para. 6.

of gas to residential customers either. Therefore, even if the Parties were to consider expanding their activities beyond their DSO areas, the Parties do not have any particular advantage compared to other competitors.

- (742) In support of this, the Commission notes that the large majority of competitors responding to the Commission market test are of the opinion that if the USP-residential customers business of E.ON were divested, the Purchaser of the Divestment Business will not have the ability and the incentives to expand beyond E.ON's DSO area to grow its regulated customer base.⁶⁸⁸ One competitor, for example, explains that no significant economies of scale can be achieved through expansion. Others insisted on the lack of infrastructure (shops) as a major barrier to expansion expand.⁶⁸⁹
- (743) [Description of future strategy].⁶⁹⁰ This casts further doubts as to the likelihood that, even absent the merger, the Parties would [...] expand outside their own DSO area.
- (744) Based on the above, the Commission considers that any potential entry of the Parties into the supply of electricity to residential customers outside of their incumbent DSO areas is neither sufficient, likely, nor timely.

c. Conclusion on horizontal non-coordinated effects in the market for the retail supply of electricity

- (745) The Commission therefore concludes that the Concentration would not significantly impede effective competition as a result of horizontal non-coordinated effects arising from the overlaps in the activities of the Parties in the markets for the retail supply of electricity to residential customers in Hungary.

9.2.1.2. Retail supply of electricity to USP-SME Customers

a. Market shares

- (746) Similarly to residential customers, the Parties are essentially active only in their own DSO area and therefore their activities do not overlap in the relevant markets (DSO areas).

Table 12 – Electricity market shares in the E.ON EKER DSO area, USP-SME Customers, 2015 – 2017 (number of PODs)

Company	Market shares		
	2015	2016	2017
E.ON	[90-100]%	[90-100]%	[90-100]%
NKM	[0-5]%	[0-5]%	[0-5]%
Total	100%	100%	100%

Source: Compass Lexecon using E.ON DSO data.

⁶⁸⁸ Replies to questionnaire Q17 – Commitments – Competitors (Hungary), question 23.

⁶⁸⁹ Replies to questionnaire Q17 – Commitments – Competitors (Hungary), question 24.

⁶⁹⁰ Email from Linklaters, 21 June 2019, 21:10, and RFI 62 to Innogy.

Table 13 – Electricity market shares in the Innogy DSO area, USP-SME Customers, 2015 – 2017 (number of PODs)

Company	Market Shares		
	2015	2016	2017
Innogy	[90-100]%	[90-100]%	[90-100]%
NKM	[0-5]%	[0-5]%	[0-5]%
Total	100%	100%	100%

Source: Compass Lexecon using Innogy DSO data.

b. Horizontal non-coordinated effects

The Notifying Party's view

- (747) The Notifying Party submits that with regard to USP-SME customers, the Parties' activities do not overlap due to the geographic limitation of their USP licences and that there is only a limited competition with NKM in this regard.⁶⁹¹

The Commission's assessment

- (748) The activities of the Parties do not overlap in the USP-SME customers market. Moreover, the Commission considers that under the current regulatory framework, the Parties do not compete with each other for the same reasons that they do not compete in the retail supply of electricity to residential customers.⁶⁹²
- (749) As regards potential competition and the effects of the new Electricity Directive, the same considerations for residential customers apply *mutatis mutandis* to USP-SME customers.⁶⁹³
- (750) Moreover, similarly to the market for the supply electricity to residential customers, the extensive review of a very large sample of internal documents of the Parties by the Commission did not provide any indication that E.ON or Innogy have plans to expand their activities beyond their own DSO areas, [...].⁶⁹⁴
- (751) Finally, similarly to the residential customers market, respondents to the market test consider that suppliers would not have the incentives or would not be able to enter the market for USP-SME customers after the implementation of the new Electricity Directive. Moreover, half of the respondents consider that the Parties would also not start providing electricity to USP-SME customers outside their DSO areas after the implementation of the new Electricity Directive.⁶⁹⁵ In the same vein, the majority of competitors are of the view that if the USP-SME customers business of E.ON were divested, the Purchaser of the Divestment Business would not have the ability and the incentives to expand beyond E.ON's DSO area to grow its regulated customers base.⁶⁹⁶

⁶⁹¹ Form CO, para. 3603, reply to the 6(1)(c) decision, paras. 142-143.

⁶⁹² See section 9.2.1.1

⁶⁹³ See section 9.2.1.1

⁶⁹⁴ Internal documents submitted in response to RFI 45 and RFI 46.

⁶⁹⁵ Replies to questionnaire Q17 – Commitments – Competitors (Hungary), questions 21 and 22.

⁶⁹⁶ Replies to questionnaire Q17 – Commitments – Competitors in (Hungary), question 23.

(752) Based on the above, the Commission considers that any potential entry of the Parties into the supply of electricity to USP-SME customers outside of their incumbent DSO areas is neither sufficient likely, nor timely.

c. Conclusion on horizontal non-coordinated effects in the market for the retail supply of electricity

(753) The Commission therefore concludes that the Concentration would not significantly impede effective competition as a result of horizontal non-coordinated effects arising from the activities of the Parties in the markets for the retail supply of electricity to USP-SME customers in Hungary.

9.2.1.3. Retail supply of electricity to SME-Competitive customers

a. Market shares

(754) The Parties have a large combined market share of [40-50]% with an increment of [20-30]%.

Table 14 – Market shares for the retail supply of electricity to Competitive-SME customers below 0.5 GWh annual consumption at national level (volume)

%	2016	2017	2018
E.ON	[20-30]	[20-30]	[20-30]
Innogy	[20-30]	[20-30]	[20-30]
<i>Combined</i>	<i>[40-50]</i>	<i>[40-50]</i>	<i>[40-50]</i>
MVM/NKM	[30-40]	[30-40]	[30-40]
E2	[5-10]	[0-5]	[0-5]
Others	[5-10]	[10-20]	[10-20]
Total	100	100	100

Source: Annex 1 of the Notifying Party's reply to RFI 44

Table 15 – Market shares for the retail supply of electricity to Competitive-SME customers below 1 GWh annual consumption at national level (volume)

%	2017	2018
E.ON	[20-30]	[20-30]
Innogy	[20-30]	[10-20]
<i>Combined</i>	<i>[40-50]</i>	<i>[40-50]</i>
MVM/NKM	[30-40]	[40-50]
E2	[0-5]	[0-5]
Others	[10-20]	[10-20]
Total	100	100

Source: Annex 2 of the Notifying Party's reply to RFI 52

b. Horizontal non-coordinated effects

The Notifying Party's views

- (755) With regard to Competitive-SME customers, the Notifying Party submits that the Concentration does not raise competition concerns as their national market shares overestimate their market position and incorrectly suggest a uniform presence across the country, and, therefore, fail to correctly reflect the true reality of incumbent/competitive entrant dynamics in the different DSO areas.⁶⁹⁷
- (756) Furthermore, the Notifying Party argues that the Parties are not each other's closest competitors and that [...], the state-owned MVM's aggressive pricing strategy has secured its position as the closest competitor of the Parties. Moreover, other competitors such as NKM and E2 exert significant competitive constraint on the Parties.⁶⁹⁸ As such, the Notifying Party argues that the Concentration would not create a duopolistic market structure, at either national or local level.⁶⁹⁹

The Commission's assessment

- (757) The Commission considers that the Concentration would significantly impede effective competition with regard to the retail supply of electricity to Competitive-SME customers in Hungary for the following reasons.
- (758) First, the Concentration would create a market structure with only two large suppliers – the merged entity and MVM/NKM – followed by significantly smaller suppliers. The merged entity ([40-50]/[40-50]) and the state-owned MVM/NKM ([30-40]/[40-50]) would account together for [80-90]% of the supply. The second largest supplier E2 ([0-5]/[0-5]) is only a fraction of the Parties' and NKM's size. A similar market structure can be observed also in each of the Parties' DSO areas.
- (759) Second, the Commission considers that the Parties exert a significant competitive pressure to each other. Competitors responding to the market investigation indicated that the Parties are close competitors in the supply of electricity to SME customers at national level.⁷⁰⁰ Even among those customers who have not switched suppliers recently, the incumbents (E.ON, Innogy and MVM/NKM) are perceived as credible suppliers to a larger extent than other retailers.⁷⁰¹ The tender data submitted by the Parties⁷⁰² confirms that they compete closely. The Parties very often meet in public tenders⁷⁰³ and are the runner-up after each other in a large proportion of tenders. [Description of tenders analysis].
- (760) Third, the Commission considers that barriers to entry to the market for retail supply of electricity to Competitive-SME customers in Hungary are not insignificant. The online sales channel is not yet much developed, most sales still take place offline and therefore an established sales infrastructure is necessary to operate successfully in the

⁶⁹⁷ Form CO, paras. 3606-3631; reply to the 6(1)(c) decision, paras. 155-157.

⁶⁹⁸ Form CO, paras. 3606-3631; reply to the 6(1)(c) decision, paras. 151-154.

⁶⁹⁹ Reply to the 6(1)(c) decision, paras. 147-150.

⁷⁰⁰ Replies to questionnaire Q9 – Competitors (Hungary), questions 35-37.

⁷⁰¹ Response to SME/micro-business questionnaire.

⁷⁰² Reply to RFI 55. The public tender data is comprised of two sources: E.ON's tender data, which includes all public tenders of interest for E.ON; and Innogy's tender data, which contains information on public tenders won by Innogy. The data covers the period 2015-2018. The parties did not provide a comprehensive dataset for private tenders.

⁷⁰³ [Description of tender analysis].

market.⁷⁰⁴ Also, as a competitor explained, “[i]n order to supply SMEs, a company needs a specific IT system, operating call centres, good invoicing and a large marketing investment to make the brand known.”⁷⁰⁵

(761) The Commission considers that the Concentration would eliminate an important competitive constraint in the market and would create a duopolistic market structure that would be harmful for competition.

c. Conclusion on horizontal non-coordinated effects in the market for the retail supply of electricity

(762) The Commission, therefore, concludes that the Concentration would significantly impede effective competition as a result of horizontal non-coordinated effects arising from the overlap in the activities of the Parties in the market for the retail supply of electricity to Competitive-SME customers in Hungary.

9.2.1.4. Retail supply of electricity to large industrial customers

a. Market shares

(763) The Parties achieve a high combined market share nationally, irrespective of whether large industrial customers should be defined as having an annual electricity consumption above 0.5 GWh or 1 GWh.

Table 16 – Market shares for the retail supply of electricity to large industrial customers above 0.5 GWh annual consumption at national level (volume)

%	2017	2018
E.ON	[20-30]	[20-30]
Innogy	[10-20]	[10-20]
<i>Combined</i>	<i>[40-50]</i>	<i>[40-50]</i>
MVM/NKM	[20-30]	[20-30]
E2	[5-10]	[5-10]
Others	[20-30]	[20-30]
Total	100	100

Source: Annex 1 of the Notifying Party’s reply to RFI 44

⁷⁰⁴ Response to SME/micro-business questionnaire.

⁷⁰⁵ Minutes of a conference call with a competitor on 3 April 2019 (ID4156), para. 4.

Table 17 – Market shares for the retail supply of electricity to large industrial customers above 1 GWh annual consumption at national level (volume)

%	2017	2018
E.ON	[20-30]	[20-30]
Innogy	[10-20]	[10-20]
<i>Combined</i>	<i>[40-50]</i>	<i>[40-50]</i>
MVM/NKM	[20-30]	[20-30]
E2	[5-10]	[5-10]
Others	[20-30]	[20-30]
Total	100	100

Source: Annex 2 of the Notifying Party's reply to RFI 52

b. Horizontal non-coordinated effects

The Notifying Party's view

- (764) The Notifying Party submits that the Concentration does not lead to competition concerns as regards the retail supply of electricity to large industrial customers because large industrial customers are engaged, price-sensitive customers characterised by high switching rates; the Parties face strong competition from several nationally active players and they are not each other's closest competitors.⁷⁰⁶
- (765) The Notifying Party further argues that tender analysis shows that the market is characterised by more than just three suppliers and that the Parties do not exert significant competitive constraint on each other.⁷⁰⁷

The Commission's assessment

- (766) The Commission considers that the Concentration would significantly impede effective competition with regard to the retail supply of electricity to large industrial customers in Hungary for the following reasons.
- (767) First, the Concentration would create a market structure with only two large suppliers – the merged entity ([40-50]%) and MVM/NKM ([20-30]%/[20-30]%) – followed by significantly smaller suppliers. The largest of these challengers, E2 ([5-10]%/[5-10]%), is almost [...] time smaller than the merger increment.
- (768) Second, the Parties compete closely and exert a significant competitive constraint on each other. The Commission has analysed the tender data provided by the Notifying Party⁷⁰⁸ which include information on almost [...] public tenders that took place in Hungary between 2015 and 2018.⁷⁰⁹

⁷⁰⁶ Form CO, paras. 3633-3654; reply to the 6(1)(c) decision, paras. 164-170.

⁷⁰⁷ Reply to the 6(1)(c) decision, paras. 173-179.

⁷⁰⁸ In reply to RFI 55, the Commission used the cleaned database "Expanded data on public tenders in Hungary.dta" (Annex 2) as the basis for the tender analysis. The public tender data is comprised of two sources: E.ON's tender data, [...]; and Innogy's tender data, [...]. The data covers the period 2015 - 2018. The parties did not provide a comprehensive dataset for private tenders. According to a

- (769) The Parties competed very often in tenders. [Description of tender analysis].⁷¹⁰ [Description of tender analysis].⁷¹¹ [Description of tender analysis].⁷¹² [...] * average, there were [0-5] bidders per tender.⁷¹³ Considering that both Parties bid for the vast majority of the tenders, the merger could significantly reduce the number of bidders per tender, on average from [...].
- (770) The Commission also examined instances where E.ON and Innogy were successful to determine who would have been the second choice. On a ranking based on bids, Innogy would have been the runner up in approximately [20-40]% of instances where E.ON won.⁷¹⁴ ⁷¹⁵ Similarly, in the tenders won by Innogy, E.ON placed the second lowest bid in approximately [...] of them.⁷¹⁶ ⁷¹⁷
- (771) Moreover, the market investigation indicates that the three incumbents have a competitive advantage vis-à-vis other suppliers in that they can serve all types of customers while smaller players have difficulties to serve some customers.⁷¹⁸ For instance with regard to public tenders a competitor explains that they “*require more administrative capacities and the ability to manage long-term fixed price contracts. Smaller competitors are more exposed to the risk of wholesale price volatility compared to competitors with a larger portfolio and financial strength.*”⁷¹⁹ Multi-site customers⁷²⁰ are also more difficult to serve because they typically require complex billing systems that some smaller players do not have.⁷²¹ Also, large customers may require significant financial guarantees which only large suppliers can offer: “*very large customers (above 100 GWh power consumption) have a preference for large electricity suppliers with solid financial background.*”⁷²²
- c. Conclusion on horizontal non-coordinated effects in the market for the retail supply of electricity
- (772) The Commission therefore concludes that the Concentration would significantly impede effective competition as a result of horizontal non-coordinated effects arising from the overlap in the activities of the Parties in the market for the retail supply of electricity to large industrial customers in Hungary.

competitor, public tenders represent a third of all tenders in Hungary, minutes of conference call with a competitor on 22 May 2019 (ID4992) para. 5.

709 [...] tenders were for companies below 1 GWh annual electricity consumption. Analysis of such tenders was included in the Competitive assessment of competitive SME segment.

710 [...].

711 [...].

712 [...].

* Should read: “On”.

713 [...].

714 Tenders with at least one other participant.

715 [...].

716 Tenders with at least one other participant.

717 [...].

718 Minutes of a conference call with a competitor, 22 May 2019 (ID4992).

719 Minutes of a conference call with a competitor, 23 May 2019, (ID4975).

720 Customers with several businesses locations and which require different invoices for each site, like for example banks.

721 Minutes of a conference call with a competitor, 23 May 2019, (ID4975); minutes of a conference call with a competitor, 22 May 2019 (ID4992).

722 Minutes of a conference call with a competitor, 22 May 2019 (ID4992).

9.2.1.5. Conclusion on the retail supply of electricity in Hungary

(773) For the reasons set out above, the Commission considers that the Concentration would significantly impede effective competition in the markets for the retail supply of electricity to Competitive-SME customers and the retail supply of electricity to large industrial customers in Hungary.

9.2.2. Electricity generation and wholesale supply of electricity

(774) E.ON and Innogy's activities in generation and wholesale supply are minimal.

(775) E.ON EK has limited electricity generation activities in Hungary.⁷²³ E.ON EK generates electricity through wind power and small gas power plants. E.ON's total capacity in electricity generation is c. [...] MW, with a production volume of [...] TWh in 2017.⁷²⁴

(776) Innogy is not active in generation but does have some limited activities in selling electricity to resellers in Hungary.⁷²⁵

(777) On the Hungarian market for electricity generation, the market shares of the Parties are illustrated in Table 18.

Table 18 – Parties' market shares estimates – Electricity generation in Hungary for 2015-2017

Company	Production volumes (TWh)						Capacity volumes (MW)					
	2015		2016		2017		2015		2016		2017	
E.ON	[...]	[0-5]%	[...]	[0-5]%	[...]	[0-5]%	[...]	[0-5]%	[...]	[0-5]%	[...]	[0-5]%
MVM	[...]	[50-60]%	[...]	[50-60]%	[...]	[40-50]%	[...]	[40-50]%	[...]	[40-50]%	[...]	[40-50]%
EDF S.A.	[...]	[0-5]%	[...]	[0-5]%	[...]	[0-5]%	[...]	[5-10]%	[...]	[0-5]%	[...]	[0-5]%
Veolia	[...]	[0-5]%	[...]	[0-5]%	[...]	[0-5]%	[...]	[0-5]%	[...]	[0-5]%	[...]	[0-5]%
RWE/Opus Global	[...]	[20-30]%	[...]	[10-20]%	[...]	[10-20]%	[...]	[10-20]%	[...]	[10-20]%	[...]	[10-20]%
MET Power AG	[...]	[0-5]%	[...]	[0-5]%	[...]	[0-5]%	[...]	[10-20]%	[...]	[10-20]%	[...]	[10-20]%
EPH	[...]	[0-5]%	[...]	[0-5]%	[...]	[0-5]%	[...]	[0-5]%	[...]	[5-10]%	[...]	[5-10]%
Alpiq	[...]	[0-5]%	[...]	[0-5]%	[...]	[0-5]%	[...]	[5-10]%	[...]	[5-10]%	[...]	[5-10]%
Uniper	[...]	[0-5]%	[...]	[0-5]%	[...]	[5-10]%	[...]	[5-10]%	[...]	[5-10]%	[...]	[5-10]%
Other	[...]	[10-20]%	[...]	[10-20]%	[...]	[20-30]%	[...]	[5-10]%	[...]	[10-20]%	[...]	[10-20]%
Overall market volume	[...]	100.00%	[...]	100%	[...]	100%	[...]	100%	[...]	100%	[...]	100%

Source: Form CO, para. 3436.

(778) According to statistics published by HEA, the size of the combined electricity generation and wholesale market is much larger, amounting to 323 TWh.⁷²⁶ The

⁷²³ E.ON EK's turnover attributed to generation and wholesale supply of electricity in Hungary amounted to approximately EUR [...] million in 2017 (EUR [...] million in 2016 and EUR [...] million in 2015). E.ON EKER's revenue from wholesale activities in Hungary amounted to approximately EUR [...] million in 2017 (EUR [...] million in 2016 and EUR [...] million in 2015).

⁷²⁴ Form CO, Para. 3425.

⁷²⁵ Innogy's turnover attributable to generation and wholesale supply of electricity in Hungary amounted to approximately EUR [...] million in 2017 (EUR [...] million in 2016 and EUR [...] million in 2015).

⁷²⁶ See: <http://mekh.hu/villamosenergia-ipari-tarsasagok-adatai>.

Parties are unable to provide wholesale activities broken down by the relevant players. However, the wholesale activities of the Parties are minimal, with Innogy selling just [...] TWh of electricity at the wholesale level in 2017 and E.ON supplying just [...] TWh. Therefore, the combined market share of the Parties would be approximately [0-5] %.

- (779) The Concentration does not give rise to a horizontally affected market as regards electricity generation and wholesale supply in Hungary under any market definition due to the limited activities of the Parties. Therefore, the Commission will not consider further this market with regards to horizontal effects.

9.2.3. *Distribution of electricity [Electricity networks]*

- (780) E.ON is active in the operation of electricity distribution networks⁷²⁷ through the following three entities which operate electricity distribution networks in Hungary: E.ON EDE, E.ON ETI and E.ON EED. Each entity has a licence to operate and manage the distribution network in a specified region, particularly in Western Hungary and the middle part of Eastern Hungary around the cities of Szolnok, Debrecen and Nyíregyháza. E.ON's turnover attributed to distribution networks in Hungary amounted to approximately EUR [...] in 2017.
- (781) Within the Innogy group, ELMŰ and ÉMÁSZ each have a licence to operate and manage the distribution network in the city of Budapest and its surrounding areas, and in the North-East of Hungary respectively. Innogy's turnover attributed to distribution networks in Hungary amounted to approximately EUR [...] in 2017.
- (782) Given that each network constitutes a distinct relevant geographic market, the activities of the Parties do not overlap due to the geographic restrictions in the distribution licences and each network constitute a natural monopoly. There are six electricity DSOs in Hungary, owned by three utility companies as indicated in the table below.

⁷²⁷ The Parties also provide meters, smart meters and associated services to Residential Customers and SME Customers located within their respective DSO territories. Metering activities in Hungary are carried out as part of a core and mandatory activity of each DSO in its territory, with each DSO having a statutory monopoly on metering services within its licence area. Smart metering activities in Hungary are carried out by DSOs pursuant to the government "KOM" Central Smart Metering Project, which puts the Hungarian DSOs under an obligation to install (and maintain) smart meters for all customers who have opted for the service in its territory. The Parties' activities are limited to their DSO territories. These obligations apply equally to all DSOs across Hungary. Customers obtain metering services only from their gas/electricity DSO and therefore do not exercise choice between metering suppliers when obtaining metering services. Since customers have no choice which DSO they are connected to, customers also have no choice regarding the supplier of their meter. Pricing is set by the HEA such that each DSO charges a fee for installing smart meters which covers costs plus a regulated margin. E.ON and Innogy (in their capacity as DSOs) are mandated by regulation to provide such services to customers within their respective DSO territories. Therefore, the activities of the parties as meters providers are linked to their activities as DSO operators, which do not overlap geographically. As a consequence the activities of the Parties related to meters and smart meters do not overlap horizontally and will not be considered further in this Decision.

Table 19 – Hungarian electricity DSOs and owners⁷²⁸

DSO	Issue Date	Expiry Date	Owner
E.ON Dél-dunántúli Áramhálózati Zrt. (“ E.ON EDE ”)	1 January 2003	1 January 2028	E.ON
E.ON Észak-dunántúli Áramhálózati Zrt. (“ E.ON EED ”)	1 January 2003	1 January 2028	E.ON
E.ON Tiszántúli Áramhálózati Zrt. (“ E.ON ETT ”)	1 January 2003	1 January 2028	E.ON
ELMŰ Hálózati Kft. (“ ELMŰ ”)	28 December 2006	1 January 2032	Innogy
ÉMÁSZ Hálózati Kft. (“ ÉMÁSZ ”)	28 December 2006	1 January 2032	Innogy
NKM Áramhálózati Kft. (“ NKM DSO ”)	27 December 2006	1 January 2032	NKM

(783) The Concentration does not give rise to a horizontally affected market as regards distribution networks for lower voltage levels operated by DSOs in Hungary. Therefore, the Commission will not consider further this market with regards to horizontal effects.

9.2.4. Gas Networks

(784) E.ON is active in the operation of low- and medium-pressure gas distribution pipeline networks operated by DSOs through the following two entities: E.ON Dél-dunántúli Gázhálózati Zrt. (“**E.ON EDD**”), operating East of Budapest in the middle part of Hungary, and E.ON Közép-dunántúli Gázhálózati Zrt. (“**E.ON EKO**”), operating around lake Balaton in the mid-eastern part of Hungary. Both companies primarily operate their gas distribution pipelines, connecting new customers to the network and maintaining the service standards as prescribed by Hungarian regulatory requirements.

(785) Innogy has no gas distribution networks in Hungary, so there is no overlap between the activities of the Parties.

(786) The regulatory framework for gas largely mirrors that for electricity. Gas distribution activities are subject to licensing under Act No. XL of 2008 on Gas Supply. Each entity has a licence to operate and manage the distribution network in a specified region.

(787) Given that each network constitutes a distinct relevant geographic market, each network constitute a natural monopoly. There are five major gas DSOs operating in Hungary, owned by three utility companies, namely E.ON (EKO and EDD), MET (TIGÁZ) and NKM (FŐGÁZ and ÉGÁZ-DÉGÁZ), as can be seen in the figure below:

⁷²⁸

Form CO, para. 3442.

Figure 18 - Hungarian gas DSOs



Source: Form CO paragraph 3665

(788) The activities of the Parties do not overlap horizontally as regards of low- and medium-pressure gas distribution pipeline networks operated by DSOs in Hungary. Therefore, the Commission will not consider further this market with regards to horizontal effects.

9.2.5. *Street lighting*

(789) E.ON provides the complete set of street lighting services (installation, operation/maintenance and renewal/modernisation). E.ON operates in total approximately [...] lighting points. Innogy is active in the street lighting segment with a total of approximately [...] lighting points.

(790) There are approximately 1.3 million street lights installed in Hungary. Based on the number of street lights, E.ON and Innogy together have a combined market share of approximately [30-40]%.⁷²⁹

The Notifying Party's view

(791) The Notifying Party is of the view that no concerns arise by the Concentration for street lighting activities due to the large number of competitors active in this sector such as energy companies or large specialized street lighting companies such as WATT ETA Kft., VILL-KORR Hungária Kft., Fényhozam Közvilágítás Üzemeltető and Karbantartó Kft. In addition, there are a number of additional players which specialise in lighting services involving renewal/modernisation, for example GREP Group, NEG Zrt., ENERIN Kft., SMVH Kft., U LIGHT Esco Kft., Lux Invest Kft., Mezeivill Kft., ELIOS Kft., LED REFORM Kft. which are also active on a national basis.

The Commission's assessment

(792) The market investigation supports in general the Notifying Party's view that the Transition will not significantly impede competition in Hungary in the market for street lighting.⁷³⁰

⁷²⁹ Form CO, para. 3725.

⁷³⁰ For completeness, the activities of the Parties also overlap horizontally in relation to the development, construction and maintenance of lighting services for some private entities. The activities of the Parties are limited in this business line. E.ON generated a turnover of EUR [...] turnover in 2017. On any plausible market definition, E.ON's market share is [0-5]%. Innogy generated [...] in 2017. Therefore

- (793) The majority of the respondents consider that there are no services of the street lighting business in Hungary in respect of which E.ON and Innogy compete particularly closely and for which there are limited alternatives to the Parties.⁷³¹ In the same vein, the majority of respondents to the market investigation are of the opinion that the prices will remain the same after the Concentration.⁷³²
- (794) The Commission considers that, due to sufficient alternatives to the Parties available post-Concentration, the moderate combined market share of the merged entity and in view of the results of the market investigation, the Concentration will not significantly impede effective competition as a result of horizontal non-coordinated effects in street lighting in Hungary.
- (795) The Commission therefore concludes that the Concentration would not significantly impede effective competition as a result of horizontal non-coordinated effects arising from the overlaps in the activities of the Parties in the markets for street lighting in Hungary.

9.3. Vertical non-coordinated effects

- (796) The activities of the Parties lead to a number of vertical relations which are analysed below.⁷³³

9.3.1. *Generation and wholesale supply of electricity (upstream) – retail supply of electricity (downstream)*

- (797) Generation and wholesale supply of electricity is a vertically affected market in relation to the retail supply of electricity in Hungary, as the combined market shares of the merged entity would be above 30% in the retail supply of electricity to USP customers, the retail supply of electricity to SMEs and the retail supply of electricity to large customers. The reasoning below applies to the different markets for the retail supply of electricity in Hungary mutata mutandis.

9.3.1.1. Input foreclosure

- (798) E.ON does not have the ability to foreclose downstream retail competitors.

no affected markets arise under any plausible market definition and the Commission will not consider further these plausible markets.

⁷³¹ Replies to questionnaire 11 – Street Lighting competitors (Hungary), question 9.

⁷³² Replies to questionnaire 11 – Street Lighting competitors (Hungary), question 13 and Replies to questionnaire Q9 – Competitors (Hungary), question 159.

⁷³³ The Notifying Party submits that some power generation is connected to the distribution grid. Therefore, there is possibly an additional vertical link between the Parties' distribution and generation/wholesale activities. The Commission considers, however, that the Concentration does not materially alter the ability or the incentives of the Parties to foreclose competitors in the downstream market (no foreclosure can occur in the upstream market as DSOs are monopolist in their own distribution network and there is no competition in the market). First the ability to foreclose is unaltered by the Concentration because the Parties, where they are DSOs are monopolist, and will remain such post-merger. Second, the incentives to foreclose are not materially altered either as the Parties have a very limited position in the generation and wholesale market and the merger does not lead to any significant increment. Therefore the extent to which the Parties would be able to capture sales lost by (possibly) foreclosed competitors does not significantly change with the merger and as a consequence the Concentration is unlikely to materially increase the Parties' incentives to foreclose access to their distribution grid. The Commission concludes that the Concentration would not significantly impede effective competition as a result of vertical non-coordinated effects arising from vertical links between the upstream market for distribution network operation and the downstream market of generation and wholesale supply of electricity in Hungary.

- (799) First, input foreclosure would require E.ON to have market power on the electricity generation and wholesale supply market. However the combined market share of the merged entity is [0-5]% in electricity generation in Hungary and approximately [0-5]% in a market encompassing electricity generation and wholesale market.
- (800) Finally, all electricity currently produced by E.ON EK is sold [...].⁷³⁴ MVM is the clear market leader in electricity generation in Hungary with a market share of approximately 50%. Therefore, the volumes sourced from the merged entity are very low compared to its actual production.

9.3.1.2. Customer foreclosure

- (801) E.ON has neither the ability nor the incentive to foreclose competing electricity generators and wholesale suppliers.
- (802) The merged entity can cover with its internal production only [10-20]% of its electricity requirements in the downstream markets and Innogy is not active in the production of electricity.⁷³⁵ Therefore, the merged entity should continue purchasing in the market the vast majority of its electricity volumes.
- (803) The merged entity does not have the incentives to reduce its purchases of electricity upstream, as this would result in enormous lost sales and profits in the downstream markets.

9.3.1.3. Conclusion

- (804) The Commission therefore concludes that the Concentration would not significantly impede effective competition as a result of vertical non-coordinated effects arising from vertical links between the upstream market for generation and wholesale supply of electricity in Hungary and the downstream markets for the retail supply of electricity in Hungary.

9.3.2. *Distribution networks for lower voltage levels operated by DSOs (upstream) – retail supply of electricity (downstream)*

- (805) Distribution networks for lower voltage levels operated by DSOs are vertically affected markets in relation to the retail supply of electricity in Hungary, as the combined market shares of the merged entity would be above 30% in distribution networks (natural monopolies) and in the retail supply of electricity to USP customers, the retail supply of electricity to SMEs and the retail supply of electricity to large customers. The reasoning below applies to the different markets for the retail supply of electricity in Hungary mutata mutandis.

9.3.2.1. Input foreclosure

- (806) The merged does not change the ability of the Parties to foreclose its rivals downstream but it could change its incentives because as a result of the Concentration the merged entity would increase its market shares in the downstream market. However, for the reasons set out below, the Commission considers that the ability of the merged entity to foreclose its rivals would be limited and the incentives are not materially strengthened by the Concentration taking into account the effect of the Commitments.
- (807) First, the Notifying Party submits that the strict requirements of the unbundling regime imposed by the regulation mean that E.ON would not have the ability to

⁷³⁴ Form CO, para. 3762

⁷³⁵ Form CO, para. 3762.

engage in any foreclosure strategy. Legal, operational and informational unbundling ensures that the distribution network is sufficiently separated from other business activities.

- (808) Under the Electricity Act, electricity distribution activities in Hungary are subject to a licence from HEA. Distribution licences are issued for a fixed period of 25 years and specify the area in which each DSO is licensed to operate. Each DSO licence includes a list of cities and villages which are covered by the licence.⁷³⁶
- (809) European Directives in the energy sector require non-discriminatory, transparent and fairly-priced network access. Terms of access and connection fees (“System Usage Fees”) to each of the regional electricity distribution networks for end-users (i.e. retail customers) in Hungary are regulated by HEA pursuant to the Electricity Act.⁷³⁷
- (810) DSOs are obliged to grant access to the network to any electricity supplier or customer on non-discriminatory terms through standardised contracts for feed-in and withdrawal of electricity. DSOs have an obligation to provide access to the full electricity network. DSOs are under an obligation to provide the necessary physical infrastructure for connection to every consumer within their operational area.⁷³⁸
- (811) HEA determines the System Usage Fees. To that purpose, HEA considers the operational and capital costs of an efficient licensee, which is determined on the basis of a review of each DSO’s assets, relevant fixed and variable costs, network losses, and asset depreciation to calculate the total eligible costs for each DSO. The System Usage Fee is then calculated, and acts as a maximum fee that the licensees can charge. DSOs cannot charge higher fees, and any fee reductions must be implemented in a non-discriminatory and transparent manner. The System Usage Fees are determined every four years, with tariffs fixed for one-year terms. The rules on the calculation of System Usage Fees are published in decrees by HEA.⁷³⁹
- (812) All competitors responding to the market investigation confirmed that in recent years they have not experienced any attempt by DSOs to hamper their ability to sign on a newly acquired customer by, e.g. not carrying out the switch in time, by not providing all the necessary information, or by any other means.⁷⁴⁰
- (813) Competitors responding to the market investigation also consider unanimously that DSOs operators do not have the ability and incentives to hamper their companies or other electricity retail suppliers’ ability to compete⁷⁴¹ and that the Concentration will not change the ability or incentives of the merged entity to hamper competing retail suppliers.⁷⁴² In the same vein, the majority of respondents consider that an electricity retail supplier that is also active as a DSO does not have a competitive advantage on the retail market.⁷⁴³
- (814) Therefore, it transpires from the above that all retailers of electricity have access to the distribution network on non-discriminatory terms. The price for distribution is regulated and end users have a free choice of the electricity supplier no matter who owns or operates the distribution network to which they are connected.

⁷³⁶ Form CO, para. 3443.

⁷³⁷ Form CO, para. 3448.

⁷³⁸ Form CO, para. 3449.

⁷³⁹ Form CO, para. 3450.

⁷⁴⁰ Replies to questionnaire Q9 – Competitors (Hungary), question 56.

⁷⁴¹ Replies to questionnaire Q9 – Competitors (Hungary), question 57.

⁷⁴² Replies to questionnaire Q9 – Competitors (Hungary), question 58.

⁷⁴³ Replies to questionnaire Q9 – Competitors (Hungary), question 59.

- (815) In view of the above, the Commission considers that even post-merger input foreclosure effects are unlikely to arise.
- (816) Second, although the Concentration could change the incentives of the Merged Entity to foreclose its rivals, as the merged entity would enjoy higher market shares in the downstream market, as a result of the commitments, the Merged Entity's market share in the downstream market for the retail supply of electricity to Competitive-SMEs customers and large industrial customers will be equal to that of pre-Concentration and therefore the incentives remain unchanged. The Concentration does not lead to any significant overlap in the Parties activities in the markets for the retail supply of electricity to residential customers or USP-SME customers, as each party is only or mainly active in their own DSO areas. As a result, the Merged Entity will not have any additional incentive to foreclose its rivals than E.ON did pre-Concentration.

9.3.2.2. Customer foreclosure

- (817) Customer foreclosure can only occur when a supplier integrates with an important customer in the downstream market and there are alternative (competing) suppliers for the downstream market. In this case, the integrated entity may stop purchasing from the rival upstream or reduce significantly the volumes purchased. Since each distribution network constitutes a natural monopoly, no actual or potential rival in the upstream market (distribution network) can be foreclosed.

9.3.2.3. Conclusion

- (818) The Commission therefore concludes that the Concentration would not significantly impede effective competition as a result of vertical non-coordinated effects arising from vertical links between the upstream markets for distribution networks for lower voltage levels operated by DSOs and the downstream markets for the retail supply of electricity in Hungary.

9.3.3. *Low- and medium-pressure gas distribution pipeline networks operated by DSOs (upstream) – retail supply of gas (downstream)*

- (819) Low- and medium-pressure gas distribution pipeline networks operated by DSOs are vertically affected markets in relation to the retail supply of gas in Hungary, as the combined market shares of the merged entity would be above 30% in distribution networks (natural monopolies). The reasoning below applies to the different markets for the retail supply of gas in Hungary mutata mutandis.

9.3.3.1. Input foreclosure

- (820) First, the Notifying Party submits that the strict requirements of the unbundling regime imposed by the regulation mean that E.ON would not have the ability to engage in any foreclosure strategy.
- (821) Under Act No. XL of 2008 on Gas Supply, gas distribution activities in Hungary are subject to a licence. Distribution licences are issued for a fixed period of 25 years and specify the area in which each DSO is licensed to operate. Each DSO licence includes a list of cities and villages which are covered by the licence.⁷⁴⁴
- (822) European Directives in the energy sector require non-discriminatory, transparent and fairly-priced network access. The regulatory framework for gas largely mirrors that for electricity, as discussed in para 769.

⁷⁴⁴ Form CO, para. 3668.

- (823) Moreover, all competitors responding to the market investigation confirmed that DSO operators in the last three years have not hampered their ability to sign on a newly acquired customer by not carrying out the switch in time, by not providing all the necessary information, or by any other means.⁷⁴⁵
- (824) Competitors responding to the market investigation also considers unanimously that DSOs operators do not have the ability and incentives to hamper their companies or other gas retail suppliers' ability to compete⁷⁴⁶ and that the Concentration will not change the ability or incentives of the merged entity to hamper retail suppliers of gas.⁷⁴⁷ In the same vein, all competitors responding to the market investigation consider that a gas retail supplier that is also active as a DSO does not have a competitive advantage on the retail market.⁷⁴⁸
- (825) Therefore, it transpires from the above that all retailers of gas have access to the distribution network on non-discriminatory terms. The price for distribution is regulated and end users have a free choice of the gas supplier no matter who owns or operates the distribution network to which they are connected.
- (826) The Commission considers that, due to the regulatory framework in which the distribution network is operated and in view of the results of the market investigation, input foreclosure is unlikely.
- (827) In view of the above, the Commission considers that even post-merger input foreclosure effects are unlikely to arise.
- (828) Second, Innogy has no gas distribution networks in Hungary. In E.ON's DSO areas, the Concentration will not lead to any change of control or ownership of the gas distribution networks and therefore the link between DSO distributor and retailers of gas was pre-existent to the Concentration, Although the Concentration could change the incentives of the Merged Entity to foreclose its rivals, as the merged entity would enjoy higher market shares in the downstream market, the Commission notes that the Parties are not active in the retail supply of gas to USP customers and that the Concentration does not lead to affected markets in the retail supply of gas to SME or large industrial customers. Therefore, the Merged Entity will not enjoy market power in the downstream markets, and the incentives to foreclose rivals are not change to a material extent.

9.3.3.2. Customer foreclosure

- (829) Customer foreclosure can only occur when a supplier integrates with an important customer in the downstream market and there are alternative (competing) suppliers for the downstream market. Under this scenario, the integrated entity may stop purchasing from the rival upstream or reduce significantly the volumes purchased. Since each gas distribution network constitutes a natural monopoly, no actual or potential rival in the upstream market (gas distribution network) can be foreclosed.

9.3.3.3. Conclusion

- (830) The Commission therefore concludes that the Concentration would not significantly impede effective competition as a result of vertical non-coordinated effects arising from vertical links between the upstream markets for low- and medium-pressure gas

⁷⁴⁵ Replies to questionnaire Q9 – Competitors (Hungary), question 110.

⁷⁴⁶ Replies to questionnaire Q9 – Competitors (Hungary), question 111.

⁷⁴⁷ Replies to questionnaire Q9 – Competitors (Hungary), question 112.

⁷⁴⁸ Replies to questionnaire Q9 – Competitors (Hungary), question 59.

distribution pipeline networks operated by DSOs and the downstream markets for the retail supply of gas in Hungary.

9.4. Conclusion on *Hungary*

- (831) For the reasons set out above, the Commission considers that as a result of horizontal non-coordinated effects arising from the overlap in the activities of the Parties, the Concentration would significantly impede effective competition in the markets for the retail supply of electricity to Competitive-SME customers and the retail supply of electricity to large industrial customers in Hungary.⁷⁴⁹

10. SLOVAKIA

- (832) Both Parties are active in the retail supply of gas and electricity to households, SMEs and large industrial customers. E.ON operates through ZSE Energia, a.s. ("ZSE") and Innogy operates via Východoslovenská energetika, a.s. ("VSE"). Both ZSE⁷⁵⁰ and VSE⁷⁵¹ are joint ventures with the Slovak state.
- (833) In Slovakia, both E.ON and Innogy are active in the leasing of dark fibre lines,⁷⁵² in e-mobility services,⁷⁵³ in the management and maintenance of substations,⁷⁵⁴ in PV

⁷⁴⁹ The Concentration gives rise to conglomerate relationships between the Parties' activities in the retail supply of electricity, gas and other electricity related markets as electric vehicles Charging Stations. The Commission notes that its assessment is restricted to potential exclusionary tying and bundling practices that could result from or be strengthened by the Concentration. As such, the Commission cannot take a view on potential bundling and tying practices within the existing product categories offered by E.ON or Innogy respectively. E.ON was pre-Concentration already active in the retail supply of electricity, gas and other electricity related markets. Therefore, the Concentration does not allow to E.ON to offer a wider range of products. Moreover, customers do not typically conclude contracts in bundles in these markets. Market participants have not voiced concerns with regards to potential negative conglomerate effects. Moreover, the merged entity will not enjoy a significant degree of market power in any market after taking into consideration the effects of the remedy. Therefore, there seems to be very little indication that the proposed Concentration could lead to any increased ability to bundle specific products and to thereby reduce competition or restrict customers' choice and in any event, the ability to bundle remains questionable as do potential effects given that alternative suppliers remain available for customers to turn to should the merged entity seek to engage in anti-competitive bundling. Thus, overall, the Concentration is unlikely to result in significant negative conglomerate effects.

⁷⁵⁰ The Slovak state holds [...] 51% in ZSE whilst E.ON holds [...] 49%.

⁷⁵¹ The Slovak state holds [...] 51% in VSE's holding company, Vychodoslovenska energetika Holding a.s. (VSEH). Innogy SE holds [...] 49%.

⁷⁵² The Parties are both active in the leasing of optical dark fiber lines used for telecommunications infrastructure and leased to from a network service provider to provide a privately-operated network. The Parties' combined market share is below 20% on the narrowest plausible market definition. The Commission will therefore not consider further this plausible market.

⁷⁵³ The Parties' activities overlap in the retail supply of private EV Charging Stations and in the installation and operation of public EV Charging Stations. The Commission has not previously analysed these markets in Slovakia. However, in line with the assessment undertaken for the same product markets in Germany, and in view of the evidence collected during the market investigation, the Commission considers that i) retail supply of private EV Charging Stations can be plausibly considered as a separate market also in Slovakia with (at least) a national geographic scope, and that ii). the markets for installation of public EV Charging Stations can be plausibly distinguished also in Slovakia between the installation and operation of public EV Charging Stations on- versus off-motorways, with a national or a sub-national geographic scope. As no affected markets arise under any of these plausible market definition in Slovakia for all above-mentioned markets, the exact definition is left open. In particular, no concerns arise for the installation and operation of on-motorways EV Charging Stations in Slovakia, as there are no pairs of EV fast Charging Stations or pairs of EV ultra-fast Charging Stations, located within a 50 km driving distance on motorways, each station of the pair being owned by a different Party (see RFI 66, answer to question 19). The Parties are both active in the leasing of optical dark fibre lines used for telecommunications infrastructure and leased to from a network service provider to provide a

systems,⁷⁵⁵ in smart home services,⁷⁵⁶ in energy consultancy,⁷⁵⁷ in lighting solutions/LED light services⁷⁵⁸ and in insurance.⁷⁵⁹

10.1. Market definition

(834) On the legal framework and general principles of market definition, see recital (34).

10.1.1. Retail supply of electricity

(835) In Slovakia, the price set for the retail supply of electricity to households and small businesses with consumption not exceeding 30 MWh annually is regulated by the Regulatory Office for Network Industries ("RONI"). No regulation applies above this consumption level.⁷⁶⁰

(836) The Parties (through ZSE and VSE) represent two of the three successors of the former regional state monopolies.⁷⁶¹ At the time of liberalisation⁷⁶², these companies had almost 100% of the market share in their respective region. Their customer portfolios were regionally concentrated in their own DSO area and the incumbents did not compete, or they did to a very limited extent, outside their area.⁷⁶³

10.1.1.1. Product market definition

The Commission's decisional practice

(837) The Commission has previously considered a segmentation of the Slovak retail supply of electricity in the three customer groups: (i) customers for whom the price

⁷⁵⁴ privately-operated network. The Parties' combined market share is below 20% on the narrowest plausible market definition. The Commission will therefore not consider further this plausible market.

The Parties are both active in engineering and maintenance services for electrical installations in relation to privately owned substations and transformers with a combined market share below [0-5]% on the narrowest plausible market definition. The Commission will therefore not consider further this plausible market.

⁷⁵⁵ The Parties' activities in PV systems are mainly related to retail supply to residential customers and provision of installation services through a network of local partners. While E.ON already operates in the market, Innogy [...]. The Parties' combined market share is below [0-5]% on the narrowest plausible market definition. The Commission will therefore not consider further this plausible market.

⁷⁵⁶ The Parties' activities in smart home are mainly related to retail supply to household customers. While E.ON already offers a central unit that connects with video cameras and window sensors (for home security) and wall plugs (to turn device on and off), which enables customers to remotely monitor their home and turn on and off devices via an application on a smartphone or PC, Innogy [...]. The Parties' combined market share is below [5-10]% on the narrowest plausible market definition. The Commission will therefore not consider further this plausible market.

⁷⁵⁷ The Parties' activities in this market are mainly related to the provision of free energy consultancy services to their existing customers, including large commercial retail customers and public entity customers. The Parties' combined market share is below [0-5]% on the narrowest plausible market definition. The Commission will therefore not consider further this plausible market.

⁷⁵⁸ The Parties' activities in this market are mainly related to distribution of lighting products (wires, fittings, bulbs, etc.) to commercial customers and public/government entities. The Parties' combined market share is below [0-5]% on the narrowest plausible market definition. The Commission will therefore not consider further this plausible market.

⁷⁵⁹ The Parties' activities in this market are mainly related to the supply of non-life insurance products to household electricity customers for which they act as intermediaries. The Parties' combined market share is below [0-5]% on the narrowest plausible market definition. The Commission will therefore not consider further this plausible market.

⁷⁶⁰ Form CO, para. 3894.

⁷⁶¹ The third being SSEAS.

⁷⁶² January 2005 for industrial customers and July 2007 for households.

⁷⁶³ Form CO, para. 3899.

regulation applies; (ii) unregulated customers with consumption below 1 GWh and (iii) unregulated customers above 1 GWh.⁷⁶⁴

The Notifying Party's view

- (838) The Notifying Party agrees that the regulated households and SMEs (that is, those consuming less than 30 MWh per year) form a separate market. However, the Notifying Party notes that the evidence about whether unregulated customers below 1 GWh and above 1 GWh should be in separate markets is mixed and, therefore, it has provided an assessment of the Concentration based on a single group including all types of business, and one SMEs and large industrial customers separately.⁷⁶⁵

The Commission's assessment

- (839) The market investigation confirmed that suppliers have different offerings for households, SMEs and large industrial customers. The distinction between regulated and unregulated SMEs is less clear but the majority of respondents to the market investigation indicated that they charge lower prices to the regulated cohort because of the regulation.⁷⁶⁶
- (840) The market investigation also generally confirmed a distinction between the unregulated SMEs (with consumption below 1 GWh) and the unregulated large industrial customers (with consumption above 1 GWh).⁷⁶⁷ The reason for this distinction depends on different consumption volumes and patterns, the procurement process and product standardisation, and to a lesser extent, contract length. Differences in price (and price structure and design) and greater flexibility in energy purchase for large industrial customers have also been pointed as a reason to distinguish between unregulated SME customers and large industrial customers.⁷⁶⁸
- (841) For the purposes of this Decision, the Commission will assess the Concentration based on the following segmentation: (i) regulated (households and SMEs) customers, (ii) unregulated customers with consumption below 1 GWh and (iii) unregulated large customers with consumption above 1 GWh.

10.1.1.2. Geographic market definition

The Commission's decisional practice

- (842) The Commission has previously considered the retail supply of electricity to be national in scope. This has also been the case for Slovakia.⁷⁶⁹

⁷⁶⁴ COMP/M.7927 – *EPH/Enel/SE*, paras. 18-19; COMP/M.6984 – *EPH/Stredoslovenska Energetika*, paras. 18-19.

⁷⁶⁵ Form CO, paras. 3925-3949; the assessment does not change materially if all industrial customers are grouped together compared to two separate segments for SMEs and large industrial customers.

⁷⁶⁶ Replies to questionnaire Q3 – Competitors (Slovakia), question 9.

⁷⁶⁷ See COMP/M.7927 – *EPH/Enel/SE*, para. 18. In that case, the Commission explained that the rationale underlying the further sub-segmentation of the market for retail supply of end-customers connected to the distribution system is that customers with yearly consumption above 1 GWh mostly procure and supply electricity through tenders so that the price and other commercial terms are negotiated individually, whereas customers with consumption below 1 GWh are usually supplied on the basis of the typical off-take diagram and the prices are based either on the suppliers' price list or are set by the regulator (prices for households and small industrial consumers).

⁷⁶⁸ Replies to question 7 of questionnaire Q4 – Customers (Slovakia).

⁷⁶⁹ COMP/M.7927 – *EPH/Enel/SE*, para. 35; COMP/M.6984 – *EPH/Stredoslovenska Energetika*, paras. 18-19.

The Notifying Party's view

- (843) The Notifying Party agrees with the Commission's geographic market delineation, i.e. that the relevant geographic market should be considered national in scope, covering the whole territory of Slovakia.⁷⁷⁰
- (844) The Notifying Party argues that there are no obstacles for suppliers to be active nationwide and the DSOs are obliged to provide all suppliers and their customers with access to the relevant distribution network on a transparent and non-discriminatory basis. Whilst the incumbent players have focused on their traditional areas, new entrants are generally active throughout Slovakia without significant differences in regional offerings. The competitive conditions are also similar in each DSO area. Regulated price caps are also set on a national basis.⁷⁷¹

The Commission's assessment

- (845) The majority of replies to the market investigation indicate that the prices, offerings and sales strategy of suppliers are similar across the country for each individual product market. Most of players are active across the country and new entrants have in general a nation-wide strategy with no strong regional focus.⁷⁷²
- (846) However, the Commission found indications that the three historical incumbents (the Parties and SSEAS) have maintained a strong regional focus on their own incumbency areas and have limited presence out of them.
- (847) The extent of the incumbents' regional focus varies by customer group. It is still very pronounced for regulated customers where the price cap has limited the incentives of incumbent suppliers to expand to adjacent geographic areas, resulting in regulated customers sourcing electricity almost exclusively from the incumbent supplier (as shown by the incumbent's share of supply in each DSO area). The same applies, though to a lesser extent, to small unregulated customers (SMEs with consumption below 1GWh).⁷⁷³ The market for large unregulated customers (with consumption above 1GWh) is the most dynamic.⁷⁷⁴ The customers commonly use tender procedures to select their electricity suppliers and local presence with shops and sales forces is not as important as for smaller customers.⁷⁷⁵ Yet, the local element due to the regional focus of the incumbents is still present, although to smaller degree than

⁷⁷⁰ Form CO, para. 3952.

⁷⁷¹ Form CO, paras. 3953-3957.

⁷⁷² Replies to questionnaire Q3 – Competitors (Slovakia), questions 14-17.

⁷⁷³ The Commission considers that some small unregulated customers (SMEs consuming more than 30 MWh, but less than 1 GWh) source electricity at national level, while others still turn to their regional incumbent, although they cannot benefit from the price cap set for regulated customers. This varying behaviour across this category is confirmed by the market investigation, where some competitors indicated that the prices they apply to regulated SMEs are similar to those applied to unregulated SMEs, some that they are just somewhat lower and others that they are considerably lower. See Replies to questionnaire Q3 – Competitors (Slovakia), question 9. A competitor also indicates that large unregulated customers generally invite to tenders the top 10 Slovak suppliers, while small unregulated customers *"tend to invite only two or three suppliers that they already know"* (see minutes of a conference call with a competitor, 1 April 2019, ID3903).

⁷⁷⁴ According to a competitor: *"Large industrial customers invite the most relevant suppliers to tender, which are highly competitive on price. These customers prefer large suppliers with more experience and a larger portfolio. The top 10 Slovak suppliers are generally invited to tenders"* (see minutes of a conference call with a competitor, 1 April 2019, ID3903).

⁷⁷⁵ A competitor indicates that *"Regarding the sales channels, (...) indicated that it never uses door-to-door sales but rather regional offices and approaches customers via telephone calls and emails. (...) does not have list prices in the unregulated segment but rather it offers individualized/bespoke prices to customers"*. (see minutes of a conference call with a competitor, 27 March 2019, ID4416)

the other two groups of customers. Therefore, the evidence above suggests that, although the geographic scope of the market is still national, it is differentiated across regions, with the incumbents focussing on their own incumbency areas, leading to a geographically differentiated market definition. As a result, the analysis of the competitive interaction between the Parties will go beyond their position at national level and will further focus on their level of closeness, particularly at regional level. In conclusion, due to the fact that some customers, to a different extent across the three categories, still source electricity locally and do not launch nationwide tenders, the Commission considers that the market can be defined as national with strong regional elements.

- (848) In any case, the Commission considers that the market definition is not an end in itself but it is rather an instrument to identify the immediate competitive constraints facing the merged entity. In this spirit, the Commission has assessed the impact of the merger also on a local level.

10.1.2. Retail supply of gas

- (849) As with the retail supply of electricity in Slovakia, the price for the retail supply of gas to households and small businesses with consumption not exceeding 100 MWh annually is regulated by RONI. No regulation applies above this consumption level.⁷⁷⁶
- (850) There is only one gas distribution operator in Slovakia, SPPD. The Parties are not active in gas distribution in Slovakia.

10.1.2.1. Product and geographic market definition

The Commission's decisional practice

- (851) The Commission has previously considered the retail supply of gas as a separate market and has subdivided this market between households, SMEs, large industrial customers and gas-powered electricity plants. This segmentation has also been applied to Slovakia where the consumption threshold between SMEs and large industrial customers has been set at 640 MWh, which reflects the tariff segmentation applied by the gas DSO.⁷⁷⁷
- (852) The Commission has previously considered the retail supply of gas to be national in scope. This has also been the case for Slovakia.⁷⁷⁸

The Notifying Party's view

- (853) The Notifying Party agrees on a separate market for household customers but considers the evidence on the possible segmentation between SMEs and large industrial customers not clear-cut. For this reason, the Notifying Party provides an assessment of the Concentration based on both a market encompassing all types of unregulated customers and separate markets for SMEs and large industrial customers.^{779 780}

⁷⁷⁶ Form CO, para. 4111.

⁷⁷⁷ COMP/M.7927 – *EPH/Enel/SE*, para. 33; COMP/M.6984 – *EPH/Stredoslovenska Energetika*, paras. 27-29.

⁷⁷⁸ COMP/M.6984 – *EPH/Stredoslovenska Energetika*, paras. 27-29.

⁷⁷⁹ Form CO, paras. 4117-4130; the assessment does not change materially if all industrial customers are grouped together compared to two separate segments for SMEs and large industrial customers as the markets remain unaffected.

- (854) The Notifying Party agrees with the Commission's geographic market delineation, i.e. that the relevant geographic market should be considered national in scope.⁷⁸¹

The Commission's assessment

- (855) The Commission's market investigation confirms that it is appropriate to separate regulated and unregulated SMEs (due to a number of factors, such as different procurement processes, consumption patterns and regulatory obligations, which determine different prices for the two categories)⁷⁸² and to separate between unregulated SMEs and unregulated large industrial customers (due to different consumption volumes and patterns, product standardisation, procurement strategy and level of competition). The results of the market investigation were mixed as to whether regulated households and regulated SMEs should be part of the same market or form separate markets.⁷⁸³
- (856) As the Concentration raises no competition concerns under any segmentation of the retail gas market, the precise product market definition can be left open.
- (857) As to geographic market definition, the vast majority of respondents to the market investigation indicated that they were active uniformly across Slovakia and that their pricing strategy and sales strategy was the same across the country.⁷⁸⁴
- (858) For the purposes of this Decision, the Commission considers that, in line with precedents, the geographic market for the retail supply of gas should be Slovakia.
- (859) In this case, the reportable markets are (i) the supply of gas to regulated households and SMEs in Slovakia, (ii) the supply of gas to unregulated SMEs in Slovakia and (iii) the supply of gas to large industrial customers in Slovakia. However, each of these markets is not affected and will therefore not be further discussed in this Decision.

10.2. Competitive assessment

10.2.1. Retail supply of electricity

10.2.1.1. Regulated customers

The Notifying Party's view

- (860) The Parties are active in the market for the retail supply of electricity to regulated customers. The combined market share of the Parties at a national level was [50-60]% in 2018. The Notifying Party argues that the Concentration does not raise concerns on this market for the following reasons.
- (861) First, the national market shares do not accurately reflect the competitive dynamics at play due to the asymmetrical regional position of the Parties arising from their incumbent status. It submits that the market shares at the DSO level highlight that the Parties have limited presence in each other's DSO area and that they are merely one of several smaller suppliers challenging the position of the other incumbent. The share of supply of the incumbents in their own DSO area is above [80-90]% and the

⁷⁸⁰ The Notifying Party notes that gas-powered electricity plants could be considered together with large industrial customers. Nevertheless, as neither of the Parties supplies gas-powered electricity plants, there is no overlap on this hypothetical segmentation.

⁷⁸¹ Due to the fact that there is only one single gas DSO active nationally and thus the competitive and regulatory conditions are identical across Slovakia. See Form CO, para. 4133.

⁷⁸² Replies to questionnaire Q3 – Competitors (Slovakia), question 58.

⁷⁸³ Replies to questionnaire Q3 – Competitors (Slovakia), questions 54, 57, 58.

⁷⁸⁴ Replies to questionnaire Q3 – Competitors (Slovakia), questions 63-69.

presence of the other merging party is less than [0-5]%. The Notifying Party also submits that the high market shares do not reflect market power, but result from the legacy portfolios of the Parties, who inherited the customers following liberalisation of the market. Innogy's growth in 2017 in E.ON's DSO area stems from the acquisition of CEZ's regulated customer portfolio and not organic growth.⁷⁸⁵ Also, market shares are being progressively eroded by new entrants challenging the incumbent.⁷⁸⁶

- (862) Second, each supplier's individual price cap reflects its cost structure, and the resulting margins are low. Price regulation precludes the ability to raise prices in this market.⁷⁸⁷
- (863) Third, entry into the market is not subject to material barriers other than price regulation (licensing requirements are easy to comply with). It is just a mass market that requires a sales network (internet, telephone or door-to-door sales) in order to be successful. Entry has been low due to the price regulation, which decreases the incentives of customers to switch and creates a less attractive market for potential entrants.⁷⁸⁸
- (864) Fourth, those companies who have entered the market are competing aggressively offering multi-annual contracts discount off the price caps. New entrants are perceived as having lower operating costs and greater flexibility than the larger incumbents, and they actively rely on door-to-door sales or efficient online services in order to attract customers. On the contrary, the incumbents rely more on their established network of shops and mostly target less active customers.⁷⁸⁹
- (865) Fifth, the diversion ratios between the Parties are limited which suggest that they do not compete closely. Customers lost by the Parties mostly switched to new entrants, such as SPP and Slovakia Energy, who are marketing aggressively on a nationwide basis. Between 2015 and 2018 SPP attracted, on average, [50-60]% of E.ON's switching customers and Slovakia Energy has attracted, on average, [30-40]%.⁷⁹⁰ Innogy's diversion ratio is the highest to Slovakia Energy ([50-60]%)⁷⁹¹ and SPP ([30-40]%).⁷⁹²

The Commission's assessment

- (866) The Parties are both active in the market for the retail supply of electricity to regulated customers. On a national basis, the combined market share of the Parties is almost [60-70]%.⁷⁹³

⁷⁸⁵ Form CO, para. 3993.

⁷⁸⁶ Form CO, para. 3971.

⁷⁸⁷ Form CO, paras. 3977-3980.

⁷⁸⁸ Form CO, paras. 3987-3989.

⁷⁸⁹ Form CO, paras. 3994-3998 and 4007.

⁷⁹⁰ See *Supplemental response to the Commission's theories of harm with respect to the Czech Republic and Slovakia*, submitted by E.ON on 8 May 2019, Figure 1.

⁷⁹¹ Diversion ratios from Innogy were calculated based on VSD and ZSD DSOs data only, as Innogy's switching data from SSD DSO were unavailable.

⁷⁹² Form CO, paras. 3999-4014.

⁷⁹³ The post-merger Herfindahl-Hirschman Index (HHI) on a national level is approximately 4200, with a delta – compared to the pre-merger HHI - of approximately 1600. The HHI is defined in the Commission's Horizontal Merger Guidelines, para. 16.

Table 20 – National market shares for the retail supply of electricity to regulated customers, 2015 – 2018 (volume)

%	2018	2017	2016	2015
E.ON	[30-40]	[30-40]	[30-40]	[30-40]
Innogy	[20-30]	[20-30]	[20-30]	[20-30]
<i>Combined</i>	<i>[50-60]</i>	<i>[50-60]</i>	<i>[50-60]</i>	<i>[50-60]</i>
SSEAS	[20-30]	[20-30]	[20-30]	[20-30]
SPP	[5-10]	[5-10]	[5-10]	[0-5]
Slovakia Energy	[5-10]	[0-5]	[5-10]	[0-5]
Utylis	[0-5]	[0-5]	[0-5]	[0-5]
Energie2	[0-5]	[0-5]	[0-5]	[0-5]
Others	[0-5]	[0-5]	[0-5]	[0-5]
Total	100	100	100	100

Source: Compass Lexecon using data provided by E.ON and Innogy and RONI data (reply to RFI 44)

- (867) However, as noted in the fact that the market is geographically differentiated and due to the strong regional elements discussed above (recital (847)) the Commission considers that the national market shares do not accurately reflect the competitive situation in the market. In that respect, although recognizing that the Parties' combined market shares at national level currently exceed [50-60]%, the Commission considers that the Parties' position at DSO level is most relevant for a full competitive assessment. At this level, the market structure shows a strong incumbency effect (with the historical supplier still holding most of the sales to regulated customers) but no or limited overlap between the Parties. E.ON is absent in Innogy's area and Innogy has a limited presence in E.ON's areas ([0-5]%) which is entirely attributable to the acquisition of CEZ's regulated customer portfolio in 2017. Therefore, the observed increment at national level is mainly driven by the combination of market shares of the parties in regions where their activities overlap to a very limited extent.

Table 21 – Regional shares of supply for the retail supply of electricity to regulated customers in E.ON DSO area in 2015-2018 (volume)

%	2018	2017	2016	2015
E.ON	[70-80]	[80-90]	[80-90]	[80-90]
Innogy	[0-5]	[0-5] ⁷⁹⁴	[0-5]	[0-5]
<i>Combined</i>	<i>[80-90]</i>	<i>[80-90]</i>	<i>[80-90]</i>	<i>[80-90]</i>
SSEAS	[0-5]	[0-5]	[0-5]	[0-5]
Slovakia Energy	[5-10]	[0-5]	[0-5]	[0-5]
SPP	[5-10]	[5-10]	[5-10]	[5-10]
ČEZ	[0-5]	[0-5]	[0-5]	[0-5]
Energie2	[0-5]	[0-5]	[0-5]	[0-5]
Magna	[0-5]	[0-5]	[0-5]	[0-5]
Others	[0-5]	[0-5]	[0-5]	[0-5]
Total	100	100	100	100

Source: Compass Lexecon using E.ON DSO data (reply to RFI 44)

Table 22 – Regional shares of supply for the retail supply of electricity to regulated customers in Innogy DSO area in 2015-2018 (volume)

%	2018	2017	2016	2015
E.ON	[0-5]	[0-5]	[0-5]	[0-5]
Innogy	[80-90]	[80-90]	[90-100]	[90-100]
<i>Combined</i>	<i>[80-90]</i>	<i>[80-90]</i>	<i>[90-100]</i>	<i>[90-100]</i>
Slovakia Energy	[5-10]	[5-10]	[0-5]	[0-5]
SPP	[5-10]	[0-5]	[0-5]	[0-5]
Others	[0-5]	[0-5]	[0-5]	[0-5]
Total	100	100	100	100

Source: Compass Lexecon using Innogy DSO data (reply to RFI 44)

⁷⁹⁴ Innogy's growth in 2017 in E.ON's DSO stems from an acquisition from CEZ and not organic growth (Form CO, para. 3993).

Table 23 – Regional shares of supply for the retail supply of electricity to regulated customers in SSD DSO area in 2015-2018 (volume)

%	2018	2017	2016	2015
E.ON	[0-5]	[0-5]	[0-5]	[0-5]
Innogy	[0-5]	[0-5]	[0-5]	[0-5]
<i>Combined</i>	<i>[0-5]</i>	<i>[0-5]</i>	<i>[0-5]</i>	<i>[0-5]</i>
SSEAS	[90-100]	[90-100]	[80-90]	[90-100]
Others	[5-10]	[5-10]	[10-20]	[5-10]
Total	100	100	100	100

Source: Compass Lexecon using Innogy DSO data (reply to RFI 44)

- (868) The Commission considers that the Concentration does not significantly impede effective competition as a result of horizontal non-coordinated effects arising from the overlaps in the activities of the Parties in the market for the retail supply of electricity to regulated customers in Slovakia for a number of reasons indicated in the following s.
- (869) Given that the market is geographically differentiated, the Commission was particularly concerned in assessing the closeness of competition between the merging Parties at regional level. In that respect, the analysis of switching measures is particularly relevant. The Commission finds that the Parties are not close competitors. The shares of supply at DSO level indicate that the Parties have focussed their commercial efforts on their own DSO area and have competed against each other to a very limited extent. This is also supported by the switching rates between the Parties which are negligible. In their own areas, the Parties face most competition from Slovakia Energy and SPP.

Table 24 – Diversion ratios between retail suppliers of electricity to regulated customers in 2015-2018

DSO Area	Switching ratio from the incumbent to the other party	Switching ratios from the incumbent to other suppliers
EON DSO	[0-5]%	SPP ([50-60]%), Slovakia Energy ([30-40]%)
Innogy DSO	[0-5]%	Slovakia Energy ([50-60]%), SPP ([30-40]%)

Source: Compass Lexecon using data provided by E.ON and Innogy (reply to RFI 39)

- (870) The fact that the overall switching rate of regulated customers is low (c. [0-5]% for 2018⁷⁹⁵) in Slovakia, does not detract from the fact that those customers who switch

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Reply to RFI 75.

away from each of E.ON and Innogy in their respective DSO areas clearly choose to go to other third party competitors.⁷⁹⁶

- (871) The Commission also examined E.ON's retention policies in order to assess whether those customers who E.ON kept in its DSO area through retention policies would have likely moved to Innogy had E.ON not managed to retain them. For the years 2016 and 2017, only [0-5]% of all regulated customers that E.ON managed to retain had expressed the wish to switch to Innogy, far behind other competitors (e.g. [40-50]% wanted to switch to SPP and [20-30]% to Slovakia Energy)⁷⁹⁷.
- (872) The market participants contacted by the Commission during its investigation considered that the Parties are distant competitors.⁷⁹⁸ E.ON has traditionally focussed on Western Slovakia while Innogy has been active in Eastern Slovakia.⁷⁹⁹ The Parties have different competitive strategies and, in that respect, Slovakia Energy and SPP are seen as closer/more direct competitors to the Parties for the regulated customers.⁸⁰⁰
- (873) The Parties' internal documents support the view that the limited presence/absence outside their DSO area is the result of a deliberate strategy driven by cost considerations [regarding DSO strategy]⁸⁰¹ and issues related to [brand recognition].⁸⁰² In that respect, the merging parties are in a similar footing to the more recent entrants in as much as they also have to build their brand and face investment costs to operate in other areas and so have no particular competitive advantage compared to these entrants.
- (874) The Commission considers that the extent to which the Parties currently compete is limited and therefore the overall impact of the Concentration is likely to be limited in the market for the retail supply of electricity to regulated customers in Slovakia.

10.2.1.2. Unregulated customers with consumption below 1 GWh

The Notifying Party's view

- (875) Both Parties are active in the market for the retail supply of electricity to unregulated customers consuming less than 1 GWh. The combined market share of the Parties at national level is approximately [40-50]% based on 2018 data. The Notifying Party submits that the national market shares do not accurately reflect the competitive dynamics in the market due to the asymmetrical regional position of the Parties and submits that diversion ratios are more reflective of the competitive dynamics.⁸⁰³
- (876) The Notifying Party submits that the market share of the Parties has been steadily decreasing at both national and DSO levels, where they are the incumbent. Additionally, the presence of the other Party in each DSO area is very small

⁷⁹⁶ The low diversion ratio simply reflects a certain level of customer inertia, meaning that a large proportion of regulated customers never consider switching and simply stay with the incumbent. This inertia (or "stickiness"), is a feature of the market that is not affected by the level or intensity of competition. The Concentration is unlikely to have any significant material impact on these customers and there is limited competition for these non-switching customers in the first place.

⁷⁹⁷ Form CO, Annex 6F_15. For [...].

⁷⁹⁸ Evidence in this sense emerged also from the Phase I questionnaires, see, for example, Replies to questionnaire Q3 – Competitors (Slovakia), questions 30-33.

⁷⁹⁹ Replies to questionnaire Q3 – Competitors (Slovakia), questions 27-28.

⁸⁰⁰ Replies to questionnaire Q3 – Competitors (Slovakia), questions 30-31.

⁸⁰¹ [Internal documents].

⁸⁰² [Internal documents].

⁸⁰³ Form CO, para. 4022.

(between [0-5]% and [0-5]%). As for regulated customers, taking the regional dynamics as an indication of the Parties' presence at national level produces a misleading picture, as the Parties have minor activities in the third DSO area of SSD.⁸⁰⁴

- (877) The Notifying Party submits that the customers in this segment are becoming increasingly sophisticated and turning more frequently to tendering processes similar to those run by large industrial customers in order to get a competitive price. In the experience of the Notifying Party, customers typically approach three suppliers for quotes.⁸⁰⁵
- (878) In addition, the Notifying Party submits that there are very low barriers to entry into the retail electricity market for unregulated customers with consumption below 1 GWh as the licensing regime is straightforward and not materially burdensome. This has allowed high entry levels into the market and competitors that previously focussed on large industrial customers are now also targeting SME customers.⁸⁰⁶
- (879) The competitors in the market will impose significant competitive constraints on the Parties, according to the Notifying Party. CEZ has been the most successful entrant post-liberalisation, being capable of providing comprehensive energy solutions. Some competitors, such as Elgas, are entering the market via their gas customers; some focus on pricing (for example, SPP and CEZ) and others on customer care (such as Magna). Also, the Notifying Party notes, the fringe players had particularly strong growth in 2017.⁸⁰⁷
- (880) Regarding the preferences of switching customers, the Notifying Party shows that the unregulated customers with consumption below 1GWh that changed electricity supplier, in general, did not switch to the other Party. E.ON's closest competitors in the period 2015-2018 in E.ON's DSO area were identified as SPP (selected by [10-20]% of switching customers), followed by Magna and SPP ([10-20]% each), whereas Innogy's ones were CEZ (chosen by [20-30]% of switching customers), SPP ([10-20]%) and Energie2 ([10-20]%). Therefore, the Notifying Party submits that the Parties are not each other's closest competitors and the competitive constraint imposed by them on each other is negligible.⁸⁰⁸

The Commission's assessment

- (881) The Parties are both active in the market for the retail supply of electricity to unregulated customers consuming less than 1 GWh. The combined market share of the Parties was approximately [40-50]% in 2018.⁸⁰⁹ As shown in Table 25, below, E.ON's and Innogy's market shares and, as a result, their combined share, have been decreasing since 2015.

⁸⁰⁴ Form CO, paras. 4023-4025. E.ON had a share of supply of [5-10]% in 2018. Innogy, however, was not even active in the market (RFI 44, Table 347).

⁸⁰⁵ Form CO, paras. 4016-4019.

⁸⁰⁶ Form CO, paras. 4020-4021.

⁸⁰⁷ Form CO, paras. 4027, 4039-4040.

⁸⁰⁸ Form CO, paras. 4028-4041.

⁸⁰⁹ The post-merger HHI on a national level is approximately 2300, with a delta – compared to the pre-merger HHI - of approximately 780.

Table 25 – National market shares for the supply of unregulated customers with a consumption below 1 GWh (volume)

%	2018	2017	2016	2015
E.ON	[20-30]	[20-30]	[20-30]	[30-40]
Innogy	[10-20]	[10-20]	[10-20]	[10-20]
<i>Combined</i>	<i>[40-50]</i>	<i>[40-50]</i>	<i>[40-50]</i>	<i>[40-50]</i>
SSEAS	[10-20]	[10-20]	[10-20]	[20-30]
ČEZ	[5-10]	[5-10]	[5-10]	[5-10]
SEES	[5-10]	[5-10]	[10-20]	[10-20]
Elgas	[0-5]	[0-5]	[0-5]	[0-5]
Magna	[0-5]	[0-5]	[0-5]	[0-5]
Železnice Slovenskej Republiky	[0-5]	[0-5]	[0-5]	[0-5]
SPP	[0-5]	[0-5]	[0-5]	[0-5]
EP Energy Trading	[0-5]	[0-5]	[0-5]	[0-5]
Energa Slovakia	[0-5]	[0-5]	[0-5]	[0-5]
Pow-en	[0-5]	[0-5]	[0-5]	[0-5]
Others	[0-5]	[0-5]	[0-5]	[0-5]
Total	100	100	100	100

Source: Compass Lexecon using data provided by E.ON and Innogy and RONI data (reply to RFI 44).

- (882) Given that the market is geographically differentiated, the Commission was particularly concerned in assessing the closeness of competition between the merging Parties at a regional level. In that respect, although recognising that the Parties' combined market share at national level currently exceeds [40-50]%, the Commission considers that the Parties' position at DSO level is most relevant for a full competitive assessment. On a DSO level, the Parties mainly focus on their domestic DSO area and the increment in their share of supply at DSO level brought about by the Concentration is therefore limited.

Table 26 – Regional shares of supply for the supply of retail electricity to unregulated customers with a consumption below 1 GWh in E.ON DSO area in 2015-2018 (volume)

%	2018	2017	2016	2015
E.ON	[50-60]	[50-60]	[50-60]	[60-70]
Innogy	[0-5]	[0-5]	[0-5]	[0-5]
<i>Combined</i>	<i>[50-60]</i>	<i>[50-60]</i>	<i>[50-60]</i>	<i>[60-70]</i>
Magna	[5-10]	[5-10]	[5-10]	[5-10]
SPP	[5-10]	[5-10]	[5-10]	[0-5]
ČEZ	[5-10]	[5-10]	[0-5]	[0-5]
Elgas	[0-5]	[0-5]	[0-5]	[0-5]
SEES	[0-5]	[0-5]	[0-5]	[0-5]
Slovakia Energy	[0-5]	[0-5]	[0-5]	[0-5]
Energie2	[0-5]	[0-5]	[0-5]	[0-5]
SSEAS	[0-5]	[0-5]	[0-5]	[0-5]
Energy Europe	[0-5]	[0-5]	[0-5]	[0-5]
Pow-en	[0-5]	[0-5]	[0-5]	[0-5]
BCF	[0-5]	[0-5]	[0-5]	[0-5]
Others	[0-5]	[0-5]	[0-5]	[0-5]
Total	100	100	100	100

Source: Compass Lexecon using E.ON DSO data (reply to RFI 44).

Table 27 – Regional shares of supply for the supply of retail electricity to unregulated customers, with a consumption below 1 GWh in Innogy DSO area in 2015 to 2018 (volume)

%	2018	2017	2016	2015
E.ON	[0-5]	[0-5]	[0-5]	[0-5]
Innogy	[50-60]	[60-70]	[60-70]	[70-80]
<i>Combined</i>	<i>[60-70]</i>	<i>[60-70]</i>	<i>[60-70]</i>	<i>[70-80]</i>
ČEZ	[5-10]	[0-5]	[0-5]	[0-5]
SPP	[5-10]	[0-5]	[0-5]	[0-5]
Magna	[0-5]	[0-5]	[0-5]	[0-5]
Energie2	[0-5]	[0-5]	[0-5]	[0-5]
Slovakia Energy	[0-5]	[0-5]	[0-5]	[0-5]
SEES	[0-5]	[0-5]	[0-5]	[0-5]
Energy Europe	[0-5]	[0-5]	[0-5]	[0-5]
SSEAS	[0-5]	[0-5]	[0-5]	[0-5]
Elgas	[0-5]	[0-5]	[0-5]	[0-5]
Energa Slovakia	[0-5]	[0-5]	[0-5]	[0-5]
Pow-en	[0-5]	[0-5]	[0-5]	[0-5]
Bukoza	[0-5]	[0-5]	[0-5]	[0-5]
Others	[0-5]	[0-5]	[0-5]	[0-5]
Total	100	100	100	100

Source: Compass Lexecon using Innogy DSO data (reply to RFI 44).

Table 28 – Regional shares of supply for the supply of retail electricity to unregulated customers, with a consumption below 1 GWh in SSD DSO area in 2015 to 2018 (volume)

%	2018	2017	2016	2015
E.ON	[5-10]	[0-5]	[5-10]	[5-10]
Innogy	[0-5]	[0-5]	[0-5]	[0-5]
<i>Combined</i>	<i>[5-10]</i>	<i>[0-5]</i>	<i>[5-10]</i>	<i>[5-10]</i>
SSEAS	[50-60]	[50-60]	[50-60]	[60-70]
Others	[30-40]	[30-40]	[30-40]	[30-40]
Total	100	100	100	100

Source: Compass Lexecon using Innogy DSO data (reply to RFI 44).

- (883) The Commission considers that the Concentration would not significantly impede effective competition as a result of horizontal non-coordinated effects arising from the overlaps in the activities of the Parties in market for the retail supply of electricity to unregulated customers with consumption below 1 GWh in Slovakia for a number of reasons addressed in the following recitals.
- (884) First, at the national level, although the Concentration would result in the merged entity being the market leader based on national market shares, the closest competitor, the third incumbent (SSEAS), will have a relatively large market share of

[10-20]%. In addition, there is a large number of suppliers with non-negligible shares (for example, SEES and CEZ) as well as multiple steadily growing competitors (for example, Magna, SPP, Elgas and EP Energy Trading) in the market.⁸¹⁰

- (885) Second, the shares of supply measured at the DSO level suggest that there is currently limited competition between the Parties at DSO level. As also indicated by the Notifying Party,⁸¹¹ the incumbents are behaving as challengers in the other incumbent's market, but have not been successful in their attempt to expand and they lag behind other new entrants, as the latter have, since their market entry, implemented their sales and marketing strategies at national level.⁸¹² The shares of supply at DSO level, in fact, show that the vast majority of the new entrants have thrived and increased their market share. The joint share of these new entrants increased from [20-30]% to [30-40]% between 2015 and 2018 in Innogy's DSO area, an overall increase of over [50-60]% in four years. In E.ON's DSO area, the joint share of the new entrants increased from [30-40]% to [40-50]% between 2015 and 2018 which is an overall increase of over [20-30]% in four years. Even SSEAS, the third incumbent, has grown more than (or, at least, as much as) the Party entering as a challenger in the other merging Party DSO area. For example, SSEAS' share in the E.ON DSO area is [0-5]%, compared to Innogy's [0-5]%, and SSEAS' growth has been faster. In Innogy's DSO area, SSEAS and E.ON have a comparable share of supply ([0-5]% - [0-5]%). Overall, in E.ON's DSO area, there are [...] competitors with a higher share of supply than Innogy and in Innogy's DSO area, there are [...] competitors with a higher share of supply than E.ON. In the SSD DSO area, where neither Party is the incumbent, E.ON's share of supply of [5-10]% whilst Innogy's is [0-5]%.
(886) Third, given that the market is geographically differentiated, the Commission was particularly concerned in assessing the closeness of competition between the merging Parties. In that respect, the analysis of switching measures is particularly relevant and, as shown by Table 29 below, diversion ratios indicate that the Parties are not each other's closest competitor and that smaller competitors are more aggressive and more successful in attracting customers switching away from the Parties. This difference in diversion ratios is not reflected in the different shares of supply at regional level (particularly in the Innogy DSO area) and is probably linked with the more price-aggressive policies of smaller competitors but it still shows that smaller players are closer competitors to the incumbents than the Parties. The table also shows that newer entrants (such as CEZ SK, SPP and Energie2) are, unlike the Parties, active with good commercial results across different DSO areas.⁸¹³

⁸¹⁰ See minutes of the call with a competitor of 27 March 2019 (ID4416). A competitor has indicated that, regardless of the difficulty in acquiring customers, "*they are still growing every year*" and that they manage to gain customers with only a small amount of people in their sales force and some small intermediaries working on their behalf. See minutes of the call with a competitor of 1 April 2019, (ID3903).

⁸¹¹ Form CO, para. 3901.

⁸¹² See replies to questions 14, 15, 16 and 17 of questionnaire Q3 – Competitors (Slovakia).

⁸¹³ It is common to most suppliers to target Western Slovakia, due to the high industrialisation of the West and North of Slovakia while the Eastern-Central part of the country is more traditional and customers there tend to switch less. In general, all suppliers are present across the country. See, in this respect, minutes of the call with a competitor of 27 March 2019 (ID4416); minutes of the call with a competitor on 1 April 2019 (ID3903).

Table 29 – Diversion ratios between retail suppliers of electricity to unregulated customers below 1 GWh in 2015-2018

DSO Area	Switching ratio from the incumbent to the other party	Switching ratios from the incumbent to other suppliers
EON DSO	[0-5]%	SPP ([10-20]%), CEZ SK and Magna ([10-20]%)
Innogy DSO	[0-5]%	CEZ SK ([20-30]%), SPP ([10-20]%), Energie2 ([10-20]%)

Source: Compass Lexecon using data provided by E.ON and Innogy (reply to RFI 39).

- (887) The fact that the overall switching rate of unregulated customers with consumption below 1 GWh is relatively low (c. [5-10]% in 2018⁸¹⁴) in Slovakia, does not detract from the fact that those customers who switch away from each of E.ON and Innogy in their respective DSO areas clearly choose to go to other third party competitors.⁸¹⁵ Regulated customer inertia to stay with the respective incumbent is a feature of the market that the merger does not affect in any manner.
- (888) The Commission also examined E.ON's retention policies in order to assess whether those customers who E.ON kept in its DSO area through retention policies would have likely moved to Innogy had E.ON not managed to retain them. For the years 2016 and 2017, of all unregulated customers with a consumption less than 250 MWh per year that E.ON managed to retain, [very few] expressed the wish to switch to Innogy.⁸¹⁶
- (889) Fourth, the Commission analysed the Parties' bidding behaviour for the customers who chose competitive processes to determine an electricity supplier.⁸¹⁷ The bidding analysis revealed that E.ON and Innogy compete against each other in Slovakia to only a very limited extend: E.ON bid together with Innogy in only [...] % of all tenders that E.ON participated in the period 2015 - 2018. Similarly, Innogy met E.ON in only [...] % of all such tenders where Innogy bid in this period. Therefore, such behaviour shows that the Parties do not compete in tenders for unregulated

⁸¹⁴ Reply to RFI 75.

⁸¹⁵ The relatively low diversion ratio simply reflects a certain level of customer inertia, meaning that a large proportion of unregulated customers with a consumption below 1GWh never consider switching and simply stay with the incumbent. This inertia (or "stickiness"), is a feature of the market that is not affected by the level or intensity of competition. The Concentration is unlikely to have any significant material impact on these customers and there is limited competition for these non-switching customers in the first place

⁸¹⁶ Form CO, Annex 6F_15. For [80-90]% of the successfully retained unregulated customers below 250 MWh of E.ON for 2016 and 2017, the competitors to whom the customers wanted to switch is not known. Observing the diversion ratios as set out above, the Commission has no reason to believe that these customers would be more inclined to switch to Innogy's than the ones that declare to which competitor they want to switch. Retention of customers with consumption greater than 250 MWh is not monitored by E.ON as these customers are not subject to the same change of supplier process as the customers with a consumption below 250 MWh. Indeed, as they are not on long term contracts, they change supplier by [...] * a new contract upon termination of their existing one.

* Should read: "signing".

⁸¹⁷ Reply to RFI 49, Annex 1. Annex 2 and Annex 3; Supplemental response to the Commission's theories of harm with respect to Czech Republic and Slovakia, Submitted on 8 May 2019.

customers below 1 GWh to such an extent as to exert effective competitive pressure on each other.

- (890) Moreover, the bidding analysis revealed that the Parties maintain a different geographical focus as the vast majority of bids placed by E.ON and Innogy were for entities located in their own DSO areas: [...] % for E.ON and [...] % for Innogy, respectively. The remaining [...] % and [...] % of E.ONs bids were placed in Innogy's DSO and SSD DSO areas. With respect to Innogy, the remaining [...] % and [...] % bids were placed in E.ON's DSO and SSD DSO areas.
- (891) Fifth, in the Phase I market investigation, competitors were asked to indicate the three main competitors of the Parties. Only two of the six respondents to the questionnaire have indicated VSE (Innogy) as main competitor of ZSE (E.ON) and only one has mentioned ZSE among the top three competitors of VSE. Other competitors mentioned are Magna, SPP, Energie2 for ZSE and Elgas, SPP and Magna for VSE.⁸¹⁸ The Commission considers these replies as evidence of the limited effectiveness of the Parties in competing against each other.
- (892) Sixth, the outcome of the investigation suggests that barriers to entry are comparatively lower than for regulated customers. This is both true for the Parties and for the small suppliers too. As indicated by the Parties' competitors, *"In the commercial segment, there are not significant investments that are required to operate successfully in the market"* and *"there is always place for small suppliers to enter the market with lower prices"*.⁸¹⁹ The market for small unregulated customers is competitive⁸²⁰ and all new entrants are able to target the same customers as the larger competitors.⁸²¹
- (893) The Commission considers that the extent to which the Parties currently compete is limited and the only noticeable market share increase occurred through Innogy's acquisition of CEZ and therefore the overall impact of the Concentration is likely to be limited in the market for the retail supply of electricity to unregulated customers with consumption below 1 GWh in Slovakia.

10.2.1.3. Unregulated customers with consumption above 1 GWh

The Notifying Party's view

- (894) Both Parties are active in the market for the retail supply of electricity to unregulated customers consuming more than 1 GWh. The combined market share of the Parties is [30-40]%. In this respect, the Notifying Party submits that the national market shares do not accurately reflect the competitive dynamics in the market due to the asymmetrical regional position of the Parties, which overstates their market position.⁸²²
- (895) The Notifying Party submits that the customers in this segment are highly price sensitive as electricity can represent a substantial input into their production process therefore, in Innogy's experience, customers would switch for a price difference of

⁸¹⁸ Replies to questions 30 and 31 of questionnaire Q3 – Competitors (Slovakia).

⁸¹⁹ See minutes of the call with a competitor of 7 January 2019, ID 3525; minutes of the call with a competitor of 27 March 2019 (ID4416).

⁸²⁰ See minutes of the call with a competitor of 7 January 2019, ID 3525; minutes of the call with a competitor of 27 March 2019 (ID4416).

⁸²¹ See minutes of the call with a competitor of 27 March 2019, ID 4416; minutes of the call with a competitor on 1 April 2019 (ID 3903).

⁸²² Form CO, paras. 4052, 4054.

less than [0-10]%. These customers are also sophisticated negotiators who use annual competitive processes, such as tenders, electronic auctions or requests for quotations from multiple suppliers, typically five, to lower their electricity costs. This buyer power results in low margins in this market; for example E.ON had a median gross margin of [...] EUR/MWh in 2017 for this group of customers compared to [...] EUR/MWh for customers with consumption below 1 GWh.⁸²³

- (896) The Notifying Party also argues that entry barriers into the retail electricity market are low as the licensing regime is straightforward and not materially burdensome. Additionally, new entrants need not make large upfront investments in infrastructure or a large sales force.⁸²⁴
- (897) The Notifying Party further submits that the existence of a significant number of other competitors will continue to impose significant competition constraints on the Parties post-Concentration. These are namely CEZ, who are the most successful company to enter the market following liberalisation, Elgas, Magna, SEES and SPP. The lack of any price regulation has enabled smaller and newer suppliers to compete successfully in this market with the fringe players having particularly strong growth in 2017.⁸²⁵
- (898) As for the other market segments (that is, regulated and small unregulated customers), the Notifying Party submits that a diversion analysis captures the competitive dynamics of the market better than the national market shares that are distorted by incumbency effects. In E.ON's DSO area, Innogy does not exert a significant competitive pressure; the closest rivals to E.ON are SPP, CEZ and SSEAS, with diversion ratios of [10-20]%, [10-20]% and [10-20]%, respectively. Likewise, E.ON cannot be considered the closest competitor of Innogy, as SPP has the highest diversion ratio, on average, between 2015 and 2017 ([10-20]%).⁸²⁶ Furthermore, there are high switching rates in this segment as, on average, of approximately 1[10-20]% of customers switched in E.ON's DSO area between 2015 and 2017. This rate also underestimates the level of switching as it does not capture the significant number of customers that selected their existing provider following a competitive selection process.⁸²⁷

The Commission's assessment

- (899) The Parties are both active in the market for the retail supply of electricity to unregulated customers consuming more than 1 GWh. The combined market share of the Parties at national level in 2018 was [40-50]% by volume and [30-40]% by number of customers.⁸²⁸ The Commission considers that such market share, as opposed to the Parties' share of supply at DSO level, is more indicative of their actual market position, due to the fact that the market for the retail supply of electricity to large customers has achieved a national dimension and presents only to a limited extent the local elements visible in the other market segments. However, in markets largely characterised by customer tenders, the indicative value of market shares can be more limited (see recital (903)).

⁸²³ Form CO, paras. 4044-4047.

⁸²⁴ Form CO, paras. 4050-4051.

⁸²⁵ Form CO, paras. 4056-4057.

⁸²⁶ Form CO, paras. 4058-4070.

⁸²⁷ Form CO, paras. 4048.

⁸²⁸ The post-merger HHI on a national level is approximately 2000, with a delta – compared to the pre-merger HHI - of approximately 650.

Table 30 – Market shares for the retail supply of electricity to unregulated customers consuming more than 1 GWh at national level (volume)

%	2018	2017	2016	2015
E.ON	[20-30]	[20-30]	[20-30]	[20-30]
Innogy	[10-20]	[10-20]	[10-20]	[10-20]
<i>Combined</i>	<i>[40-50]</i>	<i>[30-40]</i>	<i>[30-40]</i>	<i>[30-40]</i>
SSEAS	[10-20]	[10-20]	[10-20]	[10-20]
ČEZ	[5-10]	[10-20]	[10-20]	[10-20]
SEES	[5-10]	[5-10]	[10-20]	[10-20]
Elgas	[0-5]	[5-10]	[0-5]	[0-5]
Magna	[0-5]	[0-5]	[0-5]	[0-5]
Železnice Slovenskej Republiky	[0-5]	[0-5]	[0-5]	[0-5]
SPP	[0-5]	[0-5]	[0-5]	[0-5]
EP Energy Trading	[0-5]	[0-5]	[0-5]	[0-5]
Energa Slovakia	[0-5]	[0-5]	[0-5]	[0-5]
Pow-en	[0-5]	[0-5]	[0-5]	[0-5]
Energie2	[0-5]	[0-5]	[0-5]	[0-5]
Others	[0-5]	[0-5]	[0-5]	[0-5]
Total	100	100	100	100

Source: Form CO and Compass Lexecon using data provided by E.ON and Innogy and RONI data (reply to RFI 44).

Table 31 – Market shares for the retail supply of electricity to unregulated customers consuming more than 1 GWh at national level (customers)

%	2018	2017	2016	2015
E.ON	[20-30]	[20-30]	[20-30]	[20-30]
Innogy	[10-20]	[10-20]	[10-20]	[10-20]
<i>Combined</i>	<i>[30-40]</i>	<i>[30-40]</i>	<i>[30-40]</i>	<i>[40-50]</i>
SSEAS	[10-20]	[10-20]	[10-20]	[10-20]
ČEZ	[10-20]	[10-20]	[10-20]	[10-20]
SEES	[5-10]	[5-10]	[10-20]	[10-20]
Elgas	[5-10]	[5-10]	[0-5]	[0-5]
Magna	[0-5]	[0-5]	[0-5]	[0-5]
Železnice Slovenskej Republiky	[0-5]	[0-5]	[0-5]	[0-5]
SPP	[0-5]	[0-5]	[0-5]	[0-5]
EP Energy Trading	[0-5]	[0-5]	[0-5]	[0-5]
Energa Slovakia	[0-5]	[0-5]	[0-5]	[0-5]
Pow-en	[0-5]	[0-5]	[0-5]	[0-5]
Energie2	[0-5]	[0-5]	[0-5]	[0-5]
Others	[0-5]	[0-5]	[0-5]	[0-5]
Total	100	100	100	100

Source: Compass Lexecon using data provided by E.ON and Innogy and RONI data (reply to RFI 44).

Table 32 – Regional shares of supply for the supply of retail electricity to unregulated customers consuming more than 1 GWh in E.ON DSO area in 2015 to 2018 (volume)

%	2018	2017	2016	2015
E.ON	[40-50]	[40-50]	[40-50]	[40-50]
Innogy	[5-10]	[0-5]	[0-5]	[0-5]
<i>Combined</i>	<i>[40-50]</i>	<i>[40-50]</i>	<i>[40-50]</i>	<i>[40-50]</i>
CEZ	[10-20]	[10-20]	[10-20]	[10-20]
SEES	[10-20]	[10-20]	[10-20]	[10-20]
SSEAS	[5-10]	[5-10]	[5-10]	[5-10]
Elgas	[0-5]	[0-5]	[5-10]	[5-10]
SPP	[0-5]	[0-5]	[0-5]	[0-5]
Magna	[0-5]	[0-5]	[0-5]	[0-5]
Pow-en	[0-5]	[0-5]	[0-5]	[0-5]
Duslo	[0-5]	[0-5]	[0-5]	[0-5]
Energie2	[0-5]	[0-5]	[0-5]	[0-5]
Slovakia Energy	[0-5]	[0-5]	[0-5]	[0-5]
Energa Slovakia	[0-5]	[0-5]	[0-5]	[0-5]
Energy Europe	[0-5]	[0-5]	[0-5]	[0-5]
Others	[0-5]	[0-5]	[0-5]	[0-5]
Total	100	100	100	100

Source: Compass Lexecon using E.ON DSO data (reply to RFI 44).

Table 33 – Regional shares of supply for the supply of retail electricity to unregulated customers consuming more than 1 GWh in Innogy DSO area in 2015 to 2018 (volume)

%	2018	2017	2016	2015
EON	[10-20]	[10-20]	[5-10]	[0-5]
Innogy	[50-60]	[50-60]	[50-60]	[50-60]
<i>Combined</i>	<i>[60-70]</i>	<i>[60-70]</i>	<i>[60-70]</i>	<i>[60-70]</i>
CEZ	[10-20]	[5-10]	[5-10]	[10-20]
SEES	[0-5]	[0-5]	[0-5]	[5-10]
SSEAS	[5-10]	[0-5]	[0-5]	[0-5]
Elgas	[0-5]	[0-5]	[0-5]	[0-5]
SPP	[0-5]	[0-5]	[0-5]	[0-5]
Magna	[0-5]	[0-5]	[0-5]	[0-5]
Energie2	[0-5]	[0-5]	[0-5]	[0-5]
Slovakia Energy	[0-5]	[0-5]	[0-5]	[0-5]
Energa Slovakia	[0-5]	[0-5]	[0-5]	[0-5]
Bukoza	[0-5]	[0-5]	[0-5]	[0-5]
Others	[0-5]	[5-10]	[5-10]	[5-10]
Total	100	100	100	100

Source: Compass Lexecon using Innogy DSO data (reply to RFI 44).

Table 34 – Regional shares of supply for the supply of retail electricity to unregulated customers consuming more than 1 GWh in SSD DSO area in 2015 to 2018 (volume)

%	2018	2017	2016	2015
EON	[5-10]	[0-5]	[5-10]	[5-10]
Innogy	[0-5]	[0-5]	[0-5]	[0-5]
<i>Combined</i>	<i>[10-20]</i>	<i>[5-10]</i>	<i>[10-20]</i>	<i>[10-20]</i>
SSEAS	[40-50]	[40-50]	[40-50]	[30-40]
Others	[40-50]	[40-50]	[40-50]	[50-60]
Total	100	100	100	100

Source: Compass Lexecon using Innogy DSO data (reply to RFI 44).

- (900) As noted in the introduction to this Section, the Commission considers that, for unregulated customers consuming more than 1 GWh national market shares are more indicative of the Parties' actual market position than the Parties' share of supply at DSO level (that can reach [60-70]% in the Innogy DSO area, for instance). This is due to the fact that the market for the retail supply of electricity to large customers has achieved a national dimension and presents only to a limited extent the local elements visible in the other market segments. The Commission considers that the Concentration would not significantly impede effective competition as a result of horizontal non-coordinated effects arising from the overlaps in the activities of the Parties in the market for the retail supply of electricity to unregulated customers with

consumption above 1 GWh in Slovakia for a number of reasons discussed in the following recitals.

- (901) First, although at national level, the Concentration would result in the merged entity being the market leader, the Commission notes that there are competitors with relatively large market shares. The closest competitor, the third incumbent SSEAS, has a market share of approximately [10-20]%, while the next largest competitor, CEZ, has a [10-20]% market share.⁸²⁹ The market also includes a number of smaller competitors, some of which (for example, Elgas and Magna) with growing national market shares (in particular by number of customers).
- (902) Second, given that the market is geographically differentiated, the Commission was particularly concerned in assessing the closeness of competition between the merging Parties. In that respect the analysis of dynamic measures like tenders and switching measures is particularly relevant and the switching analysis carried out by the Commission revealed that the Parties are not close competitors to each other. Diversion ratios complement any initial assessment based on market shares by illustrating the competitive dynamics in the market. Out of all large customers in Slovakia who left E.ON in the period 2015 – 2018, only [5-10]% chose Innogy as their new supplier.⁸³⁰ The competitors, which attracted the largest share of previous E.ON customers, were CEZ with diversion ratio of [20-30]%, and SPP, with diversion ratio of [10-20]%.⁸³¹ As national switching data for Innogy was unavailable, the sample of switching from Innogy was significantly smaller and therefore less informative. The largest share ([10-20]%) of Innogy's lost customers in Innogy's DSO area⁸³² chose SPP as their new supplier in the period 2015 - 2018, with CEZ and E.ON coming second and third with [10-20]% share each⁸³³ However, the switching to E.ON decreased between 2015 and 2018.
- (903) Third, the importance of market shares in tender markets is relative and must be interpreted in the light of the specific impact of the merger proposal on bidding behaviour, as sufficient competition can exist even with relatively few suppliers and market shares alone may not constitute an adequate basis on which to analyse the competitive situation.⁸³⁴ Tenders typically cover a period from one to two years, as the responses to the market investigation indicate.⁸³⁵ The bidding analysis revealed that E.ON and Innogy rarely compete against each other in Slovakia.⁸³⁶ The Commission analysed E.ON's and Innogy's competitive processes for public and private entities with consumption above 1 GWh in Slovakia, which occurred in the period 2015 – 2018.⁸³⁷ The Commission found that the Parties rarely placed competing bids against each other: E.ON bid together with Innogy in only [...] % of

⁸²⁹ Market shares in volume for 2017, substantially unchanged, if one considers the number of customers in 2018.

⁸³⁰ Reply to RFI 39.

⁸³¹ For example, in 2018 CEZ attracted [...] very large customer from Innogy, constituting over [60-70]% of all switched volume from Innogy in Innogy's DSO area in 2018, which shows that other competitors are able to compete for very large customers. Reply to RFI 44.

⁸³² Innogy was unable to provide switching data in SSD DSO area, hence national diversion ratios cannot be computed.

⁸³³ Reply to RFI 39.

⁸³⁴ See e.g. COMP/M.3653 - *Siemens/VA Tech*, para.318; COMP/M. 4647 – *AEE/LENTJE,S* para.57.

⁸³⁵ Replies to question 14 of questionnaire Q4 – Large industrial customers (Slovakia).

⁸³⁶ Reply to RFI 49, Annex 1, Annex 2 and Annex 3; Supplemental response to the Commission's theories of harm with respect to Czech Republic and Slovakia, Submitted on 8 May 2019.

⁸³⁷ Reply to RFI 49, Annex 1, Annex 2 and Annex 3, Supplemental response to the Commission's theories of harm with respect to Czech Republic and Slovakia, Submitted on 8 May 2019.

all tenders that E.ON participated in. Similarly, Innogy met E.ON in [...] % of all tenders that Innogy participated in Slovakia in the period. Such low number of common tender participations indicates that the Parties do not often compete head to head in tenders.

- (904) Moreover, the tender data analysis also indicated and confirmed that E.ON and Innogy focus on different geographic areas in Slovakia. [Regarding DSO bid strategy].⁸³⁸ [Regarding DSO bid strategy].⁸³⁹ Only [...] % of all of E.ON's bids in tenders for unregulated customers with consumption above 1 GWh occurred in Innogy's DSO area. [Regarding DSO bid strategy]. Finally, the Commission notes that [regarding DSO bid strategy]. Out of all the tenders where Parties met, only [0-10] % of these occurred in SSD DSO area.
- (905) The Commission also notes that, in spite of [...], Innogy has achieved a share of supply (based on volume) of approximately [5-10] % in E.ON's DSO area, whereas CEZ has approximately [10-20] % sales share, SEES approximately [10-20] %, SSEAS approximately [5-10] % and Elgas is very close to Innogy with approximately [5-10] %. When looking at the number of customers, the shares of supply of the Parties decrease significantly in each other's DSO areas: In E.ON's DSO area, Innogy accounted for only [0-5] % of the customers (compared to [5-10] % of volume), while E.ON accounted for only [5-10] % ([10-20] % of volume) in Innogy's DSO area.⁸⁴⁰ This also illustrates that losing few large customers can change the shares of supply relatively quickly. The Commission also notes that a number of these customers are so-called multi-site customers, where the customer is present not only in the supplier's incumbency area and sources from one provider for its nation-wide consumption.⁸⁴¹ In such cases, the presence of one supplier in another's incumbency area can be more a by-product of the supplier's participation in tenders (covering multiple sites) within its own incumbency area. For example, [...] E.ON's customers in Innogy's DSO area have multiple off-take points across Slovakia that are all supplied by E.ON, [...].⁸⁴²
- (906) Fourth, the Commission considers that competition in the segment for large unregulated customers is very dynamic. In fact, the Phase I market investigation revealed that competitors believe that the Parties' large industrial customers are price sensitive and would, if needed, most likely switch to one of the cheapest offers available on the market.⁸⁴³ The Commission considers that switching is also facilitated by the fact that the majority of customers enter into supply contracts for a limited duration of one or two years.⁸⁴⁴ Moreover, some customers in the unregulated part of the market confirmed that they look for alternative suppliers to the traditional incumbents.⁸⁴⁵ In this respect, customers also indicated recent entrants as alternatives, such as SPP, CEZ and Energie2.⁸⁴⁶ Furthermore, a customer noted that *"there are multiple suppliers providing delivery of electricity"*.⁸⁴⁷

⁸³⁸ Reply to RFI 49, Q5.

⁸³⁹ [...].

⁸⁴⁰ Calculation based on the 2018 data provided by the Parties in Reply to RFI 44.

⁸⁴¹ Reply to RFI 60.

⁸⁴² Reply to RFI 60.

⁸⁴³ Replies to questionnaire Q3 – Competitors (Slovakia), questions 35, 39.

⁸⁴⁴ Replies to questionnaire Q4 – Customers (Slovakia), question 14.

⁸⁴⁵ Replies to questionnaire Q3 – Competitors (Slovakia), question 42.

⁸⁴⁶ Replies to questionnaire Q4 – Customers (Slovakia), question 26.

⁸⁴⁷ A customer replying to Questionnaire Q4 – Customers (Slovakia), question 26.

- (907) Also, market participants indicated that the market for large unregulated customers is competitive and referred to “*the difficulty to compete on that segment of the market because margins are kept very low due to high competition in tenders*”.⁸⁴⁸ Financial solidity and flexibility of the supplier are the important elements which determine suppliers’ participation and subsequent success in tenders and, in this respect, incumbents are not considered as having an advantage vis-à-vis new entrants. According to a competitor, “*Having a large portfolio certainly gives an advantage [...] but this does not depend on your position as incumbent or attacker on the market.*”⁸⁴⁹ One of the largest customers indicated that, after the Concentration, “*other 3-4 large competitors will still remain active in the market*”.⁸⁵⁰
- (908) Lastly, the Commission notes that in the market investigation concerning large unregulated customers, all respondents indicated that they expected no change in the competitive conditions or the prices following the merger.⁸⁵¹
- (909) The Commission therefore considers that whilst each Party certainly has some more activity in the other’s DSO area in respect of large unregulated customers in terms of share of supply (as compared to regulated customers and unregulated customers consuming less than 1 GWh), the extent to which the Parties currently compete, and therefore the competitive pressure they currently exert on each other, is nevertheless relatively limited. The Parties appear to rarely compete in the same tenders and their focus largely remains on their own DSO areas. Moreover, multiple competitors capable of competing in this price sensitive bidding market remain. Therefore the overall impact of the Concentration is likely to be limited in the market for the retail supply of electricity to unregulated customers with consumption above 1 GWh in Slovakia.

10.2.1.4. *Loss of potential competition*

- (910) The Commission has considered whether the Concentration, although not having a significant impact on the current level of competition in Slovakia, may significantly impede effective competition by leading to a loss of potential competition.
- (911) This concern applies to all retail electricity markets in Slovakia. Although competition is to some extent more dynamic in the unregulated customers segments, competition between the Parties remains relatively limited, even in the market for large industrial unregulated customers consuming more than 1 GWh where the Parties have some more activity in each other’s DSO areas compared to regulated customers and unregulated customers consuming less than 1 GWh, for the reasons set out above in recitals (899) to (909).
- (912) The results of the Commission investigation do not support the conclusion that the Concentration, by removing Innogy from the market, could determine a loss of potential competition. The Commission notes that the evidence supporting this view is largely the same for the three relevant categories of customers. However, in the following recitals, the Commission differentiates, where appropriate, the evidence between the three categories of customers.

⁸⁴⁸ See minutes of conference call with a competitor, 28 March 2019, (ID4755).

⁸⁴⁹ See minutes of a conference call with a competitor, 28 March 2019, (ID4755); minutes of call with a competitor, 27 March 2019, (ID4416). A competitor indicates that it targets the same customers as the Parties (minutes of a conference call, 1 April 2019, ID3903).

⁸⁵⁰ See minutes of a conference call with a customer, 3 May 2019, (ID5017).

⁸⁵¹ Replies to questionnaire Q4 – Customers (Slovakia), questions 29 and 30.

a. The framework for assessing the loss of potential competition

(913) Paragraph 60 of the horizontal merger guidelines (HMG)⁸⁵² provides that a merger with a potential competitor, in order to have significant anti-competitive effects, must fulfil two requirements.

(914) First, the potential competitor must already exert a significant constraining influence or there must be a significant likelihood that it would grow into an effective competitive force. In this respect, evidence that a potential competitor has plans to enter a market in a significant way could help the Commission to reach such a conclusion. Second, there must not be a sufficient number of other potential competitors, which could maintain sufficient competitive pressure after the merger.

b. The first prong of the test – expansion plans in non-traditional geographic areas

(915) In its investigation, the Commission found some evidence that E.ON and Innogy have had relatively recent plans (dating from 2016) to expand in geographic areas outside their own incumbency region (West Slovakia for E.ON/ZSE, East Slovakia for Innogy/VSE).

(916) As regards Innogy, it was considering expanding to West and Central Slovakia⁸⁵³ and concerned all categories of customers. For example, in a document of 2016, Innogy noted that “[*regarding strategy plans*]”.⁸⁵⁴ In the same year, a document discussed growth targets for sale in the Western and Central region of Slovakia: “[*regarding strategy plans*]”⁸⁵⁵. [*Regarding strategy plans*]⁸⁵⁶ [*regarding strategy plans*]⁸⁵⁷. Other internal documents⁸⁵⁸ contain Innogy’s cost benefit analysis of acquiring B2B customers in Western and Central Slovakia.

(917) [*Regarding strategy plans*]⁸⁵⁹.

(918) In assessing the likelihood of Parties’ expansion plans, the Commission has identified two main barriers to geographic expansion across the three product markets: the need for a strong/recognisable brand outside their traditional area and the investment to develop a sales force on the ground to support the expansion.⁸⁶⁰

(919) As regards the brand, [*regarding strategy plans*]⁸⁶¹ [*regarding strategy plans*].⁸⁶² [*Regarding strategy plans*].⁸⁶³⁸⁶⁴

⁸⁵² *Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings*, OJ C 31, 5 February 2004, p. 5–18.

⁸⁵³ E.ON launched a new nation-wide brand, ZEON, but this initiative does not appear to have been successful and, [...] (Reply to the 6(1)(c) Decision, para 200), which it did in early 2019. Currently, the only products still supplied under the ZEON brand are Smart Home products. [...]. See E.ON’s reply to RFI 58.

⁸⁵⁴ Reply to RFI 46, internal document (ID4448-15537).

⁸⁵⁵ Reply to RFI 46, internal document (ID4448-17734).

⁸⁵⁶ Reply to RFI 16, internal document (ID1255-134).

⁸⁵⁷ Reply to RFI 46, internal document (ID4448-18074).

⁸⁵⁸ Reply to RFI 46, internal document (ID4448-21784).

⁸⁵⁹ Reply to RFI 46, internal document (ID4448-15537).

⁸⁶⁰ Sales force and physical presence are also important for large customers. [*Regarding strategy plans*].

⁸⁶¹ Internal document (ID4448-21408).

⁸⁶² Reply to RFI 46, internal document (ID4448-16002).

⁸⁶³ [...]. See reply to RFI 58 (part I), paras 1 and 2.

⁸⁶⁴ The Commission acknowledges that in respect of large unregulated customers consuming more than 1 GWh, brand may be slightly less important than for regulated customers and unregulated customers consuming less than 1 GWh given that these are more sophisticated customers with more buyer power

- (920) As for the investment to develop a sales force adequate to support expansion in a new geographic area, [regarding strategy plans].⁸⁶⁵ [Regarding strategy plans]⁸⁶⁶ [regarding strategy plans].⁸⁶⁷
- (921) [Regarding strategy plans].⁸⁶⁸ [Regarding strategy plans].⁸⁶⁹
- (922) In respect of regulated customers, Innogy itself has acknowledged that growing organically outside its incumbent area is difficult “[...]”.⁸⁷⁰ [...].⁸⁷¹
- (923) The acquisition of the CEZ customer portfolio gave Innogy a regulated customer portfolio in West Slovakia (approximately [0-5]% of the regulated customers segment). However, despite this acquisition, Innogy was not able to gain any significant traction in the E.ON DSO area in regulated customers. Its share of supply in E.ON’s DSO area for regulated customers has decreased in 2018,⁸⁷² and the diversion ratio from E.ON to CEZ, post-Innogy acquisition, dropped from [0-5]% to [0-5]%⁸⁷³. This shows that, at this stage, Innogy has not been successful in leveraging CEZ’s regulated customer portfolio in West Slovakia to capture the customers switching away from E.ON. [...]. This highlights the need for a good brand and sales force.
- (924) As regards E.ON’s attempts to expand outside its own DSO area, [regarding strategy plans].⁸⁷⁴
- (925) In summary, whilst both Parties, especially Innogy, were interested in expanding and considered various initiatives to pursue this goal, the evidence suggests that Innogy has made limited progress⁸⁷⁵ [regarding strategy plans]. There is also no evidence to suggest that E.ON had any concrete plans on the back of which it would be able to expand its activities significantly.
- (926) In respect of regulated customers, the Parties’ internal documents clearly suggest that organic growth is extremely difficult for them. [Regarding strategy plans].⁸⁷⁶ [Regarding strategy plans].⁸⁷⁷ Finally, the Commission has not uncovered any documents which would reveal plans by E.ON to attempt in any significant manner to gain regulated customers in Eastern Slovakia. In this context the Commission recalls that E.ON’s share of supply for regulated customers in Innogy’s DSO area is [0-5]%. As such, in order to develop into an effective competitive force, E.ON would have to have some substantial plans as to how it would gain traction with regulated customers in Eastern Slovakia.

and with the key focus on price. Nevertheless, the internal documents discussing the importance of brand do not exclude large customers from the scope of discussion.

⁸⁶⁵ Reply to RFI 46 (ID4448-26026) and RFI 16 (ID1255-127).

⁸⁶⁶ Reply to RFI 46 (ID4448-26026). [Regarding strategy plans]. In this respect it is worth noting that other Innogy’s internal documents support the view that the non-commodity business (and gas retail) could generate higher profits than electricity retail. [Regarding strategy plans].

⁸⁶⁷ Reply to RFI 16 (ID1255-127).

⁸⁶⁸ Reply to RFI 58, question 8.

⁸⁶⁹ Email by [...] (ID4448-26527).

⁸⁷⁰ Reply to RFI 45 (ID4420-3949).

⁸⁷¹ [Extracts from an internal document].

⁸⁷² Supplemental Response to the 6(1)(c) decision of 8 May 2019, Table 1.

⁸⁷³ Supplemental Response to the 6(1)(c) decision of 8 May 2019, Figure 1.

⁸⁷⁴ [Regarding strategy plans].

⁸⁷⁵ [...].

⁸⁷⁶ See footnote 869.

⁸⁷⁷ Para. 211 of E.ON’s response to the Article 6(1)(c) decision.

- (927) [Regarding strategy plans]. Even if one were to accept that the barriers to entry in this customer segment are lower than for regulated customers, there is no evidence on the basis on which the Commission could assume that there is a significant likelihood that Innogy would grow into an effective competitive force in the short- to mid-term outside its own DSO area. Moreover, as regards those unregulated customers who source through tendering, given that past tender data shows that the Parties have competed against each other to a very limited extent [regarding strategy plans], without additional evidence, the Commission cannot assume this would significantly change in the future.
- (928) In respect of large customers with a consumption above 1 GWh, the Commission acknowledges that there is some actual competition between the Parties. Nevertheless, given that the Commission considers that the loss of this actual competition will not lead to a significant impediment to effective competition (see recital (909)), the Commission examined whether there was any evidence that the Parties would be likely to significantly expand their activities in each other's regions. The Commission found no evidence that is not already set out above in recitals (915) to (925) that either Party had any plans to somehow expand their reach to large unregulated customers located outside their own DSO area. Whilst barriers to expand are somewhat lower than the regulated customers and unregulated customers with consumption below 1GWh, in the sense that price tends to be the key factor, brand and sales force presence nevertheless remain important. Moreover, the Commission notes that if past tender data suggests that the Parties rarely compete in the same tenders and their focus largely remains on their own DSO areas, without additional evidence, the Commission cannot assume this would significantly change in the future.
- (929) In light of the above, the Commission considers that, based on the evidence available, the Parties do not already exert a significant constraining influence, nor is there a significant likelihood that the Parties would be able to overcome these obstacles and grow into an effective competitive force in each other's DSO areas in particular in respect of regulated customers and unregulated customers with a consumption below 1 GWh. As regards large industrial customers with a consumption above 1 GWh, there is no evidence to suggest that the Parties are likely to expand and grow in each others' DSO areas to any significant extent.
- c. The second prong of the test - sufficient competitive pressure from alternative providers
- (930) With respect to the second prong of the test, the Commission found that, even if Innogy were to expand in E.ON's DSO area, there is not sufficient evidence to claim that Innogy would exert a constraint on E.ON stronger than and thus not replicable by any other supplier already active in West Slovakia, such as SPP, Slovakia Energy, Magna, etc.
- (931) The Commission found that the fact that Innogy is large in East Slovakia does not necessarily imply that it would be better placed than other suppliers to challenge E.ON's incumbent position in West Slovakia. As discussed above in recitals (865), (886) and (902), the Parties are not close competitors. They mostly lose customers to other suppliers and the switching rate between the Parties has even further declined or remained stable in 2018 compared to 2015 across all three customer groups. Moreover, when it comes to the key barriers to expansion facing Innogy, it seems unlikely that Innogy could materially leverage its existing brand and sales force currently located in East Slovakia to penetrate the Western part of the country. Nor does it seem that Innogy could benefit from significant economies of scale (for

example, in customer care services) compared to smaller players. As recognised by the company itself in its internal assessment, Innogy would have to invest significant time and resources in building brand awareness and an adequate sales force in West Slovakia, as much as any other new entrant.⁸⁷⁸

- (932) The same applies to any potential expansion by E.ON into Innogy's DSO area. Even if E.ON were to expand in Innogy's DSO area, in all three customer segments there is not sufficient evidence to claim that E.ON would exert a significant constraint on Innogy that could not be replicated by any other supplier already active in East Slovakia, such as CEZ, SPP, Energie2, Magna, SEES, etc.

d. Conclusion on the loss of potential competition

- (933) Based on the evidence presented in the above recitals, the Commission considers that the requirements set forth in paragraph 60 of the merger guidelines are not met. The Commission therefore considers that the Concentration, by eliminating Innogy as competitor in Slovakia, would not determine a loss of potential competition in the future.

10.2.2. Overall conclusion on the retail supply of electricity in Slovakia

- (934) In light of the above, the Commission considers that the Concentration would not significantly impede effective competition as a result of horizontal non-coordinated effects arising from the overlaps in the activities of the Parties in the markets for the retail supply of electricity to (i) regulated customers (ii) unregulated customers with consumption below 1 GWh and (iii) unregulated customers with consumption above 1 GWh in Slovakia.

10.3. Vertical non-coordinated effects

10.3.1. Electricity distribution networks (upstream) – Electricity generation and wholesale supply (downstream)

- (935) The Parties have a very limited presence in the market for electricity generation and wholesale distribution (less than [0-5]%)⁸⁷⁹ and are each a monopolist in their own electricity distribution networks. Therefore, this relationship leads to a technically vertically affected market.
- (936) In relation to such vertical relationship, however, the Commission considers that the Concentration does not raise input or customer foreclosure concerns.
- (937) In fact, the Commission considers that, by reason of their very limited presence in generation and wholesale distribution of electricity, the Parties will lack both the ability and the incentive to foreclose other distribution network operators from their electricity generation capacities. As to the possible foreclosure of the distribution networks, the Commission considers that no foreclosure can occur in the market as DSOs are monopolist in their own distribution networks and are required by regulation to connect generation and storage facilities on reasonable, non-discriminatory and transparent terms.

⁸⁷⁸ The barrier linked to scarce brand recognition and related investment problems emerges from a number of Innogy's internal documents: "[regarding strategy plans]" (Innogy's internal document ID4448-16858); "[regarding strategy plans]" ([...]* ID4448-21408); "[regarding strategy plans]" (Innogy's internal document ID4448-16002).

* Should read: "Innogy's internal document".

⁸⁷⁹ Form CO, para 4201.

(938) The Commission therefore considers that the Concentration would not significantly impede effective competition as a result of the vertical relationship between the Parties as regards the market for generation and wholesale supply of electricity and the market for electricity distribution networks in Slovakia.

10.3.2. Electricity generation and wholesale supply (upstream) – retail supply of electricity (downstream)

(939) The Parties limited activities in electricity generation and wholesale supply are also linked to their activities on the downstream markets for the retail supply of electricity, where their single of combined market share exceeds 30%, thus leading to a vertically affected market.

(940) The Commission, however, considers that such vertical relationships do not raise input or customer foreclosure concerns.

(941) Post-Concentration, it would not be possible (ability) or profitable (incentive) for the merged company to increase the costs of its competitors at the downstream level (electricity retail suppliers) by restricting their access to an important input (electricity generation and wholesale supply) due to the limited presence of the Parties in the upstream market for electricity generation and the availability of alternative electricity generation sources.

(942) Similarly, the merged entity would lack both ability and incentive to leverage its position in electricity retail supply in order to foreclose competition in the market for electricity generation and wholesale supply. In fact, the merged entity would not have the ability nor the incentive to foreclose upstream competitors given its inability to source all of its required electricity production from its own upstream division (which has a limited electricity generation capacity) and the presence, downstream, of other competitors which electricity generation and wholesale suppliers will be able to supply in alternative to the merged entity.

(943) The Commission therefore considers that the Concentration would not significantly impede effective competition as a result of the vertical relationship between the Parties as regards the upstream market for generation and wholesale supply of electricity and the downstream market for retail supply of electricity in Slovakia.

10.3.3. Electricity distribution networks (upstream) – retail supply of electricity (downstream)

(944) Both Parties are active in the operation of electricity distribution networks upstream, where they are monopolists, and on the downstream market for retail supply of electricity in Slovakia, with a combined market share in excess of 30%. Therefore, the Concentration leads to vertically affected markets in this respect.

(945) The Commission, however, considers that such vertical relationships do not raise input or customer foreclosure concerns.

(946) In fact, both E.ON and Innogy have a pre-existing vertical link between their distribution network and retail activities in their network areas. As the Parties have limited activities outside their own DSO area, the merger does not materially increase the Parties' position at DSO level. As to customer foreclosure, the merged entity is already a monopolist in the market for electricity distribution and will thus lack any incentive to leverage its downstream retail activities as a strategy to improve its market position upstream.

(947) The Commission therefore considers that the Concentration would not significantly impede effective competition as a result of the vertical relationship between the

Parties as regards the upstream market for electricity distribution networks and the downstream market for retail supply of electricity in Slovakia.

10.3.4. Downstream wholesale supply of gas (upstream) – Retail supply of gas (downstream)

- (948) The combined market share of the Parties in the downstream wholesale supply of gas is less than 1%⁸⁸⁰ and, downstream, the market share of the Parties, either individually or combined, is below 30%. Therefore, these are not vertically affected markets and will not be discussed further in this Decision.

11. UNITED KINGDOM

- (949) In the United Kingdom (UK), both E.ON and Innogy are active⁸⁸¹ in the generation and wholesale supply of electricity, in the retail supply of electricity, in the retail supply of gas, in metering (electricity and gas), in heating systems, in PV systems, in district heating, in energy auditing and consultancy services⁸⁸² and in demand-side response and flexibility services.^{883 884}

11.1. Market definition

- (950) On the legal framework and general principles of market definition, see recital (34).

11.1.1. Retail supply of electricity

- (951) Both Parties are active in the retail supply of electricity to households, SMEs and large industrial customers. E.ON operates through its subsidiary E.ON UK plc in Great Britain and Innogy operates through its subsidiary Npower Group Limited ("Npower").⁸⁸⁵

⁸⁸⁰ Form CO, para. 3814.

⁸⁸¹ Form CO, paras. 2188, 2190.

⁸⁸² The Parties activities in this market are related energy saving services (including technology assessment, strategy design for regulatory compliance, energy efficiency, carbon management or energy security) and provided to non-domestic customers. The Parties' combined market share is [0-5]% on the narrowest plausible market definition. The Commission will therefore not consider further this plausible market.

⁸⁸³ E.ON's activities in this market consist of connecting customers to E.ON's virtual power plant which brings together E.ON's customers' energy assets, including energy consumption, generation and storage systems, into one integrated network that is monitored and optimised by E.ON's specialist "Connecting Energies Team". Once connected to E.ON's Virtual Power Plant, E.ON's business customers are then able to contribute their flexible energy assets (e.g. on-site generation, renewables, battery storage, refrigeration, lighting, etc.) to the Virtual Power Plant in order to generate revenue and support Great Britain's National Grid. Innogy/Npower, [discussion of Innogy's business activities and strategy], designed and built the software required to deliver DSR services to clients and to participate in National Grid Schemes. Npower can also design, install and commission assets and infrastructure for remote operation of assets. Npower's DSR offerings are still being developed and Npower's activities in this area are currently limited. Npower has [...] current contracts, producing £[...] turnover in 2017. The Parties' combined market share is [0-5]% on the narrowest plausible market definition. The Commission will therefore not consider further this plausible market.

⁸⁸⁴ Before March 2019, the Parties' activities overlapped in e-mobility in the installation and operation of public EV Charging Stations. [Discussion of Innogy's business activities and strategy] since then there are no more overlap for the installation and operation of public EV Charging Stations neither on nor off motorways in the UK.

⁸⁸⁵ Form CO, paras. 2188, 2190.

- (952) On 1 January 2019, the United Kingdom government introduced a price cap on standard variable tariffs ("SVTs") for households. The SVT price cap will be updated every six months from 1 April 2019 to reflect changes in efficient costs.⁸⁸⁶

11.1.1.1.Product market definition

The Commission's decisional practice

- (953) The Commission has previously considered the retail supply of electricity as a separate market and has subdivided this market between households, SMEs and large industrial customers. In the United Kingdom specifically, the Commission has also distinguished between households, SMEs (on non-half-hourly rates) and large industrial customers (on half-hourly rates).⁸⁸⁷
- (954) This approach has also been adopted by the Competition and Markets Authority ("CMA") in the United Kingdom in their Energy Market Investigation and recent merger investigation.⁸⁸⁸
- (955) In its Energy Market Investigation, the CMA considered whether the market for households could be further segmented by type of supply contract (i.e. SVT, FTC), method that the customer uses to pay for their electricity (i.e. direct debit; standard credit and prepayment meter) and the meter used to measure their consumption of electricity. Ultimately, the CMA found that there was evidence that these constituted separate market segments but not for antitrust purposes.⁸⁸⁹ In its recent merger investigation, these segments were investigated but it was found not necessary to define the product market more narrowly than to household customers overall.⁸⁹⁰

The Notifying Party's view

- (956) The Notifying Party submits that the market for the retail supply of electricity can be subdivided into households, SMEs (on non-half-hourly rates) and large industrial customers (on half-hourly rates).⁸⁹¹
- (957) Additionally, the Notifying Party submits that a further division of households dependent of the type of meter or contract is not necessary.
- (958) According to the Notifying Party, the main differences between households and SMEs are the lower variation in competitor pricing levels, higher switching levels and greater buyer power.⁸⁹² Also, the main differences between SMEs and large

⁸⁸⁶ Form CO, para. 2203.

⁸⁸⁷ COMP/M.5978 – *GDF Suez/International Power*, para. 41, COMP/M.5224 – *EDF/British Energy*, para. 87, COMP/M.2890 – *EDF/Seeboard*, para. 32.

⁸⁸⁸ CMA – *Energy Market Investigation*: Final Report 2016; *SSE Retail/Npower* Final Report 2018. In 2018 the CMA assessed the proposed merger between the domestic customer business of SSE and Npower. The CMA did not find any substantial lessening of competition arising in connection with the concentration and cleared the merger unconditionally. The Commission considers that, in relation to the domestic business, there are similarities between the concentration investigated by the CMA and the present Concentration as SSE and E.ON have rather similar positions in the market.

⁸⁸⁹ CMA – *Energy Market Investigation*: Final Report 24 June 2016, paras. 3.33, 3.40, 3.41, 3.46-3.48.

⁸⁹⁰ CMA – *SSE Retail/Npower* Final Report 2018, paras. 7.16-7.25. The CMA also considered whether “dual fuel” offers should be considered separately from single offers of electricity or gas. The conclusion, based on the evidence of similar competitive conditions to supply single and dual fuel customers, was that it was not necessary to assess a separate market for dual fuel offerings (para. 7.14).

⁸⁹¹ Form CO, para. 2425.

⁸⁹² Form CO, para. 2217.

industrial customers are the higher instance of negotiated contracts and, as a result, less standardisation.⁸⁹³

The Commission's assessment

- (959) The market investigation confirmed the segmentation between households, SMEs and large industrial customers. The Commission notes that the main differences between households and SMEs⁸⁹⁴ include consumption volumes and patterns, contract length, costs, routes to market, regulation, the SMEs use of energy brokers, the different players on the markets and the fact that prices for households are published, which is not the case for SMEs. The replies to the market investigation indicated that the differences between SMEs and large industrial customers are due to different volumes, payment terms and methods, market access fees, the tailoring of the product, bespoke service and flexible contracts for large customers along with the greater competition in the market.⁸⁹⁵
- (960) For the purposes of this Decision, based on the results of the market investigation, the Commission considers that, in line with precedents, the market should be separated between (i) households, (ii) SMEs and (iii) large industrial customers.

11.1.1.2. Geographic market definition

The Commission's decisional practice

- (961) The Commission has previously considered the retail supply of electricity to be national in scope. In the context of the United Kingdom, the Commission has defined the geographic market as encompassing Great Britain⁸⁹⁶, excluding Northern Ireland.⁸⁹⁷
- (962) The CMA has also previously considered the geographic market to be Great Britain.⁸⁹⁸

The Notifying Party's view

- (963) The Notifying Party submits the geographic market is Great Britain.⁸⁹⁹

The Commission's assessment

- (964) The market investigation confirmed that suppliers' offerings to customers for each individual product market are generally the same across the country, with a common sales strategy, and that all of the respondents to the market investigation are active across the whole or most of GB. Prices may vary occasionally but this is due to regional cost differences, bespoke deals for customers, competitor strategy and competition intensity, not a geographic distinction. The vast majority of customers also indicated that they procure electricity on a national basis.⁹⁰⁰

⁸⁹³ Form CO, para. 2343.

⁸⁹⁴ The majority of respondents to the market investigation indicated that micro-businesses are considered part of the SME segment; replies to question 8 of questionnaire Q5 – Competitors (United Kingdom).

⁸⁹⁵ Replies to questions 5-7 of questionnaire Q5 – Competitors (United Kingdom); replies to questions 5-7 of questionnaire Q6 – Customers (United Kingdom).

⁸⁹⁶ COMP/M.5224 – *EDF/British Energy*, para. 88; COMP/M.4517 – *Iberdrola/Scottish Power*, para. 17.

⁸⁹⁷ E.ON is not active in Northern Ireland. Innogy had been active in Ireland until the end of 2018, [...].

⁸⁹⁸ *SSE Retail/Npower*, Final Report 2018, para. 7.34; *Telecom Plus plc/Npower Ltd*, 2013, para. 21; *Npower Ltd/Telecom Plus plc*, 2006, para. 11.

⁸⁹⁹ Form CO, para. 2425.

⁹⁰⁰ Replies to questions 12-17 of questionnaire Q5 – Competitors (United Kingdom); replies to question 13 of questionnaire Q6 – Customers (United Kingdom).

(965) For the purposes of this Decision, the Commission considers that, in line with precedents, the geographic market for the retail supply of electricity should be Great Britain.

(966) As the market for the retail supply of electricity to SMEs is not affected, it will not be further discussed in this Decision.

11.1.2. Retail supply of gas

(967) Both Parties are active in the retail supply of gas to households, SMEs and large industrial customers. E.ON operates through its subsidiary E.ON UK plc in Great Britain and Innogy operates through its subsidiary Npower.

11.1.2.1. Product and geographic market definition

The Commission's decisional practice

(968) The Commission has previously considered the retail supply of gas as a separate market and has subdivided this market between households, SMEs, large industrial customers and gas-powered electricity plants, also in the context of the United Kingdom.⁹⁰¹ This approach has also been adopted by the United Kingdom competition authority.⁹⁰²

(969) As for the electricity market, in its Energy Market Investigation, the CMA also considered whether the retail supply of gas to households could be further segmented by type of supply contract, method of payment and type of meter used. However, these were not found to be forming distinct product markets.⁹⁰³ Likewise, no distinct product market for micro-business.⁹⁰⁴

(970) As to geographic scope of the market, the Commission has previously considered the retail supply of gas to be national in scope. In the context of the United Kingdom, the Commission has defined the geographic market as encompassing Great Britain⁹⁰⁵, excluding Northern Ireland.⁹⁰⁶

(971) The CMA has also previously considered the geographic market to be Great Britain.⁹⁰⁷

The Notifying Party's view

(972) The Notifying Party submits that the market for the retail supply of gas can be subdivided into households, SMEs (receiving up to 25 000 therms per annum) and large industrial customers (receiving more than to 25 000 therms per annum).⁹⁰⁸

(973) The Notifying Party submits the geographic market is Great Britain.⁹⁰⁹

⁹⁰¹ COMP/M.8358 – *Macquarie/National Grid/Gas Distribution Business of National Grid*, paras. 15-22.

⁹⁰² *Anticipated acquisition by Centrica of 20% of Lake Acquisitions*, 2009, para. 25.

⁹⁰³ Form CO, paras. 2682-2684.

⁹⁰⁴ Form CO, para. 2688.

⁹⁰⁵ COMP/M.7228 – *Centrica/Bord Gais Energy*, para. 18; COMP/M.5224 – *EDF/British Energy*, para. 88; COMP/M.4517 – *Iberdrola/Scottish Power*, para. 17.

⁹⁰⁶ Npower had a small number of retail energy contracts [...], these were terminated in 2018.

⁹⁰⁷ *Anticipated acquisition by Telecom Plus plc of Electricity Plus Supply Limited and Gas Plus Supply Limited from Npower Limited*, 2013, para. 21; *Npower Ltd/Telecom Plus plc*, 2006; *Scottish and Southern Energy plc/Atlantic Electric and Gas Ltd*, 2004.

⁹⁰⁸ Form CO, paras. 2690, 2692. [...].

⁹⁰⁹ Form CO, para. 2702.

The Commission's assessment

- (974) The market investigation confirmed the segmentation between households, SMEs and large industrial customers. The majority of respondents to the market investigation indicated that competition conditions are materially different between households and SMEs.⁹¹⁰ Differences between them include consumption volumes, contract length and metering.⁹¹¹ The vast majority of respondents to the market investigation also identified a distinction between SMEs and large industrial customers. The differences are a lower number, but more competitive suppliers, larger suppliers which are essential to cater for large volume purchases and the additional services provided for large industrial customers, which are not available to SMEs, such as specialised account managers.⁹¹²
- (975) For the purposes of this Decision, the Commission considers that, in line with precedents, the product market should be separated between (i) households, (ii) SMEs, (iii) large industrial customers and (iv) gas-powered electricity plants.
- (976) As to the geographic scope of the market, the market investigation confirmed that the respondents are active across the whole or most of Great Britain and that the most common strategy is to have similar prices across the country in general but with some occasional differences between areas. This can be due to costs or the intensity of competition. The vast majority of respondents to the market investigation indicated that their sales strategy does not differ by region.⁹¹³
- (977) For the purposes of this Decision, the Commission considers that, in line with precedents, the geographic market for the retail supply of gas should be Great Britain.
- (978) As none of the markets for the retail supply of gas in Great Britain is affected, they will not be further discussed in this Decision.⁹¹⁴

11.1.3. Metering services for energy (electricity and gas)

- (979) Both Parties are active in the provision of metering services for households, SMEs and large industrial customers for both electricity and gas.

11.1.3.1. Product market definition

- (980) The Commission has previously considered meter-related activities to involve both the (i) installation and operation of meters and (ii) meter reading and the associated data processing activities. These activities were provided by the energy supplier in the past, however, in the United Kingdom, these are now open to competition.⁹¹⁵
- (981) The Notifying Party does not disagree with the above market definition⁹¹⁶ which is then retained for the purpose of this Decision.

⁹¹⁰ The majority of respondents to the market investigation indicated that micro-businesses are considered part of the SME segment; replies to question 49 of questionnaire Q5 – Competitors (United Kingdom).

⁹¹¹ Replies to questions 46-48 of questionnaire Q5 – Competitors (United Kingdom).

⁹¹² Replies to question 26 of questionnaire Q6 – Customers (United Kingdom).

⁹¹³ Replies to questions 53-58 of questionnaire Q5 – Competitors (United Kingdom).

⁹¹⁴ The Parties' combined market shares, in volume, are: [10-20]% for the retail supply of gas to domestic customers; [5-10]% for the retail supply of gas to SMEs customers and [5-10]% for the retail supply of gas to large industrial customers.

⁹¹⁵ COMP/M.2890 – *EDF/Seeboard*, paras. 25-26.

⁹¹⁶ Reply to RFI dated 4 February 2019, para. 2.

11.1.3.2. Geographic market definition

- (982) The Commission has previously considered meter-related activities to encompass the whole of Great Britain. This is mainly because for meter operation conditions for providing this service are homogeneous throughout the country, and for meter reading the skills, technology and resources required are the same throughout Great Britain.⁹¹⁷
- (983) The Notifying Party does not disagree with the above market definition⁹¹⁸ which is then retained for the purpose of this Decision.

11.2. Competitive Assessment

11.2.1. Retail supply of electricity to households

The Notifying Party's view

- (984) The Notifying Party submits that the combined market share of E.ON and Npower would be [20-30]%, that is below the level (25%) at which the European Commission's Horizontal Merger Guidelines⁹¹⁹ indicate that a concentration is unlikely to impede effective competition and may be presumed to be compatible with the internal market.⁹²⁰
- (985) The Notifying Party also submits that the remaining large energy firms and SME suppliers will continue to impose important competitive constraints on the market and compete fiercely against the Parties. Additionally, there will be four large competitors with a market share above 10% and a large number of SME suppliers that have grown to a considerable size.⁹²¹
- (986) The Notifying Party further submits that The Parties are not close competitors. First small suppliers tend to have a lower cost base than the large retail suppliers, such as E.ON and Npower (as they are exempt from government obligation schemes, have a lower proportion of vulnerable customers that have a higher cost to serve and have less complex business structures and no legacy costs and pensions) and therefore tend to be price more competitively. This is supported by the evidence that in price ranking tables, the number of times that the Parties have been listed in the top ten cheapest tariffs has decreased over time.⁹²² Second, the diversion ratios between the Parties indicate that customers tend to switch from large retail suppliers to small suppliers, rather than other large retail suppliers⁹²³ and, even just focussing on the large retail suppliers, E.ON and Npower's customers tend not to switch to each other indicating that the Parties do not compete particularly closely compared to other large competitors.⁹²⁴ Internal documents point towards the Parties monitoring, not only large retail suppliers but also small suppliers.⁹²⁵

⁹¹⁷ COMP/M.2890 – *EDF/Seaboard*, paras. 27.

⁹¹⁸ Reply to RFI dated 4 February 2019, para. 2.

⁹¹⁹ European Commission – *Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings*, OJ C (2004)031, para. 18.

⁹²⁰ Form CO, para. 2431.

⁹²¹ Form CO, paras. 2436-2438.

⁹²² Form CO, paras. 2439-2458; Annex_6C 05.

⁹²³ Form CO, paras. 2459-2463.

⁹²⁴ Form CO, paras. 2469-2472.

⁹²⁵ Form CO, paras. 2464-2468.

- (987) The Notifying Party submits that customers can easily switch electricity supplier owing to the high degree of price transparency in the market and the high level of customer engagement, aided by price comparison websites.⁹²⁶
- (988) According to the Notifying Party, barriers to entry into the market are also low. The Notifying Party submits that, despite recent exits from the retail electricity market, due to rising wholesale energy prices, there were approximately 60 suppliers in the market at the end of 2018. Furthermore, the number of licensed electricity suppliers active in the retail supply of electricity to households is more than six times the number in December 2007. Regulatory barriers are low and prior industry experience is not required; entry takes as little as a few months as Ofgem, from whom the license is acquired, aims to grant the license within 60 working days and it is possible to purchase an off-the-shelf billing system. Start-up costs are low as costs to a new entrant are typically variable, meaning the minimum efficient scale is small and can be reached rapidly.⁹²⁷

The Commission's assessment

- (989) The Commission considers that the Concentration is unlikely to raise competition concerns. First, with a combined market share of [20-30]% the Concentration would cause the merged entity to remain below the 25% thresholds, triggering the presumption that it is compatible with the internal market.⁹²⁸

⁹²⁶ Form CO, paras. 2473-2488.

⁹²⁷ Form CO, paras. 2489-2502.

⁹²⁸ Recital 32 of Regulation 139/2004 and para. 18 of the European Commission's Horizontal Merger Guidelines.

Table 35 – Market shares for the retail supply of electricity to households (volume)⁹²⁹

%	2018	2017	2016
E.ON	[10-20]	[10-20]	[10-20]
Npower	[5-10]	[5-10]	[5-10]
<i>Combined</i>	<i>[20-30]</i>	<i>[20-30]</i>	<i>[20-30]</i>
British Gas	[10-20]	[20-30]	[20-30]
SSE	[10-20]	[10-20]	[10-20]
EDF Energy	[10-20]	[10-20]	[10-20]
Scottish Power	[10-20]	[10-20]	[10-20]
Ovo Energy	[0-5]	[0-5]	[0-5]
First Utility	[0-5]	[0-5]	[0-5]
Bulb	[0-5]	[0-5]	-
Utilita	[0-5]	[0-5]	[0-5]
Utility Warehouse	[0-5]	[0-5]	[0-5]
Octopus Energy	[0-5]	-	-
Co-op Energy	[0-5]	[0-5]	[0-5]
Green Star Energy	[0-5]	[0-5]	-
Spark ⁹³⁰	[0-5]	[0-5]	[0-5]
Avro Energy	[0-5]	-	-
Economy Energy ⁹³¹	[0-5]	[0-5]	[0-5]
Others	[5-10]	[5-10]	[0-5]
Total	100%	100%	100%

Source: Reply to RFI dated 7 February 2019 (Data for 31 January 2017, 31 January 2018 and 31 October 2018)

- (990) Second, the market shares of the Parties have been decreasing in the 2016 – 2018 period. British Gas, with a market share of [10-20]%, would likely continue to provide a strong constraint on the Parties. Furthermore, post-Concentration, there will continue to be four other players with market shares of above 10% along with a plethora of smaller competitors on the market.
- (991) The respondents to the market investigation identified the Parties as close competitors based on similarities in their status as national suppliers with big legacy portfolios which compete aggressively in the household segment and have walk-in shops available (which is important in the household segment).⁹³² However, the Commission notes, when asked to list the three closest competitors of each of the Parties, many alternative suppliers were listed by the respondents to the market investigation, with none of the suppliers being closer to either of the Parties in the household segment than others. Also, the vast majority of respondents to the market investigation stated that there was no customer grouping or geographic area for which the Parties competed particularly closely and that had limited alternative

⁹²⁹ Data up to 31 October of each year.

⁹³⁰ Ceased trading in November 2018 and its customers were transferred to Ovo Energy.

⁹³¹ Ceased trading in January 2019 and its customers were transferred to Ovo Energy.

⁹³² Replies to questions 19, 22-24 of questionnaire Q5 – Competitors (United Kingdom). The Notifying Party submits that it has no walk-in shops in the UK.

suppliers.⁹³³ Therefore, overall, the Commission considers that the Parties are not close competitors.

- (992) Regarding entry barriers, the Commission observes that the market investigation revealed that the majority of suppliers believe that they are capable of targeting all customer segments.⁹³⁴
- (993) Regarding the impact of the current price cap for households, the market investigation revealed a mixed view, with some suppliers stating that the cap had little or no effect on their pricing while others had to reduce their prices to meet the cap. Some respondents expressed concerns that the price cap will reduce the level of switching and competition in the segment.⁹³⁵
- (994) The Commission also notes that the vast majority of respondents to the market investigation indicated that the Proposed Concentration would have little or no material impact on their company, that the intensity of competition would not change and that prices would not change as a result of the Proposed Concentration.⁹³⁶

11.2.1.1. Conclusion on the retail supply of electricity to households

- (995) In light of the above, the Commission considers that the Proposed Concentration does not lead to a significant impediment of effective competition in the internal market with regard to the retail supply of electricity to households in Great Britain.

11.2.2. *Retail supply of electricity to large industrial customers*

The Notifying Party's view

- (996) The Notifying Party submits that the combined market share of E.ON and Npower would be less than 25% and therefore the Concentration is unlikely to impede effective competition and it may be presumed to be compatible with the internal market.⁹³⁷
- (997) The Notifying Party submits that large industrial customers are sophisticated buyers of electricity who have extensive procurement processes and employ third party intermediaries to ensure that they get competitive prices and a high service level from their energy suppliers. In general, they contact up to 5 suppliers in order to obtain quotes and are able to negotiate on this basis. These customers have significant buyer power with an ability to drive down prices, and would switch if the Parties tried to raise prices.⁹³⁸
- (998) The Notifying Party also submits that competition in the market stems not only from other large retail suppliers but also oil and gas producers, along with SME suppliers. These will continue to impose important competitive constraints on the Parties. Aggregate diversion ratios indicate that, from 2013-2018, around [60-70]% of E.ON's customers switched to other large retail suppliers and [40-50]% went to SME suppliers or oil and gas producers; for Npower, diversion ratios to other large retail

⁹³³ Replies to questions 25, 26, 33, 34 of questionnaire Q5 – Competitors (United Kingdom).

⁹³⁴ Replies to questions 37-39 of questionnaire Q5 – Competitors (United Kingdom).

⁹³⁵ Replies to questions 40, 41 of questionnaire Q5 – Competitors (United Kingdom).

⁹³⁶ Replies to questions 42-44 of questionnaire Q5 – Competitors (United Kingdom); some respondents indicated that the Proposed Concentration may give market power to the Parties due to scale and efficiency, and their technical advantage may disrupt traditional business models but given the amount of alternative suppliers, any effect would be limited.

⁹³⁷ Form CO, para. 2599.

⁹³⁸ Form CO, paras. 2604-2612.

suppliers fell from [60-70]% in 2015 to [40-50]% in 2018.⁹³⁹ Focussing on the large retail suppliers, E.ON and Npower's large industrial customers tend not to switch to each other indicating that the Parties do not compete particularly closely compared to other large competitors.⁹⁴⁰

- (999) Additionally, the Notifying Party submits that barriers to entry into the market are also low and new suppliers can easily enter the market. New entry has stemmed from competitors entering from parallel industries (e.g. Total, Shell) and suppliers from other countries (e.g. Vattenfall, Orsted and Statkraft), which has led to a downward trend incumbent market shares and profit margins.

The Commission's assessment

- (1000) The Parties are both active in the market for the retail supply of electricity to large industrial customers. The combined market share of the Parties is [20-30]%.

Table 36 - Market shares for the (upstream) – retail supply of electricity to large industrial customers (volume)⁹⁴¹

%	2018	2017	2016
E.ON	[5-10]	[10-20]	[10-20]
Npower	[10-20]	[10-20]	[10-20]
<i>Combined</i>	<i>[20-30]</i>	<i>[20-30]</i>	<i>[20-30]</i>
EDF Energy	[10-20]	[10-20]	[20-30]
SSE	[5-10]	[5-10]	[10-20]
Total Power	[5-10]	[5-10]	[5-10]
Haven Power	[5-10]	[5-10]	[5-10]
Engie	[5-10]	[5-10]	[5-10]
Smartest Energy	[5-10]	[0-5]	[5-10]
Orsted	[5-10]	[0-5]	-
Scottish Power	[5-10]	[5-10]	[5-10]
British Gas	[5-10]	[5-10]	[5-10]
Opus Energy	[5-10]	[5-10]	[5-10]
Gazprom	[5-10]	[5-10]	[5-10]
Others	[5-10]	[5-10]	[5-10]
Total	100	100	100

Source: Reply to RFI dated 7 February 2019 Data for 31 January 2017, 31 January 2018 and 31 October 2018)

- (1001) The Concentration would lead to the Parties becoming the market leader. The Commission notes, however, that the Parties' market shares, and their combined market share, has been decreasing in the 2016 - 2018 period. The Commission also considers that EDF Energy, with a market share of [10-20]%, will likely provide strong competition in the market and there are at least 6 players with a market share of above 5%.
- (1002) As to the Parties' closeness, the Commission notes that respondents to the market investigation identified the Parties as quite close competitors limited to their status of large national companies and on other business similarities (one respondent also

⁹³⁹ Form CO, paras. 2613-2623.

⁹⁴⁰ Form CO, paras. 2624-2629.

⁹⁴¹ Data up to 31 October of each year.

noted that both Parties provide additional services).⁹⁴² At the same time, however, the Commission notes that the Parties' customer base appears to be static and volumes are falling. Also, when asked to list the three closest competitors of each of the Parties, the respondents to the market investigation listed many alternative suppliers, with none of the suppliers being closer to either of the Parties than the others (EDF, SSE, Orsted, Scottish Power and Total).⁹⁴³ These competitors are seen as being large, professional companies with similar products and services, who are credit worthy and have competitive offerings for large industrial customers. Additionally, the Commission observes, the market investigation reported no significant switching pattern between the Parties by large industrial customers.⁹⁴⁴

- (1003) The market investigation revealed that some customers have one electricity supplier whereas others multi-source in order to retain competitive tension and/or use different suppliers for different sites. Also, most respondents to the market investigation indicated that three suppliers would be sufficient, in order to have a competitive outcome from a tender. Typically, more than five suppliers are invited to tender and generally there are at least two rounds in the tender.⁹⁴⁵ Hence, the Commission concludes that, given the number of players in the market, it appears that large industrial customers can obtain a competitive outcome for their tenders even after the Concentration takes place.
- (1004) In relation to entry barriers, the Commission notes that, based on the replies of the market investigation, these were not perceived as being particularly high. In fact, the majority of competitors stated they were capable of targeting all relevant customer groups/segments.⁹⁴⁶
- (1005) Overall, the Commission observes that the vast majority of respondents to the market investigation indicated that the Proposed Concentration would have little or no material impact on their company, that the intensity of competition would not change and that prices would not change as a result of the Proposed Concentration.⁹⁴⁷

11.2.2.1. Conclusion on the retail supply of electricity to large industrial customers

- (1006) In light of the above, the Commission considers that the Proposed Concentration does not lead to a significant impediment of effective competition in the internal market with regard to the retail supply of electricity to large industrial customers in Great Britain.

a. Vertical non-coordinated effects in the retail supply of electricity

- (1007) The Concentration will not lead to any vertically affected market. Therefore, it will not cause in any significant impediment to effective competition as a result of vertical effects in any relevant market in Great Britain.⁹⁴⁸

⁹⁴² Replies to question 24 of questionnaire Q5 – Competitors (United Kingdom).

⁹⁴³ Replies to questions 25-26 of questionnaire Q5 – Competitors (United Kingdom).

⁹⁴⁴ Replies to questions 20-23 of questionnaire Q6 – Customers (United Kingdom).

⁹⁴⁵ Replies to questions 14, 18 of questionnaire Q6 – Customers (United Kingdom).

⁹⁴⁶ Replies to question 37 of questionnaire Q5 – Competitors (United Kingdom).

⁹⁴⁷ Replies to questions 42-44 of questionnaire Q5 – Competitors (United Kingdom); replies to questions 31-33 of questionnaire Q6 – Customers (United Kingdom); one customer noted that service quality may decline and another innovation, as a result of the Proposed Concentration, but neither elaborated on their response.

⁹⁴⁸ A vertical relationship exists between the markets for electricity generation (upstream) and retail supply of electricity (downstream), but does not lead to any affected markets. In fact, E.ON's presence in the generation and wholesale supply market in the United Kingdom will further decrease, as a result of the

- (1008) In light of the above, the Commission considers that the Proposed Concentration does not lead to a significant impediment to effective competition in the internal market with regard to the market for the retail supply of electricity to (i) households, (ii) SMEs and (iii) large industrial customers in Great Britain.

11.2.3. Metering services for energy (electricity and gas)

The Notifying Party's view

- (1009) The Notifying Party submits that, also with respect to non-domestic customers, E.ON and Npower do not compete in the provision of metering services. The Parties activities, in fact, [information about the Parties' business activities and market shares] their market shares in the provision of metering services to customers who source energy from other suppliers (*off-supply metering*) is [very low].⁹⁴⁹

The Commission's assessment

- (1010) The Commission notes that there is no competition for households as by law households are supplied with metering services by their own energy provider.⁹⁵⁰
- (1011) In relation to SME and large industrial customers the Parties' activities overlap in the market for the (i) installation and operation of electricity meters and (ii) meter reading and associated data processing activities.
- (1012) As far as the supply to SME is concerned, the Commission notes that, in metering for gas, the Concentration would not result in any affected market as the Parties combined share is [5-10]% in the market for installation and operation of electricity meters and it is [0-5]% in the market for meter reading and associated data processing activities.
- (1013) In metering for electricity, the metering would be marginally affected ([20-30]% and [20-30]% for, respectively, the installation and operation of electricity meters and the meter reading and associated data processing activities).⁹⁵¹ Moreover, the Commission considers that the competition in this market is not yet developed and the Parties' share are more a reflection of their position in the retail supply of electricity. The vast majority of the customers source metering from the same supplier of electricity. Npower provides metering services [mostly] to their own customers [information about the Parties' business activities]. E.ON supply meter operation ([information about the Parties' business activities]) off-supply to a negligible extent ([information about the Parties' business activities]). As far as the supply to large industrial customers are concerned, the Commission notes that no market would be affected as a result of the Concentration. In metering for gas, the Parties combined share is [0-5]% in the market for installation and operation of

Concentration, to a market share of [0-5]% (or [0-5]% when including certain Innogy's assets that will be later transferred to RWE). In the downstream market for the retail supply of electricity, the Parties' individual or combined market shares are below 30%.

⁹⁴⁹ Reply to RFI dated 4 February 2019, para. 5.

⁹⁵⁰ The Parties' activities are limited to those required under their regulatory obligations as part of the conditions of their electricity supply licences. These obligations apply equally to all suppliers across Great Britain. nHH metering services are provided by the suppliers themselves or outsourced to third parties. [...].

⁹⁵¹ The combined market shares of the Parties for the: (i) installation and operation of gas meters for SMEs; (ii) gas meter reading and associated data processing activities for SMEs; (iii) installation and operation of electricity meters for large industrial customers; (iv) electricity meter reading and associated data processing activities for large industrial customers; (v) installation and operation of gas meters for large industrial customers; and (vi) gas meter reading and associated data processing activities for large industrial customers, are less than 20% and therefore not affected.

electricity meters and neither of Parties provides meter reading and associated data processing activities. In metering for electricity, their combined share is [10-20]% in the market for installation and operation of electricity meters and [10-20]% in the market for meter reading and associated data processing activities.

- (1014) In addition, the Commission notes that the market investigation revealed that the vast majority of competitors and large industrial customers do not envisage the Proposed Concentration having any effect on their company, the level of competitiveness in the market or prices in the market as regards the market for metering services.⁹⁵²
- (1015) Large customers identified numerous other providers of metering services, apart from the Parties, including some non-energy company providers⁹⁵³ and neither of the Parties was consistently identified as the best providers nor the companies to which one might switch if necessary. The vast majority of respondents to the market investigation considers that there is healthy competition in the market.
- (1016) Furthermore, the Commission notes that the Parties have smaller shares in the more contestable part of the market ('off-supply').

11.2.3.1. Conclusion on the metering services for energy (electricity and gas)

- (1017) In light of the above, the Commission considers that the Proposed Concentration does not lead to a significant impediment to effective competition in the internal market with regard to the (i) installation and operation of electricity or gas meters and (ii) electricity or gas meter reading and associated data processing activities for SMEs and large industrial customers in Great Britain.

12. OTHER COUNTRIES

- (1018) The activities of the Parties lead to overlaps in the following countries.

12.1. Denmark

- (1019) The Parties' activities in Denmark overlap only vertically in relation to manufacturing and distribution of EV Charging Stations,⁹⁵⁴ installation and operation of public EV Charging Stations⁹⁵⁵, distribution and installation of private EV Charging Stations⁹⁵⁶, provision of white-label (back-end) services.⁹⁵⁷
- (1020) None of these vertical links give rise to vertically affected markets, except for the manufacturing and distribution of EV Charging Stations and the provision of white-label (back-end) services in relation to the installation and operation of public EV

⁹⁵² Replies to questions 97-99 of questionnaire Q5 – Competitors (United Kingdom); replies to questions 34-36 of questionnaire Q6 – Customers (United Kingdom).

⁹⁵³ For example, IMServ, SP Dataserve, Siemens, Energy Services.

⁹⁵⁴ Innogy only is active in manufacturing and distribution of EV charging station with a market share below [0-5]% on the narrowest plausible market definition. The activities of the Parties do not overlap horizontally. The Commission will therefore not consider further this plausible market with regards to horizontal effects.

⁹⁵⁵ E.ON only is active in installation and operation of public EV Charging Stations with a market share of [50-60]% at national level. The activities of the Parties do not overlap horizontally. The Commission will therefore not consider further this plausible market with regards to horizontal effects.

⁹⁵⁶ E.ON only is active in distribution and installation of private EV Charging Stations with a market share below [5-10]% on the narrowest plausible market definition. The Commission will therefore not consider further this plausible market.

⁹⁵⁷ Innogy only is active in provision of white-label (back-end) services with a market share below [0-5]% on the narrowest plausible market definition. The Commission will therefore not consider further this plausible market.

Charging Stations in Denmark as the market share of the merged entity would be above 30% in the installation and operation of public EV Charging Stations.

12.1.1. Vertical link between manufacturing and distribution and installation and operation of EV Charging Stations/

- (1021) The market for manufacturing and distribution of EV Charging Stations and the market for the installation and operation of EV Charging Stations have been defined in Section 7.1.8 as distinct markets. In Germany, manufacturing and distribution of EV Charging Stations has at least a national scope, while installation and operation of EV Charging Stations has a national or sub-national scope. The evidence in the Commission's file has not provided any indication that would suggest that departing from this market definition would be appropriate for Denmark. Therefore, this market definition is retained.

12.1.1.1. Input foreclosure

- (1022) Input foreclosure would require E.ON to leverage off Innogy's activities in the upstream market for manufacturing and distribution to foreclose the downstream market. However, Innogy's share in the upstream market is below [0-5]% and any competitor looking to source hardware for its EV charging station operations could supply charging station operation from other competitors. In fact, Innogy only sold [...] EV Charging Stations between 2015 and 2017 to [...]. Therefore, the Commission considers that the merged entity will not have the ability to foreclose competitors.

12.1.1.2. Customer foreclosure

- (1023) First, the Notifying Party submits that [description of the Parties' business strategies]. The Commission notes that the market position of the merged entity in the upstream market will be very limited and that pursuing a foreclosure strategy would imply a significant change in the business strategy of E.ON that could affect its competitiveness in the downstream market. Therefore, given the limited position in the upstream market, it is not likely that the merged entity has the incentives to pursue a foreclosure strategy.

12.1.1.3. Conclusion

- (1024) The Commission therefore concludes that the Concentration would not significantly impede effective competition as a result of vertical non-coordinated effects arising from vertical links between the upstream market for manufacturing and distribution of EV Charging Stations and the market for installation and operation of public EV Charging Stations in Denmark.

12.1.2. Vertical link between provision of back-end services and installation and operation of EV Charging Stations

- (1025) The market for manufacturing and distribution of EV Charging Stations and the market for the provision of white-label (back-end) services have been defined in Section 7.1.8 as standalone markets with a national scope in Germany. The evidence in the Commission's file has not provided any indication that would suggest that departing from this market definition would be appropriate for Denmark. Therefore, this market definition is retained.

12.1.2.1. Input foreclosure

- (1026) Input foreclosure would require E.ON to leverage off Innogy's activities in the upstream market for the provision of white-label (back-end) services to foreclose the downstream market. However, Innogy's share in the upstream market is below [0-

5]% and any competitor looking to source white label services for its EV charging station operations could supply from other competitors. Therefore, the Commission considers that the merged entity will not have the ability to foreclose competitors.

12.1.2.2.Customer foreclosure

- (1027) The merged entity would not be able to foreclose the upstream markets for the supply of white label service, as E.ON does not currently purchase white-label services from third party providers.

12.1.2.3.Conclusion

- (1028) The Commission therefore concludes that the Concentration would not significantly impede effective competition as a result of vertical non-coordinated effects arising from vertical links between the upstream market for the provision of white-label (back-end) services and the market for installation and operation of public EV Charging Stations in Denmark.

12.2. Sweden

- (1029) The Parties' activities in Sweden overlap in relation to manufacturing and distribution of EV Charging Stations,⁹⁵⁸ installation and operation of public EV Charging Stations⁹⁵⁹, distribution and installation of private EV Charging Stations,⁹⁶⁰ provision of white-label (back-end) services.⁹⁶¹
- (1030) However, none of these markets are affected markets and therefore will not be further discussed in this Decision.

⁹⁵⁸ Innogy only is active in manufacturing and distribution of EV Charging Stations with a market share below [0-5]% on the narrowest plausible market definition. The activities of the Parties do not overlap horizontally and the vertical links with the market for installation and operation of public EV Charging Stations and the market for distribution and installation of private EV Charging Stations do not lead to a vertically affected market, as E.ON only is active in both of these vertically linked markets with a market share below 30%. The Commission will therefore not consider further this plausible market.

⁹⁵⁹ E.ON only is active in the market for the installation and operation of public EV Charging Stations both regular/fast and ultra-fast with a market share below 20% on the narrowest plausible market definition. The activities of the Parties do not overlap horizontally and the vertical link with the markets for (i) manufacturing and distribution of EV Charging Stations and (ii) provision of white-label (back-end) services for EV Charging Stations does not lead to a vertically affected market, as the individual or combined market shares of the Parties in these vertically linked markets are below 30%. The Commission will therefore not consider further this plausible market.

⁹⁶⁰ E.ON only is active in distribution and installation of private EV Charging Stations with a market share below [0-5]% on the narrowest plausible market definition. The activities of the Parties do not overlap horizontally and the vertical link with the market for the manufacturing and distribution of EV Charging Stations does not lead to a vertically affected market, as Innogy only is active in the market for manufacturing and distribution of EV Charging Stations with a market share below 30%. The Commission will therefore not consider further this plausible market.

⁹⁶¹ The Parties are both active in the provision of white-label (back-end) services for EV Charging Stations with a market share below 20% on the narrowest plausible market definition. The Concentration gives rise to a vertical link with the market for the installation and operation of public EV Charging Stations which, however, does not lead to a vertically affected market, as E.ON only is active in this vertically linked market with a market share below 30%. The Commission will therefore not consider further this plausible market.

12.3. Poland

- (1031) The Parties' activities in Poland overlap in relation to electricity generation and wholesale supply⁹⁶², electricity distribution networks, electricity retail supply⁹⁶³, gas distribution networks and gas retail supply⁹⁶⁴.
- (1032) However, none of these markets are affected markets and therefore will not be further discussed in this Decision, except for the markets for (i) electricity generation and wholesale supply⁹⁶⁵ and (ii) electricity retail supply which are vertically affected markets in relation to the electricity distribution networks where Innogy is active as natural monopolist in its DSO area. The Concentration also gives rise to a vertically affected market, as E.ON only is active in gas distribution networks prior to the Concentration as a pre-existing natural monopolist in its DSO area and the Parties are active in downstream market for the retail supply of gas.

12.3.1. *Vertical link between electricity distribution networks (DSOs) and retail supply of electricity*

- (1033) The market for electricity distribution networks (DSOs) has been defined consistently in this Decision and in previous Commission's decisions (see Section 6.1.2.1) as standalone markets with a sub-national scope and in line with the distribution network regions, such that the region for each network constitutes a distinct relevant geographic market. The market for the retail supply of electricity can be sub-segmented according to different customer categories, being national in scope⁹⁶⁶. The evidence in the Commission's file has not provided any indication that would suggest that departing from this market definition would be appropriate for Poland. Therefore, this market definition is retained.

⁹⁶² The Parties are both active in electricity generation and wholesale supply with a combined market share below 20% on the narrowest plausible market definition. The Concentration gives rise to a vertical link with the market for electricity retail supply which, however, does not lead to a vertically affected market, as the market shares of the Parties in this vertically linked market are below 30%. The Commission will therefore not consider further this vertical relation.

⁹⁶³ The Parties' are both active in electricity retail supply with a combined market share below 20% on the narrowest plausible market definition. The Concentration gives rise to a vertical link with the market for electricity generation and wholesale supply which, however, does not lead to a vertically affected market, as the market shares of the Parties in this vertically linked market are below 30%. The Commission will therefore not consider further this vertical relation.

⁹⁶⁴ The Parties are both active in gas retail supply with a combined market share below 20% on the narrowest plausible market definition. The Commission will therefore not consider further this plausible market with regards to horizontal effects.

⁹⁶⁵ The Notifying Party submits that some power generation is connected to the distribution grid. Therefore, there is possibly an additional vertical link between the Parties' distribution and generation/wholesale activities. The Commission considers, however, that the Concentration does not materially alter the ability or the incentives of the Parties to foreclose competitors in the downstream market (no foreclosure can occur in the upstream market as DSOs are monopolist in their own distribution network and there is no competition in the market). First, the ability to foreclose is unaltered by the Concentration because the Parties, where they are DSOs are monopolist, and will remain such post-merger. The incentives to foreclose are not materially altered either as the Parties have a limited position in the generation and wholesale market. Therefore the extent to which the Parties would be able to capture sales lost by (possibly) foreclosed competitors does not significantly change with the merger and as a consequence the Concentration is unlikely to materially increase the Parties' incentives to foreclose access to their distribution grid. The Commission concludes that the Concentration would not significantly impede effective competition as a result of vertical non-coordinated effects arising from vertical links between the upstream market for distribution network operation and the downstream market of generation and wholesale supply of electricity in Poland.

⁹⁶⁶ Except for some customer groups which is defined sub-national.

12.3.1.1.Input foreclosure

- (1034) Due to the DSO being a natural monopolist, all retail supply markets are vertically affected markets downstream.
- (1035) For the same reason, the ability to foreclose competitors on the downstream market is not changed by the merger on any downstream market as the Parties as DSOs are local monopolists on the upstream market pre- and post-merger and the vertical links between the upstream and downstream markets are already pre-existing.
- (1036) While the merger could have an effect on the incentives to foreclose, the Commission considers that the incentives to foreclose competition in the downstream retail markets are not materially affected by the merger.
- (1037) The market position of the Parties on the downstream markets for retail supply of electricity does not materially change due to the merger, as the increment brought by the Concentration is very limited and the Parties' combined market share in the retail supply of electricity will remain well below 20%.

12.3.1.2.Customer foreclosure

- (1038) Customer foreclosure can only occur when a supplier integrates with an important customer in the downstream market and there are alternative (competing) suppliers for the downstream market. In this case, the integrated entity may stop purchasing from the rival upstream or reduce significantly the volumes purchased. Since each distribution network constitutes a natural monopoly, no actual or potential rival in the upstream market (distribution network) can be foreclosed.

12.3.1.3.Conclusion

- (1039) The Commission therefore concludes that the Concentration would not significantly impede effective competition as a result of vertical non-coordinated effects arising from vertical links between the upstream market for electricity distribution networks (DSOs) and the market for retail supply of electricity in Poland

12.3.2. *Vertical link between gas distribution networks (DSOs) and retail supply of gas*

- (1040) The market for gas distribution networks (DSOs) has been defined consistently in this Decision and in previous Commission's decisions (see Sections 7, 8, 9) as stand-alone markets with a sub-national scope and in line with the distribution network regions, such that the region for each network constitutes a distinct relevant geographic market. The market for the retail supply of gas can be sub-segmented according to different customers categories, being national in scope or sub-national for certain categories of customers. The evidence in the Commission's file has not provided any indication that would suggest that departing from this market definition would be appropriate for Poland. Therefore, this market definition is retained.

12.3.2.1.Input foreclosure

- (1041) Due to the DSO being a natural monopolist, all retail supply markets are vertically affected markets downstream.
- (1042) For the same reason, the ability to foreclose competitors on the downstream market is not changed by the merger on any downstream market as the Parties as DSOs are local monopolists on the upstream market pre- and post-merger and the vertical links between the upstream and downstream markets are already pre-existing.
- (1043) While the merger could have an effect on the incentives to foreclose, the Commission considers that the incentives to foreclose competition in the downstream retail markets are not materially affected by the merger.

- (1044) The market position of the Parties on the downstream markets for retail supply of gas does not materially change due to the merger, as the increment brought by the Concentration is very limited and the market shares in the retail supply of electricity of the Parties will remain well below 20%.

12.3.2.2. Customer foreclosure

- (1045) Customer foreclosure can only occur when a supplier integrates with an important customer in the downstream market and there are alternative (competing) suppliers for the downstream market. In this case, the integrated entity may stop purchasing from the rival upstream or reduce significantly the volumes purchased. Since each distribution network constitutes a natural monopoly, no actual or potential rival in the upstream market (distribution network) can be foreclosed.

12.3.2.3. Conclusion

- (1046) The Commission therefore concludes that the Concentration would not significantly impede effective competition as a result of vertical non-coordinated effects arising from vertical links between the upstream market for gas distribution networks (DSOs) and the market for the retail supply of gas in Poland.

12.4. Belgium

- (1047) The Parties' activities in Belgium overlap in relation to electricity generation and wholesale supply⁹⁶⁷ and electricity retail supply.⁹⁶⁸
- (1048) However, none of these markets are affected markets and therefore will not be further discussed in this Decision.

12.5. Italy

- (1049) The Parties' activities in Italy overlap (horizontally or vertically) in relation to electricity generation and wholesale supply⁹⁶⁹, retail supply of electricity⁹⁷⁰,

⁹⁶⁷ The Parties are both active in electricity generation and wholesale supply with a combined market share below 20% on the narrowest plausible market definition. The Concentration gives rise to a vertical link with the market for electricity retail supply which, however, does not lead to a vertically affected market, as Innogy only is active in this vertically linked market with a market share below 30%. Therefore, the activities of the Parties do not lead to either horizontally or vertically affected markets. The Commission will therefore not consider further this plausible market.

⁹⁶⁸ Innogy only is active in electricity retail supply with a market share below 30% on the narrowest plausible market definition. The activities of the Parties do not overlap horizontally and the vertical link with the market for electricity generation and wholesale supply which, however, does not lead to a vertically affected market, as the combined share of the Parties in this vertically linked market are below 30%. The Commission will therefore not consider further this plausible market.

⁹⁶⁹ The Parties' are both active in electricity generation and wholesale supply of electricity with a combined market share below 20% on the narrowest plausible market definition. The Concentration gives rise to a vertical link with the market for electricity retail supply which, however, does not lead to a vertically affected market, as E.ON only is active in this vertically linked market with a market share below 30%. Therefore, the activities of the Parties do not lead to either horizontally or vertically affected markets. The Commission will therefore not consider further this plausible market.

⁹⁷⁰ E.ON only is active in electricity retail supply with a market share below 30% on the narrowest plausible market definition. The activities of the Parties do not overlap horizontally. The Concentration gives rise to a vertical link with the market for electricity generation and wholesale supply which, however, does not lead to a vertically affected market, as the combined market share of the Parties in these vertically linked markets are below 30%. Therefore, the activities of the Parties do not lead to either horizontally or vertically affected markets. The Commission will therefore not consider further this plausible market.

wholesale distribution of EV Charging Stations⁹⁷¹, installation and operation of public EV Charging Stations⁹⁷², provision of white-label (back-end) services⁹⁷³.

- (1050) However, none of these markets are affected markets and therefore will not be further discussed in this Decision.

12.6. France

- (1051) The Parties' activities in France do not give rise to any overlap⁹⁷⁴.

13. CONCLUSIONS OF COMPETITIVE ASSESSMENT

- (1052) For the reasons set out in Sections 7, 8, and 9, the Commission concludes that the Concentration would significantly impede effective competition in the internal market or in a substantial part of it, and in the territory of the EEA Agreement or a substantial part of it.
- (1053) The Commission finds that:
- (1) the Concentration would significantly impede effective competition as a result of horizontal non-coordinated effects arising from the overlap in the activities of the Parties in the market for the retail supply of heating electricity in Germany, independent of whether a national market with local elements or local markets are considered;
 - (2) the Concentration would significantly impede effective competition as a result of horizontal non-coordinated effects arising from the overlap in the activities of the Parties in the market for installation and operation of public fast EV CS on motorways in Germany;
 - (3) the Concentration would be likely to significantly impede effective competition as a result of horizontal non-coordinated effects arising from the overlap in the

⁹⁷¹ Innogy only is active in the wholesale distribution of EV Charging Stations ([...]) with a market share below [20-30]% on the narrowest plausible market definition. The activities of the Parties do not overlap horizontally. The Concentration gives rise to a vertical link with the market for installation and operation of public EV Charging Stations which, however, does not lead to a vertically affected market, as the combined market shares of the Parties in these vertically linked markets are below 30%. Therefore, the activities of the Parties do not lead to either horizontally or vertically affected markets. The Commission will therefore not consider further this plausible market.

⁹⁷² E.ON only is active in the installation and operation of public EV Charging Stations with a market share below 30% on the narrowest plausible market definition. The activities of the Parties do not overlap horizontally. The Concentration gives rise to a vertical link with the market for (i) wholesale distribution of EV Charging Stations and (ii) provision of white-label (back-end) services which, however, does not lead to a vertically affected market, as the individual or combined market shares of the Parties in these vertically linked markets are below 30%. Therefore, the activities of the Parties do not lead to either horizontally or vertically affected markets. The Commission will therefore not consider further this plausible market.

⁹⁷³ Innogy only is active in the provision of white-label (back-end) services with a market share below [20-30]% on the narrowest plausible market definition. The activities of the Parties do not overlap horizontally. The Concentration gives rise to a vertical link with the market for installation and operation of public EV charging services which, however, does not lead to a vertically affected market, as the combined market share of the Parties in this vertically linked market are below 30%. Therefore, the activities of the Parties do not lead to either horizontally or vertically affected markets. The Commission will therefore not consider further this plausible market.

⁹⁷⁴ The Commission notes that until [...], Innogy operated [...] public EV Charging Stations but is not active in e-mobility in France since that date. Therefore, even though E.ON is active in the installation and operation of public EV Charging Stations in France, there is no overlap in e-mobility.

activities of the Parties in the market for the retail supply of electricity to low voltage customers in Czechia;

- (4) the the Concentration would significantly impede effective competition as a result of horizontal non-coordinated effects arising from the overlap in the activities of the Parties in the market for the retail supply of gas to small customers in Czechia;
- (5) the Concentration would significantly impede effective competition as a result of horizontal non-coordinated effects arising from the overlap in the activities of the Parties in the market for the retail supply of gas to large customers in Czechia;
- (6) the Concentration would significantly impede effective competition as a result of horizontal non-coordinated effects arising from the overlap in the activities of the Parties in the market for the retail supply of electricity to Competitive-SME customers in Hungary;
- (7) the the Concentration would significantly impede effective competition as a result of horizontal non-coordinated effects arising from the overlap in the activities of the Parties in the market for the retail supply of electricity to large industrial customers in Hungary.

14. COMMITMENTS

14.1. Analytical framework for the assessment of the commitments

- (1054) When a concentration raises competition concerns because it would significantly impede effective competition, the parties may seek to modify the concentration so as to remove the significant impediment to effective competition identified by the Commission, with a view to having the concentration declared compatible with the internal market pursuant to Article 8(2) of the Merger Regulation.
- (1055) In assessing whether or not commitments are likely to remove its competition concerns, the Commission must consider all relevant factors including, inter alia, the type, scale and scope of the commitments with reference to the structure and particular characteristics of the markets in which the Commission has identified a significant impediment to effective competition.⁹⁷⁵
- (1056) The commitments must eliminate the competition concerns entirely and must be comprehensive and effective in all respects.⁹⁷⁶ The commitments should also be proportionate to the competition concerns identified.⁹⁷⁷ Furthermore, the commitments must be capable of being implemented effectively within a short period of time as the conditions of competition on the market will not be maintained until the commitments have been fulfilled.⁹⁷⁸
- (1057) Under the Merger Regulation, the Commission must show that a concentration would significantly impede effective competition in the internal market or in a

⁹⁷⁵ Commission Notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004, 2008/C 267/01 (OJ C 267, 22.10.2008, p. 1) (“Commission Notice on Remedies”), para. 9

⁹⁷⁶ Merger Regulation, para. 30; see also para. 9 of the Commission notice on remedies acceptable under Council Regulation (EC) No 139/2004 No 802/2004 (OJ C 267, 22.10.2008, p. 1), (the ‘Remedies Notice’).

⁹⁷⁷ Merger Regulation, para. 30.

⁹⁷⁸ Commission Notice on Remedies, para. 9.

substantial part of it. By contrast, it is for the parties to the concentration to propose appropriate commitments. The Commission only has the power to accept commitments that are deemed capable of rendering the concentration compatible with the internal market so that they will prevent a significant impediment to effective competition in all relevant markets in which competition concerns were identified.

- (1058) Pursuant to Article 10(2) of the Merger Regulation, the Commission has to take a clearance decision as soon as the serious doubts referred to in the decision initiating proceedings are removed as a result of the commitments submitted by the parties. This rule applies to commitments proposed in second phase proceedings before the Commission has issued a statement of objections.⁹⁷⁹
- (1059) It is against this background and the standard set out in the Commission Notice on Remedies⁹⁸⁰ that the Commission has assessed the viability, workability, effectiveness and ability of the proposed commitments to entirely eliminate the competition concerns identified.

14.2. Procedure

- (1060) In order to render the notified concentration compatible with the internal market and with the Agreement on the European Economic Area (“EEA Agreement”) in relation to the EEA markets for heating electricity and e-mobility services in Germany, the retail supply of electricity and gas in Czechia, and the retail supply of electricity in Hungary, the Notifying Party has modified the notified concentration pursuant to the first paragraph Article 8(2) of the Merger Regulation by submitting commitments. The Notifying Party submitted a first set of commitments on 20 June 2019 (the “Initial Commitments”). The Initial Commitments were market tested by the Commission on 21 June 2019. Subsequently, in order to address concerns based on the responses received during the market test, the Notifying Party submitted an amended set commitments on 3 July 2019 (“the Final Commitments”).

14.3. Heating Electricity Germany

14.3.1. Description of the Initial Commitments

- (1061) The Initial Commitments consist in the divestiture of a business (“the Heating Electricity Divestment Business”) which consists of materially all of EDG’s special contract (Sondervertrag) customers supplied with electricity for heating purposes (Heizstrom), in total circa [...] customers (the “Customer Portfolio”), but excluding certain customer groups.
- (1062) More specifically, the Heating Electricity Divestment Business would exclude the following groups of customer:
- (1) a limited number of heating electricity products offered to E.ON employees and pensioners (c. [...] contracts) and a limited number of heating electricity products offered to B2B customers (c. [...] customers) under special framework agreements which contain inter alia special termination rights, approval rights and/or change of control clauses; and

⁹⁷⁹ Commission Notice on Remedies, para. 18.

⁹⁸⁰ Commission Notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004, 2008/C 267/01 (OJ C 267, 22.10.2008, p. 1).

- (2) customers supplied with electricity for heating purposes under Basic or Auxillary Supply (“*Grund- oder Ersatzversorgung*”) pursuant to Section 36 or 38 of the Energy Industry Act (EnWG).⁹⁸¹
- (1063) E.ON proposed to separate the Heating Electricity Divestment Business in two parts (relating to the Northern and the Southern parts of Germany) and to divest itself of these two parts to one or two purchasers of the Heating Electricity Divestment Business.
 - (1064) The Heating Electricity Divestment Business would have the following legal and functional structure:
 - (1) E.ON Heizstrom Nord GmbH, being a wholly-owned subsidiary of EDG, with approximately [...] customers of the Heating Electricity Divestment Business and such customers being located in the Federal States of Berlin, Brandenburg, Bremen, Hamburg, Lower Saxony, Mecklenburg Western Pomerania, North Rhine-Westphalia, Rhineland-Palatinate, Saarland, Saxony, Saxony-Anhalt, Schleswig-Holstein and Thuringia;
 - (2) E.ON Heizstrom Süd GmbH, being a wholly-owned subsidiary of EDG, with approximately [...] customers of the Heating Electricity Divestment Business and such customers being located in the Federal States Baden-Wuerttemberg, Bavaria, and Hesse.
 - (1065) EDG would enter into comprehensive service level agreements (“SLAs”) at arm’s length conditions whereby EDG will manage the operations relating to the Customer Portfolio (such as procurement, customer communication, customer service and invoicing) on behalf of E.ON Heizstrom Nord GmbH and E.ON Heizstrom Süd GmbH until Closing for the Heating Electricity Divestment Business.
 - (1066) The Heating Electricity Divestment Business would include licences, permits and authorisations necessary for the functioning of the Heating Electricity Divestment Business, as well as all electricity volumes already procured by EDG to service the Heating Electricity Divestment Business and all required contracts on transmission and distribution system operator level to deliver electricity to customers of the Divestment Business. It would also include customer, credit and other records relating to the Heating Electricity Divestment Business.
 - (1067) Furthermore, the Initial Commitments included an option of the Purchaser to acquire a non-exclusive license for the “E.ON”-brand to be used as co-brand with the purchaser’s brand for a transitional period of [...] from Closing for the Heating Electricity Divestment Business.
 - (1068) The Initial Commitments also covered all support required by E.ON or Affiliated Undertakings to ensure that the technical migration of the Customer Portfolio to the

⁹⁸¹ Under the EnWG, the basic supplier status is assigned on a de jure basis only to one supplier (on a by legal entity basis) within a DSO area, it cannot be split up between several suppliers and cannot be transferred to a third party. The heating electricity customers supplied as part of EDG’s basic supplier status can thus not be transferred to a potential purchaser of the Heating Electricity Divestment Business. This is because under the regulatory framework of the EnWG, EDG’s basic supplier status remains with EDG. More specifically, EDG has a statutory obligation (as stipulated under Section 36 of the EnWG) to supply any household customer in a network area where EDG is basic supplier, and thus could not refuse to supply any such customer who does not explicitly opt into a special contract (be it with EDG or any other supplier) but still consumes electricity (including regular and heating electricity). Further, EDG cannot unilaterally change the legal nature of the supply relationship with basic supply customers. Reply to RFI 65 (Clarification on remedy for heating electricity), 19 June 2019.

information technology system of the Purchaser(s) of the Heating Electricity Divestment Business is successfully completed by Closing for the Heating Electricity Divestment Business.

- (1069) The Heating Electricity Divestment Business would not include any brand or IP rights other than the non-exclusive license for the “E.ON”-brand to be used as co-brand, any IT systems or software or any personnel.
- (1070) The Initial Commitments proposed that the Heating Electricity Divestment Business to be sold to a purchaser independent of and unconnected to E.ON and its Affiliated Undertakings and which shall have the financial resources, required expertise and incentive to maintain and develop the Heating Electricity Divestment Business. The Purchaser shall also be in a position and have the capabilities - taking into consideration the assets included in the Heating Electricity Divestment Business - to continue the Heating Electricity Divestment Business as a viable and effective competitor and shall have proven experience and existing established activities in the retail supply of electricity and/or gas.

14.3.2. Responses to the market test

- (1071) In general, the majority of the competitors who responded to the market test considered the scope of the Initial Commitments, so far as they related to the retail supply of heating electricity in Germany, to be insufficient. However, many replies did not relate to the supply of heating electricity in Germany, but rather to other markets. Those competitors who considered the scope of the Initial Commitments insufficient also stated that the Concentration would significantly impede effective competition in the German markets for retail supply of electricity and gas to small customers and the German markets for grid related services, metering point operation, services for distributed generation systems, new markets and B2C markets.⁹⁸² The Commission has assessed the effects of the Concentration on these markets and concluded that significant impediments to effective competition are not likely.
- (1072) A small number of competitors thought that the Heating Electricity Divestment Business should include a wider customer base. In particular, some competitors suggested that customers of “*E wie einfach*”, basic supply contracts and the regional companies of E.ON should be included in the Heating Electricity Divestment Business. Other competitors considered that EDG would remain the supplier of regular (non-heating) electricity for most of the heating electricity customers and hence EDG would be in a strong position to win these customers back from the purchaser of the Heating Electricity Divestment Business. In order to minimise this threat, all energy contracts for regular (non-heating) electricity overlapping with the customers for heating electricity should be included into the portfolio of the Divestment Business.⁹⁸³
- (1073) The Initial Commitments did not include support functions, assets or personnel. The overwhelming majority of respondents to the market test considered that if the purchaser of the Heating Electricity Divestment Business was not someone who was not active in the retail supply of gas or electricity (regular (non-heating) electricity or heating electricity), such a purchaser would not be able to operate the Divestment Business in a viable manner without adequate support functions and assets (e.g. sales

⁹⁸² Replies to questionnaire Q15 – Commitments – Heating Electricity (Germany), question 2.

⁹⁸³ Replies to questionnaire Q15 – Commitments – Heating Electricity (Germany), question 2.

and marketing, customer service, IT, energy data management including handling of temperature load profiles, procurement, billing/mass invoicing, approval of networks charges, IT, software) and personnel. The result would not be dissimilar for a competitor active in the supply of gas. However, only a small majority of the respondents considered that support functions, assets and personnel would be required for a purchaser active in the retail supply of regular (non-heating) electricity in Germany and the overwhelming majority suggested that a company active as a supplier of heating electricity in Germany would not require support functions or personnel.⁹⁸⁴ Almost all respondents considered that the purchaser should be active in the retail supply of heating electricity or regular electricity in Germany, with the caveat that if the purchaser were not active in the retail supply of heating electricity, it should be allowed to require the transfer of some personnel, or know-how or the provision of transitional services.⁹⁸⁵

- (1074) Moreover, the majority of respondents considered that developing sufficient competence in energy data management including handling of temperature dependent load profiles, procurement for heating electricity and billing/mass invoicing would take a significant amount of time, resources and/or very significant additional costs.⁹⁸⁶ Similarly, the majority of respondents were of the view that certain potential purchasers would require personnel to ensure the viability of the Heating Electricity Divestment Business.⁹⁸⁷ Personnel would need to have knowledge in areas such as procurement, process management, billing, or energy data management. The majority of respondents also considered that the Initial Commitments should include transitional services.⁹⁸⁸
- (1075) Although respondents to the market test considered that splitting the Heating Electricity Divestment Business into two parts (E.ON Heizstrom Nord GmbH and E.ON Heizstrom Süd GmbH) and selling them separately would cause some synergies and economies of scale to be lost⁹⁸⁹, the vast majority of respondents considered that splitting the Heating Electricity Divestment Business in this way would not affect its viability negatively.⁹⁹⁰
- (1076) The majority of respondents considered that the Heating Electricity Divestment Business would not be able to retain its current customers. The main reason put forward by competitors was that EDG would retain the regular (non-heating) electricity customers on double meters and could easily contact these customers to win them back as heating electricity customers, especially as customers may have a preference to have just one supplier for both regular (non-heating) electricity and heating electricity.⁹⁹¹
- (1077) The overwhelming majority of respondents considered that the transfer of heating electricity customers to the purchaser was feasible and could be implemented in a

⁹⁸⁴ Replies to questionnaire Q15 – Commitments – Heating Electricity (Germany), question 4.

⁹⁸⁵ Replies to questionnaire Q15 – Commitments – Heating Electricity (Germany), question 18.

⁹⁸⁶ Replies to questionnaire Q15 – Commitments – Heating Electricity (Germany), questions 5, 6 and 7.

⁹⁸⁷ Replies to questionnaire Q15 – Commitments – Heating Electricity (Germany), question 8.

⁹⁸⁸ Replies to questionnaire Q15 – Commitments – Heating Electricity (Germany), question 14.

⁹⁸⁹ Replies to questionnaire Q15 – Commitments – Heating Electricity (Germany), questions 10 and 21.

⁹⁹⁰ Replies to questionnaire Q15 – Commitments – Heating Electricity (Germany), question 9.

⁹⁹¹ Replies to questionnaire Q15 – Commitments – Heating Electricity (Germany), question 11.

short timeframe.⁹⁹² The vast majority also considered that the Heating Electricity Divestment Business was attractive and likely to attract suitable purchasers.⁹⁹³

- (1078) Finally, several respondents submitted that the purchaser should not be obliged to take over all the electricity volumes already procured, since it may decide that it would be more advantageous to procure electricity on its own.⁹⁹⁴

14.3.3. *Description of the Final Commitments*

- (1079) Following the result of the market test of the Initial Commitments relating to the retail supply of heating electricity in Germany, the Commission sent the Parties a summary of the observations made by respondents. The Commission also informed the Notifying Party that it considered some of these observations to be justified and that amendments to the Initial Commitments would be required in order to remedy the concerns raised.

- (1080) In order to address the comments made by the Commission as a result of the market test, the Notifying Party submitted the Final Commitments, which contained the following improvements to the Initial Commitments with respect to the retail supply of heating electricity in Germany:

- a modification of the purchaser criteria to require the Purchaser of the Heating Electricity Divestment Business to have proven experience and existing established activities in the retail supply of electricity in Germany.
- a modification of the Customer Portfolio of the Heating Electricity Divestment Business to also include, for customers supplied under separate meters (*getrennte Messung*), all corresponding household electricity special contracts (*Sondervertrag*) (as identified by matching name and address of the customer) relating to the Customer Portfolio (currently in total c. [...]). In total, the Divestment Business would then include c. [...] customers with, in total, c. [...] customer contracts.
- a modification of the scope of the Heating Electricity Divestment Business to include personnel with experience in heating electricity retail supply. Such experience comprising the handling of temperature dependent load profiles (for, *inter alia*, pricing calculation and procurement), calculation and generation of temperature dependent load profiles, electricity procurement, which is based on temperature dependent load profiles, acquisition and processing of temperature data, performing forecasts for heating electricity customers based on daily parameter-dependent load profiles (temperature data), regulatory knowledge for the calculation of network charges and concession fees to be able to check invoices in detail (*vis-à-vis* distribution system operators and customers), knowledge about the associated market communication processes with distribution system operators, basic knowledge of metering technology (double tariff meters and ripple control receivers (*Rundsteuerempfänger*)), knowledge about the (technical) background of heating electricity customers (heat pumps, heat storage tanks, double tariff meters, tariff times and switching times) to be able to provide customer services.

⁹⁹² Replies to questionnaire Q15 – Commitments – Heating Electricity (Germany), question 12.

⁹⁹³ Replies to questionnaire Q15 – Commitments – Heating Electricity (Germany), question 16.

⁹⁹⁴ Replies to questionnaire Q15 – Commitments – Heating Electricity (Germany), question 15.

- a modification of the scope of the Heating Electricity the Divestment Business to include also service level agreements pursuant to which E.ON or an Affiliated Undertaking will provide for a transitional period of up to [...] from Closing of the Heating Electricity Divestment Business services relating to the Customer Portfolio (such as procurement, customer communication, customer service and invoicing) within the information technology system of the Purchaser(s).
- a modification to ensure that, if the Purchaser is not active in heating electricity retail supply, the Divestment Business will include the transfer of knowledge relating to heating electricity retail supply specific capabilities comprising the handling of temperature dependent load profiles (for, *inter alia*, pricing calculation or procurement), calculation and generation of temperature dependent load profiles; electricity procurement, which is based on temperature dependent load profiles, acquisition and processing of temperature data, performing forecasts for heating electricity customers based on daily parameter-dependent load profiles (temperature data), regulatory knowledge for the calculation of network charges and concession fees to be able to check invoices in detail (vis a vis distribution system operators and customers), knowledge about the associated market communication processes with distribution system operators, basic knowledge of metering technology (double tariff meters and ripple control receivers (*Rundsteuerempfänger*)), knowledge about the (technical) background of heating electricity customers (heat pumps, heat storage tanks, double tariff meters, tariff times and switching times) to be able to provide customer services.
- a modification giving the purchaser the option of requiring that the Heating Electricity Divestment Business will include at the option of the Purchaser all electricity volumes already procured by EDG to service the Heating Electricity Divestment Business (currently c. [...] TWh).

14.3.4. *Assessment of the Final Commitments*

14.3.4.1. Removal of competition concerns

- (1081) The Commission considers that, as a result of horizontal non-coordinated effects arising from the overlap in the activities of the Parties, the Concentration would significantly impede effective competition in the market for the retail supply of heating electricity in Germany at both national and local level. Any commitments entered into by the Parties with the Commission must eliminate the competition concerns identified by the Commission and must also be proportionate to the competition concerns identified.
- (1082) The Final Commitments provide for the divestment of the Heating Electricity Divestment Business that consists of materially all of EDG's special contract customers supplied with electricity for heating purposes, currently in total c. [...] customers, and in addition include, for customers supplied under separate meters, all corresponding household electricity special contracts relating to the customers supplied with electricity for heating purposes (currently in total to c. [...] customers, being in total c. [...] customer contracts). Therefore, the Heating Electricity Divestment Business, even if split into two, constitutes a substantive sales base for maintaining and developing the Heating Electricity Divestment Business.
- (1083) The Divestment of the Heating Electricity Divestment Business on the basis set out above will effectively address all of the Commission's concerns by removing most of

the relevant competitive overlaps between the Parties and ensuring that enough competitors remain in the market.

- (1084) On a national level, the Parties' combined market share amounts to [30-40]% with an increment of approximately [10-20]% caused by the merger. The next largest suppliers are EnBW and EWE whose market shares are between [5-10]% and [5-10]%.

Table 37 - effect of the divestment of the Heating Electricity Divestment Business on E.ON's market share in heating electricity in Germany.

Party	without divestment	with divestment
E.ON	[10-20]%	[5-10]%
Innogy	[10-20]%	[10-20]%
Combined	[30-40]%	[20-30]%
Divestment Business	-	[10-20]%
Other Suppliers	[60-70]%	[60-70]%

Based on Form RM Germany Heating Electricity, Paragraph 18

- (1085) Divestment of the Heating Electricity Divestment Business reduces the Parties' combined market share by approximately [10-20] percentage points, thereby removing most of the overlap.

Table 38 - market shares pre-Concentration and post-Concentration (including taking into account the effect of the Final Commitments) for heating electricity in Germany.

Party	without divestment	with divestment
Merged Entity	[30-40]%	[20-30]%
Divestment Business	-	[10-20]%
Municipal utilities (incl.EWE)	[30-40]	[30-40]
EnBW	[5-10]	[5-10]
EWE	[5-10]	[5-10]
Vattenfall	[0-5]	[0-5]
Others	[5-10]	[5-10]

Based on Form RM Germany Heating Electricity, Paragraph 18 and on Form CO.

- (1086) If the Heating Electricity Divestment Business is sold to a single Purchaser, it would create the second largest competitor, followed by EnBW and EWE. If the Heating Electricity Divestment Business is sold to two different purchasers, it would create two additional competitors of a similar size to EnBW or EWE. Therefore, the

divestment of the Heating Electricity Divestment Business ensures that sufficient sizable competitors able to constrain the merged entity will remain in the market.

- (1087) On a local level, in E.ON's DSO areas Innogy causes the increment. Divesting E.ON customers would remove significantly more customers than the overlap as the divested customers account for more than Innogy's customer base in E.ON's DSO area. In Innogy's DSO areas the increment is caused by E.ON and it is in the range of [0-5]% to approximately [5-10]%. Divestment of the Heating Electricity Divestment Business will remove most of the overlap on average.
- (1088) Taking into account the effects of the remedy, the increase in share of supply as a result of the merger would be in the range of [0-5]% to [0-5]%.⁹⁹⁵ This appears relatively small considering that the Purchaser of the remedy will account for a share of supply in the range of [0-5]% to [0-5]% which would be significantly larger than the increase in share of supply and very close to the entire overlap in each DSO area.⁹⁹⁶
- (1089) The Commission also considers that a common denominator in the barriers to enter and expand in the market for the retail supply of heating electricity (e.g. data collection and elaboration of load profiles, procurement facilities, processing and billing, etc.)⁹⁹⁷ is the need for scale in order to be able to operate efficiently in the market. Implementation of the Final Commitments would create either the second largest retail supplier of heating electricity after the merged entity (with a share of [10-20]%) or two new players with a size comparable to EnBW, currently the largest competitor (or one of the largest competitors) of the Parties. Therefore, it is likely that the Purchaser of the Heating Electricity Divestment Business would be able to achieve the necessary scale to operate efficiently. In addition the Final Commitments would give the Purchaser a capillary foothold in the large majority of the local areas in Germany. The widespread presence at local level combined with the economies of scale will place the Purchaser in an advantageous position to compete effectively and grow across Germany (including in those areas where the merged entity retains a (limited) part of the increment, see recital (1088) above).
- (1090) Moreover, almost all the observations made in the market test (i.e. that the Purchaser must have proven experience and existing established activities in the retail supply of electricity in Germany, that volumes already procured [information addressed in the Final Commitments] to service the Heating Electricity Divestment Business should be included in the divestment at the option of the purchaser, that regular (non-heating) electricity customers [information addressed in the Final Commitments] should be included in the remedy and that personnel, transitional services and know-how should be included at the option of the purchaser) have been addressed in the Final Commitments as described in Section (14.3.3). The only observation made by respondents to the market test related to the heating electricity business that is not entirely addressed by the Final Commitments is the observation that the Heating electricity Divestment Business should include a wider customer base. However, the Final Commitments have increased very significantly the total number of customers contracts to be transferred (with c.[...] additional contracts) to be transferred. Discounting the basic supply customers with a non-transferrable legal status assigned to EDG (c. [...] customers), the number of customers retained by E.ON is very small

⁹⁹⁵ Reply to RFI 68 (Heating Electricity).

⁹⁹⁶ Reply to RFI 68 (Heating Electricity).

⁹⁹⁷ See Section 7.2.3 for more details on the barriers to entry identified by the Commission.

(less than [...] heating electricity customers, predominantly served by E.ON's EWI). In fact, ignoring basic supply customers, the increment caused by the Concentration as modified by the Final Commitments would be [0-5]% at national level.⁹⁹⁸ Moreover, the Commission notes that only a small minority of respondents to the market test made that particular observation and also that the Heating Electricity Divestment Business would inherit a significant sales base on which it could build a merchant presence from the outset.

- (1091) The Commission therefore concludes that the Final Commitments are sufficient to remove the horizontal competition concerns identified with regards to the market for the retail supply of heating electricity to households and SMEs customers in Germany both at national and at local DSO-area level.

14.3.4.2. Viability of the Final Commitments

- (1092) The Commission takes the view that the Heating Electricity Divestment Business as set up under the Final Commitments is viable.
- (1093) Any purchaser of the Heating Electricity Divestment Business is required to have proven experience and existing established activities in the retail supply of electricity in Germany and to be independent of and unconnected to E.ON. The Purchaser is also required to have the financial resources, required expertise and incentive needed to maintain and develop the respective Heating Electricity Divestment Business and be in a position and have the ability to continue the Heating Electricity Divestment Business as a viable and effective competitor.
- (1094) Taking into consideration the results of the market test, a purchaser active in the retail supply of electricity in Germany would require only limited personnel, support functions or transitional services and know-how.
- (1095) The Heating Electricity Divestment Business includes personnel with experience in the key support functions identified during the market test, such as energy data management including handling of temperature load profiles, procurement, billing/mass invoicing, or approval of networks charges. The Heating Electricity Divestment Business also includes transitional services relating to the Customer Portfolio (such as procurement, customer communication, customer service and invoicing). Moreover, the Heating Electricity Divestment Business includes knowledge relating to the following expertise needed for heating electricity retail supply: the handling of temperature dependent load profiles (for, inter alia, pricing calculation or procurement), calculation and generation of temperature dependent load profiles and electricity procurement.
- (1096) The Heating Electricity Divestment Business also includes licences, permits and authorisations necessary for the functioning of the Heating Electricity Divestment Business, and all procurement contracts of the Heating Electricity Divestment Business at the option of the Purchaser.
- (1097) The market test raised some doubts about whether the Heating Electricity Divestment Business would be able to retain its current customers because EDG would retain the regular (non-heating) electricity customers and could win them back as heating electricity customers, since it would have their data. To address this concern, the Final Commitments include, for customers supplied under separate meters, all corresponding household electricity special contracts.

⁹⁹⁸ From RM Germany Heating Electricity para. 18.

- (1098) The Commission therefore considers that, taking into account the Purchaser criteria, the Heating Electricity Divestment Business includes all know-how, assets, services and personnel required to ensure the viability and competitiveness of the Heating Electricity Divestment Business and the successful transfer of the Heating Electricity Divestment Business.
- (1099) Moreover, the Heating Electricity Divestment Business comprises a profitable business generating an annual turnover of EUR [...] million and a gross margin of EUR [...] million.⁹⁹⁹
- (1100) Therefore, the Commission takes the view that the Heating Electricity Divestment Business as set up under the Final Commitments is viable.
- (1101) Conclusion on the Final Commitments Based on the assessment in recitals (1081) to (1100), the Commission concludes that the Final Commitments are sufficient in scope and suitable to remove entirely the significant impediments to effective competition to which the Concentration would otherwise give rise in the market for the retail supply of heating electricity in Germany and that, therefore, the Final Commitments render the Concentration compatible with the internal market and the EEA Agreement in this respect.

14.4. E-Mobility Germany

14.4.1. Description of the Initial Commitments

- (1102) The Initial Commitments comprised an obligation on E.ON to fully terminate operation of 32 electric vehicle charging stations on-motorway service areas owned by Autobahn Tank & Rast GmbH ('T&R') in respect of which E.ON and its Affiliated Undertakings are contracted to act as charge point operator until [...] (the electric vehicle charging stations at those service areas are referred to in this Decision as 'the Discontinued Charging Stations') and not to operate those charging stations until after that date. Further, E.ON committed to refrain for a period of [...] from entering into agreements to become charge point operator of the electric vehicle charging stations to be installed at the on-motorway service areas [description of certain electric vehicle charging stations] referred to in this Decision as 'the Further Discontinued Charging Stations').
- (1103)
- (1104) As the charge point operator, E.ON and its Affiliated Undertakings do not own the infrastructure, but are responsible for price setting, operation and maintenance as well as management of customers, the charging process and billing.
- (1105) E.ON's obligation to terminate the operation of the Discontinued Charging Stations includes the provision of performance data, hand-over and repair protocols in relation to the Discontinued Charging Stations to T&R or a third party designated by the latter.
- (1106) The commitment to terminate the operation of the Discontinued Charging Stations and not to operate the Further Discontinued Charging Stations does not require the transfer of any further assets as the Discontinued Charging Stations are owned by T&R.

⁹⁹⁹ From RM Germany Heating Electricity para. 8.

- (1107) Finally, E.ON committed to cause T&R to grant the role as charge point operator of the Discontinued Charging Stations to an operator which will not create prima facie competition concerns.

14.4.2. Responses to the market test

- (1109) The vast majority of the competitors who responded to the market test considered that the number and the location of the divested Charging Stations would not remove the potential negative impact on competition in the market for Charging-Point Operator activities for electric vehicles (“EV”) charging stations on-motorways in Germany¹⁰⁰⁰. However, many of the replies opposing this commitment did not relate to the scope of the remedy for the electric vehicles Charging Stations on motorways in Germany, but instead to other markets such as retail supply of electricity and gas to small customers or the market for grid related services in Germany or to new markets. The Commission has assessed the effects of the Concentration on these markets and concluded that significant impediment to effective competition would not arise on these markets as a result of the Concentration.
- (1110) Some competitors, however, also raised concerns about the scope of the commitment relating to the operation of electric vehicles Charging Stations.
- (1111) First, some competitors considered that the number of charging stations included in the Initial Commitments was not sufficient and that the merged entity would continue to have a dominant position in Germany.¹⁰⁰¹
- (1112) Second, one competitor considered that E.ON’s commitment [...].¹⁰⁰²
- (1113) Finally, some competitors were of the view that the attractiveness and viability of acquiring a business comprising only 32 EV Charging Stations spread all over Germany would be reduced due to the significant transaction costs incurred in operating and maintaining these EV Charging Stations. According to some of these respondents, the commitment would be viable only if the operation of the charging stations was granted to a market participant already operating a nationwide portfolio of Charging Stations. Otherwise operation and maintenance costs would be very high.¹⁰⁰³
- (1114) The vast majority of respondents were of the opinion that the Initial Commitments included all assets, equipment, resources, and personnel that any company, who would eventually become the CPO for all or parts of the divested stations (terminated by E.ON), needs to operate these stations in a viable manner.¹⁰⁰⁴ Nevertheless, some respondents indicated that if the new operator did not have experience operating EV Charging Stations, the operator could require competent staff, IT systems or access to a network of technical field staff. In the same vein, the majority of respondents considered that the number and geographical coverage of the Discontinued Charging Stations would only allow a recipient of the whole package to offer attractive services/conditions to drivers/customers and to be viable going forward, if the new operator has already experience operating EV Charging Stations.¹⁰⁰⁵ The

¹⁰⁰⁰ Replies to questionnaire Q16 – Commitments – E-mobility (Germany), question 2.

¹⁰⁰¹ Replies to questionnaire Q16 – Commitments – E-mobility (Germany), question 2.

¹⁰⁰² Replies to questionnaire Q16 – Commitments – E-mobility (Germany), question 2.

¹⁰⁰³ Replies to questionnaire Q16 – Commitments – E-mobility (Germany), questions 2 and 3.

¹⁰⁰⁴ Replies to questionnaire Q16 – Commitments – E-mobility (Germany), question 3.

¹⁰⁰⁵ Replies to questionnaire Q16 – Commitments – E-mobility (Germany), questions 4 and 6.

Commission notes that proven experience in the e-mobility sector is one of the criteria that the new operator of the Discontinued Charging Stations must meet.

- (1115) Finally, the majority of respondents considered that the Discontinued Charging Stations are sufficiently interesting to attract suitable purchasers¹⁰⁰⁶ and half of the respondents are of the opinion that the Initial Commitments offered a viable solution, so that the recipient of the divested business can effectively compete with the Parties on a lasting basis in the market for EV Charging Stations on-motorways in Germany.¹⁰⁰⁷

14.4.3. *Description of the Final Commitments*

- (1116) Following the market test of the Initial Commitments, the Commission sent the Parties a summary of the observations made by respondents. The Commission also informed the Notifying Party that it considered some of the observations to be justified and that amendments to the Initial Commitments would be necessary in order to remedy the concerns raised.
- (1117) In order to address the comments made by the Commission as a result of the market test, the Notifying Party submitted the Final Commitments which contained the following improvements to the Initial Commitments:
- E.ON committed to cause T&R to grant the role as charge point operator of the Discontinued Charging Stations to an operator which has proven experience in the e-mobility sector.
 - if E.ON were to install any own assets at the Discontinued Charging Stations until the end of the Discontinuation Period, these assets would be transferred to either T&R or to the new operator which has been selected by T&R.
 - [description of Final Commitments]¹⁰⁰⁸ [description of Final Commitments]¹⁰⁰⁹. [Description of Final Commitments].

14.4.4. *Assessment of the Final Commitments*

14.4.4.1. Removal of competition concerns

- (1118) The Commission considers that as a result of horizontal non-coordinated effects arising from the overlap in the activities of the Parties, the Concentration would significantly impede effective competition in the market for installation and operation of fast and ultra fast public EV Charging Stations on German motorways in a number of local areas (see Section 7.2.8). The Final Commitments must eliminate the competition concerns identified by the Commission and be proportionate to the competition concerns identified.

¹⁰⁰⁶ Replies to questionnaire Q16 – Commitments – E-mobility (Germany), question 7.

¹⁰⁰⁷ Replies to questionnaire Q16 – Commitments – E-mobility (Germany), question 11.

¹⁰⁰⁸ Pursuant to para. 7 of the Commitments, in order to maintain effective competition, E.ON commits to negotiate with T&R the return of the role as charge point operator of the Discontinued Charging Stations. E.ON commits to fully terminate the operation of the Discontinued Charging Stations by the end of the Discontinuation Period and not to operate the Discontinued Charging Stations until [...]. E.ON commits to use best endeavours (i) to reach a mutually acceptable solution with Autobahn Tank & Rast GmbH about the termination and (ii) to cause Autobahn Tank & Rast GmbH to grant the role as charge point operator of the Discontinued Charging Stations to an operator which (a) will not create prima facie competition concerns and (b) has proven experience in the e-mobility sector. Further, E.ON commits not to operate the Further Discontinued Charging Stations for a period of [...].

¹⁰⁰⁹ [...].

- (1119) The Final Commitments comprise a commitment by E.ON to fully terminate the operation of the Discontinued Charging Stations and not to operate any of those sharging stations until [...]. Further, E.ON commits not to operate the Further Discontinued Charging Stations for a period of [...]. The EV Charging Stations included in the Final Commitments cover all the areas giving rise to concerns identified on the basis of the competitive assessment carried out by the Commission.
- (1120) If properly implemented, the Final Commitments would effectively address all of the Commission's concerns by removing all relevant competitive overlaps between the Parties.
- (1121) Moreover, all relevant observations and comments raised in the market test (see above) have been addressed in the Final Commitments.
- (1122) First, although some respondents considered that the number of Charging Stations included in the Initial Commitments was not sufficient and that the merged entity would continue to have a dominant position in Germany,¹⁰¹⁰ the Commission has defined the market for installation and operation of EV Charging Stations on motorways as either national with local elements or as local in scope. The commitments with respect to the Discontinued Charging Stations remove the full overlap in the Parties' activities in the local areas where the Commission identified competition problems.
- (1123) Second, the Commission notes that not all competitors have the same views with regards to the number of EV charging stations needed to operate profitably in Germany as put forward by some respondents. For example, one competitor considered that *"a network of approximately 40 sites on motorways across Germany can reasonably be seen as a sufficient number to reach the critical size and the geographic coverage that would effectively attract customers"*.¹⁰¹¹ Moreover, according to the Final Commitments E.ON commits to cause T&R to grant the role as charge point operator of the Discontinued Charging Stations to an operator which has proven experience in the e-mobility sector. Therefore, the new operator would have to already have complementary activities leading to synergies in terms of maintenance and operation costs.
- (1124) [Description of Final Commitments]¹⁰¹² [description of Final Commitments]¹⁰¹³.
- (1125) The Commission therefore concludes that the Final Commitments are sufficient to remove the competition horizontal concerns identified with respect to the markets for CPO activities for fast and ultra-fast EV Charging Station on motorways at local level in Germany.

14.4.4.2. Viability of the Final Commitments

- (1126) The Commission takes the view that the Discontinued Charging Stations and the Further Discontinued Charging Stations [description of Final Commitments] as described in the Final Commitments would [...] be a viable business.
- (1127) The commitment to terminate the operation of the Discontinued Charging Stations and not to operate the Further Discontinued Charging Stations does not require the

¹⁰¹⁰ Replies to questionnaire Q16 – Commitments – E-mobility (Germany), question 2.

¹⁰¹¹ Minutes of a conference call with a competitor, 5 June 2019 (ID6198), para. 11.

¹⁰¹² See section 14.4.3.

¹⁰¹³ [...].

transfer of any further assets. The Discontinued Charging Stations are owned by T&R.

- (1128) E.ON's obligation to terminate operation of the Discontinued Charging Stations includes the provision of performance data, hand-over and repair protocols in relation to the Discontinued Charging Stations to T&R or a third party designated by the latter.
- (1129) The majority of respondents to the market test considered that the operation of the Discontinued Charging Stations would not require any assets, equipment, resources, or personnel in order to be viable if the new operator were someone with experience.
- (1130) Moreover, E.ON commits to use best endeavours (i) to reach a mutually acceptable solution with T&R about the termination and (ii) to cause T&R to grant the role as charge point operator of the Discontinued Charging Stations to an operator which (a) will not create prima facie competition concerns and (b) has proven experience in the e-mobility sector. [Description of Final Commitments].
- (1131) Therefore, the Commission takes the view that the operation of the Discontinued Charging Stations and the Further Discontinued Charging Stations [...] as described in the Final Commitments are viable [...].

14.4.5. Conclusion on the Commitments for the operation of EV Charging Stations in Germany

- (1132) Based on the assessment in recitals (1118) to (1131), the Commission concludes that the Final Commitments are sufficient in scope and suitable to remove entirely the significant impediments to effective competition to which the Concentration would otherwise give rise in the market for the installation and operation of public EV Charging Stations on motorways in Germany and that, therefore, the Final Commitments render the Concentration compatible with the internal market and the EEA Agreement in this respect.

14.5. Czechia

14.5.1. Description of the Initial Commitments

- (1133) So far as Czechia is concerned, the Initial Commitments proposed the divestment of a business (referred to in this Decision as 'the Czech Divestment Business') comprising Innogy's electricity retail business and gas retail business, its electricity and gas wholesale businesses, certain of its electricity generation activities, and a wide range of non-core activities. The Czech Divestment Business does not include the gas distribution business nor the gas storage business.
- (1134) The Czech Divestment Business included all assets and staff that contribute to the current operation or are necessary to ensure the viability and competitiveness of the Czech Divestment Business, in particular it includes the following assets and staff with certain exceptions¹⁰¹⁴:
 - (i) all tangible and intangible assets (including intellectual property rights);
 - (ii) all licences, permits and authorisations issued by any governmental organisation for the benefit of the Czech Divestment Business;

¹⁰¹⁴ This mainly concerns the gas storage and gas distribution business and related personnel, as well as agreements/personnel for carrying out tasks related to activities outside Czechia, and brand/IP rights not used by the Czech Divestment Business.

(iii) all contracts, leases, commitments and customer orders of the Czech Divestment Business; all customer, credit and other records of the Czech Divestment Business; and

(iv) the Personnel of the Czech Divestment Business.

(1135) More specifically, E.ON committed in the Initial Commitments to procure the sale of the Czech Divestment Business comprising the following business lines, as currently operated in Czechia:

- (1) the retail supply of electricity,
- (2) the retail supply of gas,
- (3) the generation of electricity,
- (4) the distribution of electricity via local distribution systems,
- (5) the trading of electricity and gas,
- (6) the distribution and generation of heat,
- (7) the provision of e-mobility services,
- (8) the provision of compressed natural gas (“CNG”) motor fuels,
- (9) the distribution of photovoltaic systems,
- (10) the provision of energy consulting and auditing services to business customers,
- (11) the provision of home insurance services,
- (12) the provision of heating and cooling services,
- (13) the provision of lighting products, and
- (14) the provision of telecommunication services.

(1136) The Czech Divestment Business also included continuation, for a transitional period of [...] and on terms and conditions equivalent to those at present afforded to the Czech Divestment Business, all current arrangements under which Innogy or its Affiliated Undertakings supply products or services to the Czech Divestment Business, unless otherwise agreed with the Purchaser of the Czech Divestment Business.

14.5.2. Responses to the market test

(1137) The vast majority of the competitors who responded to the market test, considered that the Initial Commitments were suitable to remove the possible negative impact on competition which could result from the merger of E.ON’s and Innogy’s activities in the retail supply of electricity to low voltage customers in Czechia and in the retail supply of gas to both small and large industrial customers in Czechia.¹⁰¹⁵ The same view was expressed by the large industrial customers that responded to the market test.¹⁰¹⁶

(1138) One competitor indicated that the [...] transitional period to maintain current arrangements (see recital (1136) above) appeared long as it would block competition for those services for [...].¹⁰¹⁷ The Commission notes that it is for the purchaser of

¹⁰¹⁵ Replies to questionnaire Q13 – Commitments – Competitors (Czechia), question 2.

¹⁰¹⁶ Replies to questionnaire Q14 – Commitments – Large Customers (Czechia), question 2.

¹⁰¹⁷ Replies to questionnaire Q13 – Commitments – Competitors (Czechia), question 3.1.

the Czech Divestment Business to decide whether or not to make use of this option and that it does not prevent third parties from providing such services. Therefore, it does not prevent the purchaser from sourcing such services from third parties.

- (1139) The vast majority of respondents, competitors and large customers, were also of the opinion that the Czech Divestment Business included all assets and personnel needed to be viable so that a suitable purchaser could effectively compete in the markets for the retail supply of gas to both small and large customers and for the retail supply of electricity to low voltage customers in Czechia on a lasting basis.¹⁰¹⁸
- (1140) Finally, some competitors expressed the view that the purchaser of the Czech Divestment Business would have to have some experience in the energy sector in or outside Czechia.¹⁰¹⁹ Large customers also indicated that the purchaser would have to be active in the gas and electricity retail markets, mentioning the need for local staff to have experience in Czechia.¹⁰²⁰ The Commission notes in this respect that local staff are part of the Czech Divestment Business.

14.5.3. Description of the Final Commitments

- (1141) Following the market test of the Initial Commitments, the Commission sent the Parties a summary of the observations made by respondents. The Commission also informed the Notifying Party that it considered some of the observations to be justified and that an amendment to the Initial Commitments would be required in order to remedy the concerns raised.
- (1142) In order to address the comments made by the Commission as a result of the market test, the Notifying Party submitted Final Commitments, in which the purchaser criteria were modified to take into account the feedback to the market test. In the Final Commitments, the Purchaser of the Czech Divestment Business would have to have proven experience and existing established activities in the energy sector

14.5.4. Assessment of the Final Commitments

14.5.4.1. Removal of the competition concerns

- (1143) The Commission considers that as a result of horizontal non-coordinated effects arising from the overlap in the activities of the Parties, the Concentration would significantly impede effective competition in the markets for the retail supply of gas to both small and large customers in Czechia and for the retail supply of electricity to low voltage customers in Czechia. The Commitments must eliminate the competition concerns identified by the Commission and be proportionate to the competition concerns identified.
- (1144) The Final Commitments consist of E.ON committing to divest itself of the Czech Divestment Business which includes the entirety of Innogy's retail gas and electricity business in Czechia and other business lines of Innogy.
- (1145) The divestment of the Czech Divestment Business on the basis set out in the Final Commitments would effectively address all of the Commission's concerns by removing any relevant competitive overlaps between the Parties.

¹⁰¹⁸ Replies to questionnaire Q13 – Commitments – Competitors (Czechia), question 4 and Replies to questionnaire Q14 – Commitments – Large Customers (Czechia), question 3.

¹⁰¹⁹ Replies to questionnaire Q13 – Commitments – Competitors (Czechia), question 9.

¹⁰²⁰ Replies to questionnaire Q14 – Commitments – Large Customers (Czechia), question 9.

- (1146) The overwhelming majority of the respondents to the market test did not raise concerns about the scope of the remedies regarding Czechia. The only concern raised was about the purchaser criteria and this has been addressed in the Final Commitments as described in Section 14.5.4.2.
- (1147) The Commission therefore concludes that the Final Commitments are sufficient to remove the competition horizontal concerns identified with regard to the markets for the retail gas supply to both small and large customers in Czechia and the retail supply of electricity to low voltage customers in Czechia.

14.5.4.2. Viability of the Final Commitments

- (1148) The Commission takes the view that the Czech Divestment Business as described in the Final Commitments is viable.
- (1149) The Czech Divestment Business is a well-established business with a strong position in the Czech retail gas and electricity markets. Innogy is a successor of the historical incumbents and is well-placed in the Czech energy retail markets. The Czech Divestment Business would include all assets and staff that contribute to the current operation or are necessary to ensure the viability and competitiveness of the Czech Divestment Business (see Section 14.5.1).
- (1150) The Czech Divestment Business includes all tangible and intangible assets needed for a successful transfer of that business. It includes for instance all customer contact centres, customer care centres and other real estate, to the extent that they are not predominantly used by the gas distribution business in Czechia. It also includes the IT systems and material software, as well as the generation, CNG and e-mobility assets. Furthermore, it includes the required licences, permits and authorisations such as the retail gas and electricity licences, heat and electricity generation licences, electricity distribution licences and CNG licences.
- (1151) Therefore, the Czech Divestment Business encompasses all necessary assets and personnel, as well as all support services that are needed for the viability of the Divestment Business. The market test did not point to any support functions needed to operate autonomously that are not included in the Czech Divestment Business.
- (1152) Moreover, the Purchaser of the Czech Divestment Business would be required to have proven experience and existing established activities in the energy sector and shall be independent of and unconnected to E.ON. The Purchaser would also have to have the financial resources, expertise and incentive required to maintain and develop the Czech Divestment Business and be in a position and have the ability to continue the Czech Divestment Business as a viable and effective competitor.
- (1153) The market test confirmed that the Final Commitments regarding Czechia are sufficient to eliminate the serious doubts as to the compatibility of the Concentration with the internal market in this regard, since they are comprehensive and include all necessary assets. The vast majority of competitors and large customers supported the view that the commitments would remove any possible negative impact of the Concentration in the markets for the retail supply of gas to both small and large customers in Czechia and the retail supply of electricity to low voltage customers in Czechia.
- (1154) Therefore, the Commission takes the view that the Czech Divestment Business as described in the Final Commitments is viable.

14.5.5. Conclusion on the Final Commitments

- (1155) Based on the assessment in recitals (1143) to (1154), the Commission concludes that the Final Commitments regarding Czechia are sufficient in scope and suitable to

remove entirely the significant impediments to effective competition to which the Concentration would otherwise give rise in Czechia and that, therefore, the Final Commitments render the Concentration compatible with the internal market and the EEA Agreement in this respect.

14.6. Hungary

14.6.1. Description of the Initial Commitments

- (1156) The Initial Commitments concerned the divestment of a business ("the Hungarian Divestment Business") comprising the entirety of the electricity retail business of E.ON Energiakereskedelmi Kft.'s ("E.ON EKER") in Hungary and the portfolio of insurance contracts marketed by E.ON EKER to Residential Customers. It does not include the retail gas business, the upstream electricity generation and wholesale activities, various non-core activities (save for the insurance portfolio described above) or any business activities that sit outside of E.ON EKER, such as generation and distribution (the businesses not included are together referred to as "the Hungarian Retained Business"). E.ON therefore commits to procure divestment of the following business lines:
- (i) the retail supply of electricity to Residential Customers.¹⁰²¹
 - (ii) the retail supply of electricity to USP-SME Customers.
 - (iii) the retail supply of electricity to Competitive-SME Customers.
 - (iv) the retail supply of electricity to Large Industrial Customers.
- (1157) The Hungarian Divestment Business would comprise a legal entity (namely E.ON EKER) housing E.ON's retail electricity business and insurance services, including material support functions. Such support functions include sales, tender support, energy procurement, certain customer services functions, controlling, research and analytics and market intelligence. In relation to further support functions, including IT, marketing, legal, tax, accounting and HR functions, E.ON shall, at the option of the Purchaser for the Hungarian Divestment Business, either transfer the employees required to provide these functions to E.ON EKER from their current positions within E.ON and its Affiliated Undertakings or offer these functions through transitional service agreements ("TSAs").
- (1158) The Hungarian Divestment Business includes tangible assets (including IT systems and material software used by the Hungarian Divestment Business) and intangible assets (including intellectual property rights) as well as personnel.
- (1159) It also includes licences and permits necessary for the functioning of the Hungarian Divestment Business, as well as all procurement contracts and customer contracts of the Hungarian Divestment Business. It also included customer, credit and other records relating to the Hungarian Divestment Business.

¹⁰²¹ The Commission concluded that the Concentration would not significantly impede effective competition in the market for the retail supply of electricity to residential customers and to USP-SME customers. Therefore, the Parties excluded these business lines and the related insurance services from the scope of the Final Commitments. The Parties' activities in the supply of insurance services are de minimis and complementary to their activities as USP electricity providers given that E.ON offers insurance products exclusively to Residential Customers who do not fall within the perimeter of the Hungarian Divestment Business, which comprises Competitive-SME Customers and Large Customers. In particular, the specific services, being household insurance and health insurance products, are consumer products which are sold to residential customers primarily via a USP call centre and in some walk-in shops.

- (1160) The Initial Commitments provided for the Hungarian Divestment Business to be sold to a purchaser who is independent of and unconnected to E.ON and its Affiliated Undertakings and who has the financial resources, required expertise and incentive to maintain and develop the respective Divestment Business. The Purchaser shall also be in a position and have the capabilities - taking into consideration the assets included in the Hungarian Divestment Business - to continue the Hungarian Divestment Business as a viable and effective competitor.

14.6.2. Responses to the market test regarding Hungary

- (1161) The vast majority of the competitors who responded to the market test consider that the Initial Commitments were suitable to remove the potentially negative impact on competition that could result from the merger of E.ON's and Innogy's activities in the retail supply of electricity to competitive SMEs in Hungary.¹⁰²² and in the retail supply of electricity to large industrial customers in Hungary.¹⁰²³ Large industrial customers shared the same opinion as regards the market for the retail supply of electricity to large industrial customers in Hungary.¹⁰²⁴
- (1162) The vast majority of respondents, competitors and large industrial customers, were also of the opinion that the Hungarian Divestment Business included all assets and personnel needed to be viable so that a suitable purchaser could effectively compete in the markets for the retail supply of electricity in Hungary on a lasting basis.¹⁰²⁵
- (1163) Competitors also considered that the Hungarian Divestment Business included all services and support functions needed for a successful transfer of the Hungarian Divestment Business,¹⁰²⁶ as well as the key personnel and personnel required to ensure the viability and competitiveness of the Hungarian Divestment Business.¹⁰²⁷ The vast majority of them also considered that the scope and duration of the transitional services would be sufficient.¹⁰²⁸ In the same vein, competitors consider that the Divestment Business is likely to retain its current customers¹⁰²⁹ and large industrial customers considered that a purchaser of the Divestment Business could be a credible alternative to the existing suppliers of electricity to large industrial customers in Hungary.¹⁰³⁰
- (1164) However, some concerns were raised in relation to the Initial Commitments.
- (1165) One competitor pointed out that E.ON would be retaining the energy audit business line through which E.ON would have access to the electricity consumption data of different companies, including customers of the Hungarian Divestment Business. E.ON could use the data to target the customers of the Hungarian Divestment Business and win them back.¹⁰³¹
- (1166) The majority of the competitors who responded to the market test indicated that being active in the retail supply of electricity should be essential for any interested

¹⁰²² Replies to questionnaire Q17 – Commitments – Competitors (Hungary), question 2.

¹⁰²³ Replies to questionnaire Q17 – Commitments – Competitors (Hungary), question 3.

¹⁰²⁴ Replies to questionnaire Q18 – Commitments – Large Industrial Customers (Hungary), question 2.

¹⁰²⁵ Replies to questionnaire Q17 – Commitments – Competitors (Hungary), question 5 and Replies to questionnaire Q18 – Commitments – Large Industrial Customers (Hungary), question 3.

¹⁰²⁶ Replies to questionnaire Q17 – Commitments – Competitors (Hungary), question 7.

¹⁰²⁷ Replies to questionnaire Q17 – Commitments – Competitors (Hungary), question 8.

¹⁰²⁸ Replies to questionnaire Q17 – Commitments – Competitors (Hungary), questions 10 and 11.

¹⁰²⁹ Replies to questionnaire Q17 – Commitments – Competitors (Hungary), question 9.

¹⁰³⁰ Replies to questionnaire Q18 – Commitments – Large Industrial Customers (Hungary), question 4.

¹⁰³¹ Replies to questionnaire Q17 – Commitments – Competitors (Hungary), question 2.

purchaser, because it is important for suppliers to have knowledge of the energy sector and both the Union and the Hungarian energy market regulation.

- (1167) Finally, the vast majority of competitors and large industrial customers indicated in the market test that the Initial Commitments offered a viable solution, so that a Purchaser would be able to compete effectively with the merged entity on a lasting basis.¹⁰³²

14.6.3. Description of the Final Commitments regarding Hungary

- (1168) After concluding the Phase II investigation, the Commission concluded that the Concentration would not significantly impede effective competition in the market for the retail supply of electricity to residential customers in Hungary and the retail supply of electricity to USP-SME customers in Hungary. Therefore, the Parties excluded these business lines and related insurance services from the scope of the Final Commitments.
- (1169) Following the market test of the Initial Commitments regarding Hungary, the Commission sent the Parties a summary of the observations made by respondents. The Commission also informed the Notifying Party that it considered some of the observations to be justified and that amendments to the Initial Commitments would be needed in order to remedy the concerns raised in this respect.
- (1170) In order to address the comments made by the Commission as a result of the market test, the Notifying Party submitted the Final Commitments, which contained the following improvements regarding Hungary:
- a modification of the purchaser criteria to take into account the feedback to the market test. In the Final Commitments, the Purchaser of the Hungarian Divestment Business shall have proven experience and existing established activities in the energy sector and shall be independent of and unconnected to E.ON and its Affiliated Undertakings, and also independent of and unconnected to competitors that may create prima facie competition concerns.
 - modification committing E.ON and its Affiliated Undertakings shall eliminate all Audit Data and ensure that Audit Data is not accessible by E.ON and its Affiliated Undertakings. E.ON consents to the Purchaser obtaining access to the Audit Data from E.ON's third party service provider.
 - inclusion of an undertaking from E.ON not to solicit the Personnel of the Hungarian Divestment Businesses for a period of [time period].

14.6.4. Assessment of the Final Commitments

14.6.4.1. Removal of competition concerns

- (1171) The Commission considers that as a result of horizontal non-coordinated effects arising from the overlap in the activities of the Parties, the Concentration would significantly impede effective competition in the markets for the retail supply of electricity to Competitive-SME customers in Hungary and for the retail supply of electricity to Large Industrial Customers in Hungary. The Final Commitments must eliminate the competition concerns identified by the Commission and should also be proportionate to the competition concerns identified.

¹⁰³² Replies to questionnaire Q17 – Commitments – Competitors (Hungary), question 36 and Replies to questionnaire Q18 – Commitments – Large Industrial Customers (Hungary), question 13.

- (1172) The Final Commitments consist of the divestment of the Hungarian Divestment Business comprising the entirety of the retail electricity business in the Competitive Offering of E.ON EKER in Hungary. E.ON therefore commits to procure divestment of the following business lines:
- (i) the retail supply of electricity to Competitive-SME Customers; and
 - (ii) the retail supply of electricity to Large Industrial Customers.
- (1173) By selling the Hungarian Divestment Business, E.ON would divest itself of the entirety of its retail electricity supply business to Competitive-SMEs customers and large industrial customers in Hungary. The divestment of the Hungarian Divestment Business would effectively address all of the Commission's concerns by removing any relevant competitive overlaps between the Parties. The Final Commitments therefore eliminate the increments in market shares that would be brought about by the Concentration.
- (1174) The overwhelming majority of the respondents to the market test did not raise observations as to the fact that the remedy proposed by the Notifying Party would not solve the competition concerns. Moreover, all the observations raised in the market test (i.e. that E.ON should not have access to energy audit data and that the purchaser should have knowledge of the energy sector and both the Union and Hungarian energy market regulation) have been addressed in the Final Commitments as described in Section 14.6.3.
- (1175) All the Hungarian Divestment Business's Competitive-SME and large industrial customers would be transferred to the purchaser of the Divestment Business, meaning that the Hungarian Divestment Business would inherit a wide customer base from the outset.
- (1176) The Commission therefore concludes that the Final Commitments are sufficient to remove the competition horizontal concerns identified with regards to the markets for the retail supply of electricity to Competitive-SME customers in Hungary and the retail supply of electricity to large industrial customers in Hungary.

14.6.4.2. Viability of the Final Commitments

- (1177) The Commission takes the view that the Hungarian Divestment Business as described in the Final Commitments would be viable.
- (1178) The Hungarian Divestment Business is a well-established business with a strong position in the relevant Hungarian electricity markets. The Hungarian Divestment Business includes all services and support functions needed for a successful transfer of the Competitive-SME customer and Large Industrial Customer business lines, as well as the key personnel and personnel needed to ensure the viability and competitiveness of the Hungarian Divestment Business. Such support functions include sales, tender support, energy procurement, certain customer services functions, controlling, research and analytics and market intelligence.
- (1179) The Hungarian Divestment Business also includes IT systems and material software used by the Hungarian Divestment Business and intellectual property rights needed to operate the Hungarian Divestment Business. It also includes licences, permits and authorisations necessary for the functioning of the Hungarian Divestment Business, as well as all procurement contracts and customer contracts of that business.
- (1180) Therefore, the Hungarian Divestment Business encompasses all necessary assets and personnel, as well as support services that are needed for the viability of the Hungarian Divestment Business. The market test did not reveal any support

functions needed for the Hungarian Divestment Business to operate autonomously that are not included with the Hungarian Divestment Business.

- (1181) Moreover, the Purchaser of the Hungarian Divestment Business shall have proven experience and existing established activities in the energy sector and shall be independent of and unconnected to E.ON. The Purchaser should also have the financial resources, required expertise and incentive to maintain and develop the respective Hungarian Divestment Business and be in a position and have the capabilities to continue the Hungarian Divestment Business as a viable and effective competitor.
- (1182) The market test confirmed that the Commitments are sufficient to eliminate the serious doubts as to the compatibility of the Concentration with the internal market, as they are comprehensive and include all necessary assets. The vast majority of competitors and customers supported the view that the commitments offered would remove any possible negative impact of the Concentration in the markets for the retail supply of electricity to Competitive-SMEs and Large Industrial Customers in Hungary.
- (1183) Therefore, the Commission takes the view that the Hungarian Divestment Business as described in the Final Commitments would be viable.

14.6.5. Conclusion on the Commitments

- (1184) Based on the assessment in recitals (1171) to (1183), the Commission concludes that the Final Commitments are sufficient in scope and suitable to remove entirely the significant impediments to effective competition to which the Concentration would otherwise give rise in Hungary and that, therefore, the Final Commitments render the Concentration compatible with the internal market and the EEA Agreement in this respect.

14.7. Conclusion on the Final Commitments

- (1185) The Commission concludes that the Final Commitments are sufficient in scope and suitable to remove entirely the significant impediments to effective competition to which the Concentration would otherwise give rise and that, therefore, the Final Commitments render the Concentration compatible with the internal market and the EEA Agreement. In conclusion, the Commission finds that, following modification in accordance with the Final Commitments, the Concentration would not significantly impede effective competition in the internal market or within the territory covered by the EEA Agreement, or in a substantial part of either of them.

15. CONDITIONS AND OBLIGATIONS

- (1186) Pursuant to the second subparagraph of Article 8(2) of the Merger Regulation, the Commission may attach to its decision conditions and obligations intended to ensure that the undertakings concerned comply with the commitments they have entered into vis-à-vis the Commission with a view to rendering the concentration compatible with the internal market.
- (1187) The fulfilment of a measure that gives rise to a structural change of the market is a condition, whereas the implementing steps which are necessary to achieve that result are generally obligations on the parties. Where a condition is not fulfilled, the Commission's decision declaring the concentration compatible with the internal market is no longer applicable. Where the undertakings concerned commit a breach of an obligation, the Commission may revoke the clearance decision in accordance with Article 8(6)(b) of the Merger Regulation. The undertakings concerned may also

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

- (1188) In accordance with the distinction described in recital (1186) as regards conditions and obligations, this Decision should be made conditional on full compliance with Section B (including Parts 1 to 4) of the Final Commitments. All other commitments included in other Sections of the Final Commitments should be obligations within the meaning of Article 8(2) of the Merger Regulation. The full text of the commitments is attached as an Annex to this Decision and forms an integral part thereof.

HAS ADOPTED THIS DECISION:

Article 1

The notified concentration that would result from the acquisition by E.ON SE of control over Innogy within the meaning of Article 3(1)(b) of Regulation (EC) No 139/2004 is declared compatible with the internal market and the Agreement on the European Economic Area.

Article 2

Article 1 is subject to compliance with the conditions set out in Section B of the Annex (including Part 1, Part 2, Part 3 and Part 4, and for each Part including its annexes).

Article 3

E.ON SE shall comply with the obligations set out in the remaining Sections of the Annex not referred to in Article 2.

Article 4

This Decision is addressed to:

E.ON SE
Brüsseler Platz 1
45131 Essen
Germany

Done at Brussels, 17.9.2019

For the Commission

(Signed)

Margrethe VESTAGER

Member of the Commission

Case No COMP/M.8870



E.ON SE



Innogy SE

Commitments to the European Commission

Submitted by

E.ON SE

On

3 July 2019

Case M.8870 – E.ON / Innogy

COMMITMENTS TO THE EUROPEAN COMMISSION

Pursuant to Articles 8(2) and 10(2) of Council Regulation (EC) No 139/2004 (the “**Merger Regulation**”), E.ON (as defined below) hereby enters into the following commitments (the “**Commitments**”) *vis-à-vis* the European Commission (the “**Commission**”) with a view to rendering the acquisition by E.ON of sole control over Innogy (as defined below) (the “**Concentration**”) compatible with the internal market and the functioning of the EEA Agreement.

This text shall be interpreted in light of the Commission's decision pursuant to Article 8(2) of the Merger Regulation to declare the Concentration compatible with the internal market and the functioning of the EEA Agreement (the “**Decision**”), in the general framework of European Union law, in particular in light of the Merger Regulation, and by reference to the Commission Notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004 (the “**Remedies Notice**”).

Section A. Definitions

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

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

[...].

Assets: the assets that contribute to the current operation or are necessary to ensure the viability and competitiveness of the Czech and/or the Hungarian Divestment Businesses as indicated in Section B, paragraphs 12 and 14 and described more in detail in Parts 3 and 4 of the Schedule.

Audit Data: data which E.ON or its Affiliated Undertakings have received before the Closing for the Hungarian Divestment Business relating to the Customer Segments “Competitive-SME Customers” and “Large Customers” as part of the provision of energy audit services.

Closing: the transfer of the legal title to any of the Divestment Businesses to the respective Purchaser.

Closing Period: for each of the Divestment Businesses, the period from the approval of the respective Purchaser and the respective terms of sale by the Commission, namely [...].

Confidential Information: any business secrets, know-how, commercial information, or any other information of a proprietary nature that is not in the public domain.

Conflict of Interest: any conflict of interest that impairs the Trustee's objectivity and independence in discharging its duties under the Commitments.

Customer Segments: on a national market in Hungary: (i) the retail supply of electricity to residential customers (all being entitled to receive the USP Offering) (“**Residential Customers**”); (ii) the retail supply of electricity to industrial/commercial and municipal customers serviced by providers of the USP Offering (all being entitled to receive, and being supplied by, the USP Offering) (“**USP-SME Customers**”); (iii) the retail supply of electricity to industrial/commercial and municipal customers serviced by providers of the Competitive Offering with an annual electricity consumption of less than 0.5

GWh (being made up of both customers entitled to receive the USP Offering and customers not entitled to receive the USP Offering) (“**Competitive-SME Customers**”); and (iv) the retail supply of electricity to industrial/commercial customers serviced by providers of the Competitive Offering with an average annual electricity consumption of more than 0.5 GWh (none of whom are entitled to receive the USP Offering) (“**Large Customers**”); where the “**USP Offering**” is the retail supply of electricity on the basis of the “universal service” in Hungary which maintains regulated prices and services for certain categories of customers; the “**Competitive Offering**” is the retail supply of electricity in Hungary not provided via the USP Offering.

Czech Divestment Business: the Divestment Business to be divested in the Czech Republic as defined in Section B and in Part 3 of the Schedule.

Decision: decision by the European Commission clearing the Concentration compatible with the common market under article 8(2) of the Merger Regulation.

Discontinuation Period: the period of [...].

Discontinued Charging Stations: those public electric vehicle charging stations operated by E.ON or its Affiliated Undertakings on motorways in Germany as listed Part 2 of the Schedule.

Divestiture Trustee: one or more natural or legal person(s) who is/are approved by the Commission and appointed by E.ON and who has/have received from E.ON the exclusive Trustee mandate to sell the Divestment Business(es) to a Purchaser at no minimum price.

Divestment Businesses: the businesses, as defined in Section B and in the respective Parts of the Schedule which E.ON commits to divest, namely: (i) the Heating Electricity Divestment Business, (ii) the Czech Divestment Business, (iii) the Hungarian Divestment Business and [...].

EDG: E.ON Energie Deutschland GmbH, incorporated under the laws of the Federal Republic of Germany, with its registered seat at Arnulfstraße 203, 80634 Munich, Germany, and registered with the Commercial/Company Register (*Handelsregister*) at the District Court (*Amtsgericht*) Munich under number HRB 209327.

E.ON: E.ON SE, incorporated under the laws of the Federal Republic of Germany, with its registered office at Brüsseler Platz 1, 45131 Essen, Germany, and registered with the Commercial/Company Register (*Handelsregister*) at the District Court (*Amtsgericht*) Essen under number HRB 281986.

Effective Date: the date of the adoption of the Decision.

First Divestiture Period: the period of [...].

Further Discontinued Charging Stations: those public electric vehicle charging stations on motorways in Germany which E.ON or Affiliated Undertakings were considering to operate, as listed in Part 2 of the Schedule.

Heating Electricity Divestment Business: the Divestment Business relating to heating electricity in Germany, as defined in Section B and in Part 1 of the Schedule.

Hold Separate Manager: the person appointed by E.ON for each of the Divestment Businesses to manage the day-to-day business under the supervision of the Monitoring Trustee.

Hungarian Divestment Business: the Divestment Business to be divested in Hungary as defined in Section B and in Part 4 of the Schedule.

Innogy: Innogy SE, incorporated under the laws of the Federal Republic of Germany, with its registered office at Opernplatz 1, 45128 Essen, Germany, and registered with the Commercial/Company Register (*Handelsregister*) at the District Court (*Amtsgericht*) Essen under number HRB 27091

Key Personnel: all personnel necessary to maintain the viability and competitiveness of the Czech Divestment Business and/or the Hungarian Divestment Business, as listed in Parts 3 and 4 of the Schedule, respectively, including the respective Hold Separate Manager.

Monitoring Trustee: one or more natural or legal person(s) who is/are approved by the Commission and appointed by E.ON, and who has/have the duty to monitor E.ON's compliance with the conditions and obligations attached to the Decision.

Parties: E.ON and Innogy including their respective Affiliated Undertakings.

Personnel: the Personnel of the Czech Divestment Business and the Personnel of the Hungary Divestment Business.

Personnel of the Czech Divestment Business: all staff as defined in Part 3 of the Schedule.

Personnel of the Hungarian Divestment Business: all staff currently employed by the Hungarian Divestment Business, including staff seconded to the Hungarian Divestment Business, shared personnel as well as the additional personnel listed in Part 4 of the Schedule.

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

Purchaser Criteria: the criteria laid down in paragraph 34 of these Commitments that any Purchaser must fulfil in order to be approved by the Commission.

RWE: RWE AG, incorporated under the laws of the Federal Republic of Germany, with its registered office at Altenessener Straße 35, 45141 Essen, Germany, and registered with the Commercial/Company Register (*Handelsregister*) at the District Court (*Amtsgericht*) Essen under number HRB 14525

Schedule: the schedule to these Commitments describing more in detail the Divestment Businesses, the Discontinued Charging Stations and the Further Discontinued Charging Stations.

Tank & Rast Charging Stations: all public electric vehicle charging stations governed by the Tank & Rast Contracts.

Tank & Rast Contracts: (i) the cooperation contract between Autobahn Tank & Rast GmbH and E.ON (*Kooperationsvertrag zwischen Autobahn Tank & Rast GmbH and E.ON*) dated 27 September 2017 and (ii) the supplemental contract between Autobahn Tank & Rast GmbH and E.ON (*1. Nachtrag zum Kooperationsvertrag vom 27.09 2017*) dated 20 June 2018 pursuant to which E.ON or Affiliated Undertakings are the operators of certain public electric vehicle charging stations at on-motorway service areas (*Autobahnraststätten*) operated by Autobahn Tank & Rast GmbH.

Tank & Rast Locations: all Tank & Rast Charging Stations at Tank & Rast on motorway service areas (*Autobahnraststätten*) operated by E.ON or Affiliated Undertakings under the Tank & Rast Contracts.

Trustee(s): the Monitoring Trustee and/or the Divestiture Trustee as the case may be.

Trustee Divestiture Period: for each of the Divestment Businesses, the period [...].

Section B. The commitments to divest the Divestment Businesses and to discontinue the Discontinued Charging Stations and the Further Discontinued Charging Stations

Commitment to divest

2. In order to maintain effective competition, E.ON commits to divest, or procure the divestiture of each of the Divestment Businesses by the end of the respective Trustee Divestiture Period as a going concern to a purchaser and on terms of sale approved by the Commission in accordance with the procedure described in paragraph 35 of these Commitments. [...].
3. To carry out the divestiture, E.ON commits to find a purchaser and to enter into a final binding sale and purchase agreement for the sale of each of the Divestment Businesses.
4. If E.ON has not entered into such an agreement for a Divestment Business at the end of the respective First Divestiture Period, E.ON shall grant the Divestiture Trustee an exclusive mandate to sell the respective Divestment Business in accordance with the procedure described in paragraph 47 of these Commitments in the respective Trustee Divestiture Period.
5. E.ON shall be deemed to have complied with this commitment if:
 - (a) by the end of the respective Trustee Divestiture Period, for each Divestment Business, E.ON or the Divestiture Trustee has entered into a final binding sale and purchase agreement and the Commission approves the proposed purchaser and the terms of sale as being consistent with the Commitments in accordance with the procedure described in paragraph 35 of these Commitments; and
 - (b) the Closing of the sale of each Divestment Business to the respective Purchaser takes place within the respective Closing Period.
6. In order to maintain the structural effect of the Commitments, E.ON shall, for a period of 10 (ten) years after the respective Closing for any Divestment Business, not acquire, whether directly or indirectly, the possibility of exercising influence (as defined in paragraph 43 of the Remedies Notice, footnote 3) over the whole or part of any Divestment Business, unless, following the submission of a reasoned request from E.ON showing good cause and accompanied by a report from the Monitoring Trustee (as provided in paragraph 61 of these Commitments), the Commission finds that the structure of the market or markets has changed to such an extent that the absence of influence over the respective Divestment Business is no longer necessary to render the Concentration compatible with the internal market.

Commitment to discontinue

7. In order to maintain effective competition, E.ON commits to negotiate with Autobahn Tank & Rast GmbH the return of the role as charge point operator of the Discontinued Charging Stations. E.ON commits to fully terminate the operation of the Discontinued Charging Stations by the end of the Discontinuation Period and not to operate the Discontinued Charging Stations until [...]. E.ON commits to use best endeavours (i) to reach a mutually acceptable solution with Autobahn Tank & Rast GmbH about the termination and (ii) to cause Autobahn Tank & Rast GmbH to grant the role as charge point operator of the Discontinued Charging Stations to an operator which (a) will not create *prima facie* competition concerns and (b) has proven experience in the e-mobility sector. Further, E.ON commits not to operate the Further Discontinued Charging Stations for a period of [...] after the Effective Date.
8. [...].

Structure and definition of the Divestment Businesses

Heating Electricity Divestment Business

9. The Heating Electricity Divestment Business consists of materially all of EDG's special contract (*Sondervertrag*) customers supplied with electricity for heating purposes (*Heizstrom*) as further detailed in Part 1 of the Schedule.
10. The Heating Electricity Divestment Business further includes that E.ON and Affiliated Undertakings support the migration of the Heating Electricity Divestment Business as quickly as reasonably practicable to an IT system chosen by the Purchaser of the Heating Electricity Divestment Business with a view to completing the migration by the Closing for the Heating Electricity Divestment Business.

Czech Divestment Business

11. The Czech Divestment Business consists of the entire electricity and gas retail business of Innogy and its Affiliated Undertakings in the Czech Republic, combined with generation, wholesale and non-core activities (subject to certain carve-outs in favour of the transfer of the gas grid business and certain other assets to be retained by RWE or E.ON or their respective Affiliated Undertakings).
12. The legal and functional structure of the Czech Divestment Business as operated to date is described in Part 3 of the Schedule. The Czech Divestment Business, described in more detail in Part 3 of the Schedule, includes all assets and staff that contribute to the current operation or are necessary to ensure the viability and competitiveness of the Czech Divestment Business (subject to paragraph 12(d) below), in particular:
 - (a) all tangible and intangible assets (including intellectual property rights);
 - (b) all licences, permits and authorisations issued by any governmental organisation for the benefit of the Czech Divestment Business;
 - (c) all contracts, leases, commitments and customer orders of the Czech Divestment Business; all customer, credit and other records of the Czech Divestment Business; and
 - (d) the Personnel of the Czech Divestment Business save for the personnel excluded under paragraph 13 of Part 3 of the Schedule.
13. In addition, the Czech Divestment Business includes the benefit, for a transitional period of [...] on terms and conditions equivalent to those at present afforded to the Czech Divestment Business, of all current arrangements under which Innogy or its Affiliated Undertakings supply products or services to the Czech Divestment Business, as detailed in the Schedule, unless otherwise agreed with the Purchaser of the Czech Divestment Business. Strict firewall procedures will be adopted so as to ensure that any competitively sensitive information related to, or arising from such supply arrangements (for example, product roadmaps) will not be shared with, or passed on to, anyone outside [...] the entities providing the services.

Hungarian Divestment Business

14. The Hungarian Divestment Business consists of E.ON's activities in the retail supply of electricity in Hungary to the following Customer Segments: (i) Competitive-SME Customers, and (ii) Large Customers. The legal and functional structure of the Hungarian Divestment Business as operated to date is described in Part 4 of the Schedule. The Hungarian Divestment Business, described in more detail in Part 4 of the Schedule, includes all assets and staff that contribute to the current operation or are necessary to ensure the viability and competitiveness of the Hungarian Divestment Business, in particular:

- (a) all tangible and intangible assets (including intellectual property rights) – with the “E.ON” brand licensed for a certain period of time at the option of the Purchaser;
 - (b) all licences, permits and authorisations held by the Hungarian Divestment Business and capable of being transferred;
 - (c) all contracts, leases, commitments and customer orders of the Hungarian Divestment Business; all customer, credit and other records of the Hungarian Divestment Business; and
 - (d) the Personnel of the Hungarian Divestment Business.
15. In addition, the Hungarian Divestment Business includes the benefit, for a transitional period of [...] and on terms and conditions equivalent to those at present afforded to the Hungarian Divestment Business, of all current arrangements under which E.ON or its Affiliated Undertakings supply products or services to the Hungarian Divestment Business, as detailed in the Schedule, unless otherwise agreed with the Purchaser of the Hungarian Divestment Business. Strict firewall procedures will be adopted so as to ensure that any competitively sensitive information related to, or arising from such supply arrangements (for example, product roadmaps) will not be shared with, or passed on to, anyone outside of [...]. as the entities providing the services.
- [...]
16. [...].

Structure and definition of the Discontinued Charging Stations and the Further Discontinued Charging Stations

17. The Discontinued Charging Stations are located on 32 (thirty-two) on-motorway service areas (*Autobahnraststätten*) as listed in Part 2 of the Schedule for which E.ON or its Affiliated Undertakings currently have the role as charge point operator on the basis of the Tank & Rast Contracts; the activity E.ON commits to discontinue is the commercial role as charge point operator of these Discontinued Charging Stations. The legal and functional structure of the Discontinued Charging Stations as operated to date is described in Part 2 of the Schedule.
18. Negotiating the termination of the operation of the Discontinued Charging Stations will include E.ON also handing over to Autobahn Tank & Rast GmbH (or a third party designated by the latter) all documentation and protocols in the possession of E.ON or Affiliated Undertakings that contribute to the current operation or are necessary to ensure the viability and competitiveness of the Discontinued Charging Stations, in particular all handover protocols, initial Autobahn Tank & Rast GmbH site layouts and charger commissioning protocols.
19. The Further Discontinued Charging Stations are 2 (two) potential electric vehicle charging stations to be installed at the on-motorway service areas [...].

Section C. Related commitments

Preservation of viability, marketability and competitiveness

20. From the Effective Date until the respective Closing for the Heating Electricity Divestment Business, the Czech Divestment Business, the Hungarian Divestment Business and [...], E.ON shall preserve or procure the preservation of the economic viability, marketability and competitiveness of the Divestment Businesses, in accordance with good business practice, and shall minimise as far as possible any risk of loss of competitive potential of the Divestment Businesses. In particular, E.ON undertakes:

- (a) not to carry out any action that might have a significant adverse impact on the value, management or competitiveness of the Divestment Businesses or that might alter the nature and scope of activity, or the industrial or commercial strategy or the investment policy of the Divestment Businesses;
 - (b) to make available, or procure to make available, sufficient resources for the development of the Divestment Businesses, on the basis and continuation of the existing business plans, including, in particular, the continuation of planned roll-outs of public electric vehicle charging stations at Tank & Rast Locations;
 - (c) to take all reasonable steps, or procure that all reasonable steps are being taken, including appropriate incentive schemes (based on industry practice), to encourage all Key Personnel to remain with the respective Divestment Businesses, and not to solicit or move any Personnel to E.ON's and its Affiliated Undertakings' remaining business. Where, nevertheless, individual members of the Key Personnel exceptionally leave the Divestment Businesses, E.ON shall provide a reasoned proposal to replace the person or persons concerned to the Commission and the Monitoring Trustee. E.ON must be able to demonstrate to the Commission that the replacement is well suited to carry out the functions exercised by those individual members of the Key Personnel. The replacement shall take place under the supervision of the Monitoring Trustee, who shall report to the Commission.
21. From the Effective Date until the termination of the operation of the Discontinued Charging Stations, E.ON shall preserve or procure the preservation, the viability, marketability and competitiveness of the Discontinued Charging Stations, in accordance with good business practice, and will minimise as far as possible any risk of loss of competitive potential of the Discontinued Charging Stations.

Hold-separate obligations

22. Immediately after the Effective Date, E.ON shall appoint a Hold Separate Manager for the Heating Electricity Divestment Business. The Hold Separate Manager shall manage the Heating Electricity Divestment Business independently and in the best interest of the business with a view to ensuring its continued economic viability, marketability and competitiveness and its independence from the businesses retained by E.ON or its Affiliated Undertakings.
23. E.ON commits to keep, from the Effective Date until the Closing, the Czech Divestment Business and the Hungarian Divestment Business separate from the businesses it is retaining and to ensure that unless explicitly permitted under these Commitments:
- (a) management and staff of the businesses retained by E.ON and its Affiliated Undertakings have no involvement in the Czech Divestment Business and the Hungarian Divestment Business;
 - (b) the Key Personnel and Personnel of the Czech Divestment Business and the Hungarian Divestment Businesses have no involvement in any business retained by E.ON and its Affiliated Undertakings and do not report to any individual outside the Czech Divestment Business and the Hungarian Divestment Business.
24. From the Effective Date until the Closing for the Hungarian Divestment Business, E.ON shall assist the Monitoring Trustee in ensuring that the Hungarian Divestment Business is managed separate from the businesses which E.ON or its Affiliated Undertakings are retaining. Immediately after the Effective Date, E.ON shall appoint a Hold Separate Manager for the Hungarian Divestment Business. The Hold Separate Manager, who shall be part of the Key Personnel of the Hungarian Divestment Business, shall manage the Hungarian Divestment Business independently and in the best interest of the business with

a view to ensuring its continued economic viability, marketability and competitiveness and its independence from the businesses retained by E.ON and its Affiliated Undertakings.

25. From the Effective Date until the Closing for the Czech Divestment Business, E.ON and its Affiliated Undertakings shall assist the Monitoring Trustee in ensuring that the Czech Divestment Business is managed as a distinct and saleable entity separate from the businesses which E.ON and its Affiliated Undertakings are retaining. Immediately after the Effective Date, E.ON shall appoint a Hold Separate Manager for the Czech Divestment Business. This Hold Separate Manager, who shall be part of the Key Personnel of the Czech Divestment Business, shall manage the Czech Divestment Business independently and in the best interest of the business with a view to ensuring its continued economic viability, marketability and competitiveness and its independence from the businesses retained by E.ON and its Affiliated Undertakings.
26. [...].
27. The Hold Separate Managers shall closely cooperate with and report to the Monitoring Trustee and, if applicable, the Divestiture Trustee. Any replacement of a Hold Separate Manager shall be subject to the procedure laid down in paragraph 20(c) of these Commitments. The Commission may, after having heard E.ON, require E.ON to replace a Hold Separate Manager.

Ring-fencing

28. E.ON shall implement, or procure to implement, all necessary measures to ensure that it or its Affiliated Undertakings do not, after the Effective Date, obtain any Confidential Information relating to the Czech Divestment Business and the Hungarian Divestment Business, and that any such Confidential Information obtained by E.ON or its Affiliated Undertakings before the Effective Date will be eliminated and not be used by E.ON or its Affiliated Undertakings. This includes measures *vis-à-vis* E.ON's or its Affiliated Undertakings' appointees on the supervisory board and/or board of directors of the Czech Divestment Businesses and the Hungarian Divestment Businesses. In particular, the participation of the Czech Divestment Business and the Hungarian Divestment Businesses in any central information technology network shall be severed to the extent possible, without compromising the viability of the respective Divestment Businesses. E.ON or its Affiliated Undertakings may obtain or keep information relating to the Czech Divestment Business and the Hungarian Divestment Businesses which is reasonably necessary for the divestiture of the latter or the disclosure of which to E.ON or its Affiliated Undertakings are required by law.
29. In respect of the Hungarian Divestment Business, E.ON and its Affiliated Undertakings shall eliminate all Audit Data and ensure that Audit Data is not accessible by E.ON and its Affiliated Undertakings from the third party service provider to which they outsource the energy audit services. E.ON consents (or procures that its Affiliated Undertaking will consent) to the Purchaser obtaining access to the Audit Data from E.ON's third party service provider.

Non-solicitation clause

30. E.ON undertakes, subject to customary limitations, not to solicit, and to procure that Affiliated Undertakings do not solicit, the Key Personnel and the Personnel of the Czech and the Hungarian Divestment Businesses and the person to be transferred at the option of the Purchaser of the Heating Electricity Divestment Business under paragraph (7)(iii)(c) of Part 1 of the Schedule (if applicable), for a period of [...] after the respective Closing.

Due diligence

31. In order to enable potential purchasers to carry out a reasonable due diligence of the Divestment Businesses, E.ON shall, subject to customary confidentiality assurances and dependent on the stage of the divestiture process:
- (a) provide to potential purchasers sufficient information as regards the Divestment Businesses;
 - (b) provide to potential purchasers sufficient information relating to the Personnel and allow them reasonable access to the Personnel.

Reporting

32. E.ON shall submit written reports in English language on
- (a) potential purchasers of the Divestment Businesses and developments in the negotiations with such potential purchasers as well as
 - (b) the status of the negotiations with Autobahn Tank & Rast GmbH on the termination of the operation of the Discontinued Charging Stations

to the Commission and the Monitoring Trustee no later than 10 (ten) days after the end of every month following the Effective Date (or otherwise at the Commission's request). E.ON shall submit a list of all potential purchasers having expressed interest in acquiring a Divestment Business to the Commission at each and every stage of the divestiture process, as well as a copy of all the offers made by potential purchasers within 5 (five) days of their receipt.

33. E.ON shall inform the Commission and the Monitoring Trustee on the preparation of the data room documentation and the due diligence procedure relating to a Divestment Business and shall submit a copy of any information memorandum relating to a Divestment Business to the Commission and the Monitoring Trustee before sending the memorandum out to potential purchasers.

Section D. The Purchasers

34. In order to be approved by the Commission, any Purchaser must fulfil the following criteria:
- (a) The Purchaser(s) shall be independent of and unconnected to E.ON and its Affiliated Undertakings (this being assessed having regard to the situation following the divestiture).
 - (b) The Purchaser shall have the financial resources, required expertise and incentive to maintain and develop the respective Divestment Business. The Purchaser shall also be in a position and have the capabilities - taking into consideration the assets included in the Divestment Business - to continue the Divestment Business as a viable and effective competitor. Finally,
 - (i) the Purchaser(s) of the Heating Electricity Divestment Business shall have proven experience and existing established activities in the retail supply of electricity in Germany,
 - (ii) the Purchaser of the Czech Divestment Business shall have proven experience and existing established activities in the energy sector.
 - (iii) the Purchaser of the Hungarian Divestment Business shall have proven experience and existing established activities in the energy sector and shall be independent of and unconnected to E.ON and its Affiliated Undertakings (this being assessed having regard to the situation following the divestiture), as well as to competitors that may create *prima facie* competition concerns,

- (iv) the Purchaser of the Alternative E-mobility Divestment Business shall have proven experience in the e-mobility sector.
 - (c) The acquisition of a Divestment Business by a Purchaser must neither be likely to create, in light of the information available to the Commission, *prima facie* competition concerns nor give rise to a risk that the implementation of the Commitments will be delayed. In particular, a Purchaser must reasonably be expected to obtain all necessary approvals from the relevant regulatory authorities for the acquisition of the respective Divestment Business.
- 35. The final binding sale and purchase agreement (as well as ancillary agreements) relating to the divestment of a Divestment Business shall be conditional on the Commission's approval. When E.ON or its Affiliated Undertakings have reached an agreement with a purchaser, E.ON shall submit a fully documented and reasoned proposal, including a copy of the final agreement(s), within one week to the Commission and the Monitoring Trustee. E.ON must be able to demonstrate to the Commission that the purchaser fulfils the Purchaser Criteria and that any Divestment Business is being sold in a manner consistent with the Decision and the Commitments. For the approval, the Commission shall verify that the purchaser fulfils the Purchaser Criteria and that the respective Divestment Business is being sold in a manner consistent with the Commitments including their objective to bring about a lasting structural change in the market. The Commission may approve the sale of a Divestment Business without one or more Assets or parts of the Personnel, or by substituting one or more Assets or parts of the Personnel with one or more different assets or different personnel, if this does not affect the viability and competitiveness of the respective Divestment Business after the sale, taking account of the proposed purchaser.

Section E. Trustee

Appointment procedure

- 36. E.ON shall appoint a Monitoring Trustee to carry out the functions specified in these Commitments for a Monitoring Trustee. E.ON commits not to close the Concentration before the appointment of a Monitoring Trustee.
- 37. If E.ON or its Affiliated Undertakings have not entered into a binding sale and purchase agreement regarding a Divestment Business one month before the end of the respective First Divestiture Period or if the Commission has rejected a purchaser proposed by E.ON at that time or thereafter, E.ON shall appoint a Divestiture Trustee. The appointment of the Divestiture Trustee shall take effect upon the commencement of the respective Trustee Divestiture Period for the Divestment Business.
- 38. The Trustee shall:
 - (a) at the time of appointment, be independent of E.ON and its Affiliated Undertakings;
 - (b) possess the necessary qualifications to carry out its mandate, for example have sufficient relevant experience as an investment banker or consultant or auditor; and
 - (c) neither have nor become exposed to a Conflict of Interest.
- 39. The Trustee shall be remunerated by E.ON or its Affiliated Undertakings in a way that does not impede the independent and effective fulfilment of its mandate. In particular, where the remuneration package of a Divestiture Trustee includes a success premium linked to the final sale value of a Divestment Business, such success premium may only be earned if the divestiture takes place within the respective Trustee Divestiture Period.

I. Proposal by E.ON

40. No later than two weeks after the Effective Date, E.ON shall submit the name or names of one or more natural or legal persons whom E.ON proposes to appoint as the Monitoring Trustee to the Commission for approval. No later than one month before the end of any First Divestiture Period or on request by the Commission, E.ON shall submit a list of one or more persons whom E.ON proposes to appoint as Divestiture Trustee to the Commission for approval. The proposal shall contain sufficient information for the Commission to verify that the person or persons proposed as Trustee fulfil the requirements set out in paragraph 38 of these Commitments and shall include:
- (a) the full terms of the proposed mandate, which shall include all provisions necessary to enable the Trustee to fulfil its duties under these Commitments;
 - (b) the outline of a work plan which describes how the Trustee intends to carry out its assigned tasks;
 - (c) an indication whether the proposed Trustee is to act as both Monitoring Trustee and Divestiture Trustee or whether different trustees are proposed for the two functions.

II. Approval or rejection by the Commission

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

III. New proposal by E.ON

42. If all the proposed Trustees are rejected, E.ON shall submit the names of at least two more natural or legal persons within one week of being informed of the rejection, in accordance with paragraphs 36 and 41 of these Commitments.

IV. Trustee nominated by the Commission

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

Functions of the Trustee

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

I. Duties and obligations of the Monitoring Trustee

45. The Monitoring Trustee shall:
- (a) propose in its first report to the Commission a detailed work plan describing how it intends to monitor compliance with the obligations and conditions attached to the Decision;
 - (b) oversee, in close co-operation with the Hold Separate Managers, the on-going management of the Divestment Businesses with a view to ensuring their continued economic viability,

marketability and competitiveness and monitor compliance by E.ON with the conditions and obligations attached to the Decision. To that end the Monitoring Trustee shall:

- (i) monitor the preservation of the economic viability, marketability and competitiveness of the Divestment Businesses and Discontinued Charging Stations, and the keeping separate of the Divestment Businesses from the business retained by the Parties, in accordance with paragraphs 20 to 25 of these Commitments;
 - (ii) supervise the management of the Divestment Businesses as distinct and saleable entities or businesses (as applicable), in accordance with paragraphs 22 to 25 of these Commitments;
 - (iii) with respect to Confidential Information relating to the Hungarian Divestment Business and the Czech Divestment Business:
 - determine all necessary measures to ensure that E.ON or its Affiliated Undertakings do not after the Effective Date obtain any Confidential Information,
 - in particular strive for the severing of the Hungarian Divestment Business's and the Czech Divestment Business's participation in any central information technology network to the extent possible, without compromising the viability of these Divestment Businesses,
 - make sure that any Confidential Information obtained by E.ON or its Affiliated Undertakings before the Effective Date is eliminated and will not be used by E.ON or its Affiliated Undertakings; and
 - decide whether such information may be disclosed to or kept by E.ON or its Affiliated Undertakings as the disclosure is reasonably necessary to allow E.ON or its Affiliated Undertakings to carry out the divestiture or as the disclosure is required by law;
 - (iv) monitor and ensure compliance with the commitment to negotiate the termination of the role as operator of the Discontinued Charging Stations;
- (c) monitor the splitting of assets and the allocation of Personnel between the Hungarian Divestment Business and the Czech Divestment Business (respectively) and E.ON or Affiliated Undertakings. [...];
- (d) propose to E.ON such measures as the Monitoring Trustee considers necessary to ensure E.ON's compliance with the conditions and obligations attached to the Decision, in particular the maintenance of the full economic viability, marketability or competitiveness of the Divestment Businesses, the holding separate of the Czech Divestment Business and the Hungarian Divestment Business and the non-disclosure of competitively sensitive information;
- (e) review and assess potential purchasers as well as the progress of the divestiture process and verify that, dependent on the stage of the divestiture process:
- (i) potential purchasers receive sufficient and correct information relating to the Divestment Businesses and the Personnel in particular by reviewing, if available, the data room documentation, the information memorandum and the due diligence process, and
 - (ii) potential purchasers are granted reasonable access to the Personnel;
- (f) act as a contact point for any requests by third parties, in particular potential purchasers, in relation to the Commitments;

- (g) provide to the Commission, sending E.ON a non-confidential copy at the same time, a written report within 15 (fifteen) days after the end of every month that shall cover the operation and management of the Divestment Businesses as well as the splitting of assets and the allocation of Personnel so that the Commission can assess whether the business is held in a manner consistent with the Commitments and the progress of the divestiture process as well as potential purchasers;
- (h) promptly report in writing to the Commission, sending E.ON a non-confidential copy at the same time, if it concludes on reasonable grounds that E.ON is failing to comply with these Commitments;
- (i) within one week after receipt of the documented proposal referred to in paragraph 35 of these Commitments, submit to the Commission, sending E.ON a non-confidential copy at the same time, a reasoned opinion as to the suitability and independence of the proposed purchaser and the viability of the Divestment Businesses after the sale and as to whether the Divestment Businesses are sold in a manner consistent with the conditions and obligations attached to the Decision, in particular, if relevant, whether the sale of the Divestment Businesses without one or more Assets or not all of the Personnel affects the viability of such Divestment Business after the sale, taking account of the proposed purchaser;
- (j) assume the other functions assigned to the Monitoring Trustee under the conditions and obligations attached to the Decision.

46. If the Monitoring and Divestiture Trustee are not the same legal or natural persons, the Monitoring Trustee and the Divestiture Trustee shall cooperate closely with each other during and for the purpose of the preparation of the Trustee Divestiture Period in order to facilitate each other's tasks.

II. Duties and obligations of the Divestiture Trustee

47. Within the respective Trustee Divestiture Period, the Divestiture Trustee shall sell at no minimum price a Divestment Business to a purchaser, provided that the Commission has approved both the purchaser and the final binding sale and purchase agreement (and ancillary agreements) as in line with the Decision and the Commitments in accordance with paragraphs 34 and 35 of these Commitments. The Divestiture Trustee shall include in the sale and purchase agreement (as well as in any ancillary agreements) such terms and conditions as it considers appropriate for an expedient sale in the respective Trustee Divestiture Period. In particular, the Divestiture Trustee may include in the sale and purchase agreement such customary representations and warranties and indemnities as are reasonably required to effect the sale. The Divestiture Trustee shall protect the legitimate financial interests of E.ON, subject to E.ON's unconditional obligation to divest at no minimum price in the respective Trustee Divestiture Period.
48. In the respective Trustee Divestiture Period (or otherwise at the Commission's request), the Divestiture Trustee shall provide the Commission with a comprehensive monthly report written in English language on the progress of the divestiture processes. Such reports shall be submitted within 15 (fifteen) days after the end of every month with a simultaneous copy to the Monitoring Trustee and a non-confidential copy to E.ON.

Duties and obligations of the Parties

49. From the Effective Date on, E.ON shall provide and shall cause its advisors to provide the Trustee with all such co-operation, assistance and information as the Trustee may reasonably require to perform its tasks. From the Effective Date on, the Trustee shall have full and complete access to any of E.ON's and its Affiliated Undertakings', the Heating Electricity Divestment Business's, the Czech Divestment

Business's, the Hungarian Divestment Business's and [...] books, records, documents, management or other personnel, facilities, sites and technical information necessary for fulfilling its duties under the Commitments and E.ON and these Divestment Businesses shall provide the Trustee upon request with copies of any document. E.ON and these Divestment Businesses shall make available to the Trustee one or more offices on their premises and shall be available for meetings in order to provide the Trustee with all information necessary for the performance of its tasks.

50. From the Effective Date on, E.ON shall provide the Monitoring Trustee with all managerial and administrative support that it may reasonably request on behalf of the management of the Czech Divestment Business and the Hungarian Divestment Business. This shall include all administrative support functions relating to the Czech Divestment Business and the Hungarian Divestment Business which are currently carried out at headquarters level. E.ON shall provide and shall cause its advisors to provide the Monitoring Trustee, on request, with the information submitted to potential purchasers, in particular give the Monitoring Trustee access to the data room documentation and all other information granted to potential purchasers in the due diligence procedure. E.ON shall inform the Monitoring Trustee on possible purchasers, submit lists of potential purchasers at each stage of the selection process, including the offers made by potential purchasers at those stages, and keep the Monitoring Trustee informed of all developments in the divestiture process.
51. E.ON shall grant or procure Affiliated Undertakings to grant comprehensive powers of attorney, duly executed, to the Divestiture Trustee to effect the sales (including ancillary agreements), the Closings and all actions and declarations which the Divestiture Trustee considers necessary or appropriate to achieve the sales and the Closings, including the appointment of advisors to assist with the sale process. Upon request of the Divestiture Trustee, E.ON shall cause the documents required for effecting the sales and the Closings to be duly executed.
52. E.ON shall indemnify the Trustee and its employees and agents (each an "Indemnified Party") and hold each Indemnified Party harmless against, and hereby agrees that an Indemnified Party shall have no liability to E.ON for, any liabilities arising out of the performance of the Trustee's duties under the Commitments, except to the extent that such liabilities result from the wilful default, recklessness, gross negligence or bad faith of the Trustee, its employees, agents or advisors.
53. At the expense of E.ON, the Trustee may appoint advisors (in particular for corporate finance or legal advice), subject to E.ON's approval (this approval not to be unreasonably withheld or delayed) if the Trustee considers the appointment of such advisors necessary or appropriate for the performance of its duties and obligations under the Trustee's mandate, provided that any fees and other expenses incurred by the Trustee are reasonable. Should E.ON refuse to approve the advisors proposed by the Trustee the Commission may approve the appointment of such advisors instead, after having heard E.ON. Only the Trustee shall be entitled to issue instructions to the advisors. Paragraph 52 of these Commitments shall apply *mutatis mutandis*. In any Trustee Divestiture Period, the Divestiture Trustee may use advisors who served E.ON during the respective Divestiture Period if the Divestiture Trustee considers this in the best interest of an expedient sale.
54. E.ON agrees that the Commission may share Confidential Information proprietary to E.ON with the Trustee. The Trustee shall not disclose such information and the principles contained in Article 17(1) and (2) of the Merger Regulation apply *mutatis mutandis*.
55. E.ON agree that the contact details of the Monitoring Trustee are published on the website of the Commission's Directorate-General for Competition and they shall inform interested third parties, in particular any potential purchasers, of the identity and the tasks of the Monitoring Trustee.
56. For a period of 10 (ten) years from the Effective Date the Commission may request all information from the Parties that is reasonably necessary to monitor the effective implementation of these Commitments.

Replacement, discharge and reappointment of the Trustee

57. If the Trustee ceases to perform its functions under the Commitments or for any other good cause, including the exposure of the Trustee to a Conflict of Interest:
- (a) the Commission may, after hearing the Trustee and E.ON, require E.ON to replace the Trustee; or
 - (b) E.ON may, with the prior approval of the Commission, replace the Trustee.
58. If the Trustee is removed according to paragraph 57 of these Commitments, the Trustee may be required to continue in its function until a new Trustee is in place to whom the Trustee has effected a full hand over of all relevant information. The new Trustee shall be appointed in accordance with the procedure referred to in paragraphs 36 to 43 of these Commitments.
59. Unless removed according to paragraph 57 of these Commitments, the Trustee shall cease to act as Trustee only after the Commission has discharged it from its duties after all the Commitments with which the Trustee has been entrusted have been implemented. However, the Commission may at any time require the reappointment of the Monitoring Trustee if it subsequently appears that the relevant remedies might not have been fully and properly implemented.

Section F. The review clause

60. The Commission may extend the time periods foreseen in the Commitments in response to a request from E.ON or, in appropriate cases, on its own initiative, [...]. Where E.ON requests an extension of a time period, it shall submit a reasoned request to the Commission no later than one month before the expiry of that period, showing good cause. This request shall be accompanied by a report from the Monitoring Trustee, who shall, at the same time send a non-confidential copy of the report to E.ON. Only in exceptional circumstances shall E.ON be entitled to request an extension within the last month of any period.
61. The Commission may further, in response to a reasoned request from E.ON showing good cause waive, modify or substitute, in exceptional circumstances, one or more of the undertakings in these Commitments. This request shall be accompanied by a report from the Monitoring Trustee, who shall, at the same time send a non-confidential copy of the report to E.ON. The request shall not have the effect of suspending the application of the undertaking and, in particular, of suspending the expiry of any time period in which the undertaking has to be complied with.

Section G. Entry into force

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

Signed _____ in Essen, Germany

[...]

Duly authorised for and on behalf of E.ON SE

Part 1 – Description of the Heating Electricity Divestment Business

- (1) The Heating Electricity Divestment Business consists of materially all of EDG's special contract (*Sondervertrag*) customers supplied with electricity for heating purposes (*Heizstrom*), currently in total c. [...] customers (the "**Customer Portfolio**"). The Customer Portfolio also includes, for customers supplied under separate meters (*getrennte Messung*), all corresponding household electricity special contracts (*Sondervertrag*) (as identified by matching name and address of the customer) relating to the Customer Portfolio (currently in total to c. [...] customers), but excluding certain *de minimis* customer groups which are detailed in paragraph (8)(i) of this Part 1 of the Schedule.
- (2) E.ON will separate the Heating Electricity Divestment Business in two parts (relating to the Northern and the Southern part of Germany) and will divest these two parts to one or two Purchasers for the Heating Electricity Divestment Business. The provisions of the Commitments relevant for the Heating Electricity Divestment Business will then apply *mutatis mutandis* to each of these two parts.

I. Legal and Functional structure of the Heating Electricity Divestment Business

- (3) The Heating Electricity Divestment Business will have the following legal and functional structure:
 - a. E.ON Heizstrom Nord GmbH, being a wholly-owned subsidiary of EDG, with c. [...] customers of the Heating Electricity Divestment Business, corresponding to c. [...] customer contracts, and such customers being located in the network areas specified in Annex 1.1 to this Part 1 of the Schedule, which are mainly located in the Federal States Berlin, Brandenburg, Bremen, Hamburg, Lower Saxony, Mecklenburg Western Pomerania, North Rhine-Westphalia, Rhineland-Palatinate, Saarland, Saxony, Saxony-Anhalt, Schleswig-Holstein, and Thuringia;
 - b. E.ON Heizstrom Süd GmbH, being a wholly-owned subsidiary of EDG, with c. [...] customers of the Heating Electricity Divestment Business, corresponding to c. [...] customer contracts, and such customers being located in the network areas specified in Annex 1.1 to this Part 1 of the Schedule, which are mainly located in the Federal States Baden-Wuerttemberg, Bavaria, and Hesse.
- (4) Each of E.ON Heizstrom Nord GmbH and E.ON Heizstrom Süd GmbH will hold all rights and obligations as stipulated in the underlying customer contracts.
- (5) The interim management team of the Heating Electricity Divestment Business will be drawn from within EDG and will keep their respective employment arrangements with EDG.
- (6) EDG will enter into comprehensive service level agreements ("**SLAs**") at arm's length conditions whereby EDG will manage the operations relating to the Customer Portfolio (such as procurement, customer communication, customer service and invoicing) on behalf of E.ON Heizstrom Nord GmbH and E.ON Heizstrom Süd GmbH until Closing for the Heating Electricity Divestment Business.

II. Composition of the Heating Electricity Divestment Business

- (7) In accordance with paragraphs 9 and 10 of the Commitments, the Heating Electricity Divestment Business includes:
- (i) all of the shares in (a) E.ON Heizstrom Nord GmbH and (b) E.ON Heizstrom Süd GmbH;
 - (ii) the following main intangible assets, which will transfer as part of E.ON Heizstrom Nord GmbH and E.ON Heizstrom Süd GmbH:
 - (a) the following main licences, permits and authorisations:
 - (i) notification according to Section 5 of the German Energy Industry Act (*Energiewirtschaftsgesetz*) regarding a notification of energy supply of household customers to the Federal Network Agency (*Anzeige der Energiebelieferung von Haushaltskunden bei der Bundesnetzagentur*);
 - (ii) identification numbers for market communication (Global Location Number provided by Energie & Services GmbH) in the market roles supplier (*Lieferant*) and balance group responsible party (*Bilanzkreisverantwortlicher*);
 - (iii) registration with the European Network of Transmission System Operators for Electricity (ENTSO-E) for balancing group management (EIC-Codes);
 - (iv) Agency for the Cooperation of Energy Regulators (ACER) codes for reporting under the Regulation on wholesale Energy Market Integrity and Transparency;
 - (v) permission as a supplier of energy according to Section 4 of the Electricity Tax Act (*Stromsteuergesetz*) by the Main Customs Office (*Stromsteuererlaubnisschein des Hauptzollamts*);
 - (vi) registration in the German register of participants in the energy market (*Marktstammdatenregister*);
 - (vii) registration with the Federal Environment Agency (*Umweltbundesamt*) for handling of green certificates (Guarantees of Origins).
 - (b) the following main contracts, agreements, leases, commitments and understandings:
 - (i) all *customer* contracts held by each of E.ON Heizstrom Nord GmbH and E.ON Heizstrom Süd GmbH (respectively), currently in total c. [...] customers with, in total, c. [...] customer contracts;
 - (ii) all required *contracts* on transmission and distribution system operator level to deliver electricity to customers (including *Lieferantenrahmenverträge*, *Bilanzkreisverträge* and *Zuordnungsvereinbarungen*),

- (c) customer, credit and other records relating to the Heating Electricity Divestment Business, to be transferred in full or in part;
- (iii) at the option of the Purchaser,
 - (a) a non-exclusive license for the "E.ON"-brand to be used as co-brand with the Purchaser's brand for a transitional period of [...] from Closing for the Heating Electricity Divestment Business and for the sole purpose of facilitating the smooth transfer of the Customer Portfolio to the Purchaser;
 - (b) all electricity volumes already procured by EDG to service the Heating Electricity Divestment Business (currently c. [...] TWh) with such volumes allocated *pro rata* to E.ON Heizstrom Nord GmbH and E.ON Heizstrom Süd GmbH;
 - (c) one person (in case of a divestment of E.ON Heizstrom Nord GmbH and E.ON Heizstrom Süd GmbH to separate Purchasers, one person for each of E.ON Heizstrom Nord GmbH and E.ON Heizstrom Süd GmbH) with experience in heating electricity retail supply, such experience comprising the handling of temperature dependent load profiles (for, *inter alia*, pricing calculation and procurement), calculation and generation of temperature dependent load profiles, electricity procurement, which is based on temperature dependent load profiles, acquisition and processing of temperature data, performing forecasts for heating electricity customers based on daily parameter-dependent load profiles (temperature data), regulatory knowledge for the calculation of network charges and concession fees to be able to check invoices in detail (*vis-à-vis* distribution system operators and customers), knowledge about the associated market communication processes with distribution system operators, basic knowledge of metering technology (double tariff meters and ripple control receivers (*Rundsteuerempfänger*)), knowledge about the (technical) background of heating electricity customers (heat pumps, heat storage tanks, double tariff meters, tariff times and switching times) to be able to provide customer services;
 - (d) a comprehensive SLA with EDG pursuant to which E.ON or an Affiliated Undertaking will provide the same services as required under paragraph (6) of this Part 1 of the Schedule for a transitional period of up to [...] from Closing of the Heating Electricity Divestment Business within the information technology system of the Purchaser(s) to which the Customer Portfolio is being migrated pursuant to paragraph (7)(iv) of this Part 1 of the Schedule;
 - (e) if the Purchaser is not active in heating electricity retail supply, the transfer of knowledge relating to heating electricity retail supply specific capabilities comprising the handling of temperature dependent load profiles (for, *inter alia*, pricing calculation or procurement), calculation and generation of temperature dependent load profiles; electricity procurement, which is based on temperature dependent load profiles, acquisition and processing of temperature data, performing forecasts for heating electricity customers based on daily parameter-dependent load profiles (temperature data), regulatory knowledge for the calculation of network charges and

- concession fees to be able to check invoices in detail (vis a vis distribution system operators and customers), knowledge about the associated market communication processes with distribution system operators, basic knowledge of metering technology (double tariff meters and ripple control receivers (*Rundsteuerempfänger*)), knowledge about the (technical) background of heating electricity customers (heat pumps, heat storage tanks, double tariff meters, tariff times and switching times) to be able to provide customer services;
- (iv) all support required by E.ON or Affiliated Undertakings to ensure that the technical migration of the Customer Portfolio to the information technology system of the Purchaser(s) of the Heating Electricity Divestment Business is successfully completed by Closing for the Heating Electricity Divestment Business. Relevant support will include [...].
- (8) The Heating Electricity Divestment Business will comprise the Customer Portfolio as described in paragraph (1) of this Part 1 of the Schedule except for:
- (i) electricity products offered to (former) employees of E.ON and its Affiliated Undertakings, including under tariffs agreed with a works council of E.ON or its Affiliated Undertakings (*Stromdeputate*) (currently c. [...] contracts) and heating electricity products offered to B2B-customers under B2B-tariffs (currently c. [...] contracts) [...]; and
 - (ii) customers supplied with electricity under Basic or Auxiliary Supply (*Grund- oder Ersatzversorgung*) pursuant to Section 36 or 38 of the Energy Industry Act.
- (9) The Heating Electricity Divestment Business shall not include:
- (i) any brand or IP rights other than as stipulated in paragraph (7)(iii)(a) of this Part 1 of the Schedule;
 - (ii) any IT systems or software;
 - (iii) any personnel including the Hold Separate Manager and EDG's interim management team other than as stipulated in paragraph (7)(iii)(c) of this Part 1 of the Schedule.
- (10) If there is any asset which is not covered by paragraph (8) of this Part 1 of the Schedule but which is necessary for the continued viability and competitiveness of the Heating Electricity Divestment Business, that asset or adequate substitute will be offered to potential purchasers.

Annex 1.1 – Network Areas assigned to E.ON Heizstrom Nord GmbH and E.ON Heizstrom Süd GmbH

Network areas assigned to E.ON Heizstrom Nord GmbH

[...]

[...]

[...]

[...]

[...]

[...]

[...]

[...]

[...]

[...]

[...]

[...]

Network areas assigned to E.ON Heizstrom Süd GmbH

[...]

[...]

[...]

[...]

[...]

[...]

[...]

[...]

[...]

[...]

[...]

[...]

[...]

[...]

[...]

The aforementioned network areas have been identified based on the E'NET database.

Part 2 – Description of the Discontinued Charging Stations and the Further Discontinued Charging Stations [...]

- (1) Pursuant to paragraph 7 of these Commitments, E.ON commits to negotiate with Autobahn Tank & Rast GmbH the return of the role as charge point operator for the Discontinued Charging Stations. E.ON commits to fully terminate the operation of the Discontinued Charging Stations by the end of the Discontinuation Period and not to operate the Discontinued Charging Stations [...]. Further, E.ON commits not to operate the Further Discontinued Charging Stations for a period of [...]
- (2) [...].

I. The Discontinued Charging Stations

- (3) The Discontinued Charging Stations are located at 32 (thirty-two) on-motorway service areas of Autobahn Tank & Rast GmbH, for which the latter granted E.ON and its Affiliated Undertakings the role as charge point operator until [...].
- (4) E.ON and its Affiliated Undertakings as the charge point operator do not own the infrastructure, but are responsible for price setting, operation and maintenance as well as management of customers, the charging process and billing. Hence, E.ON and its Affiliated Undertakings bear the full economic risk of operating each public electric vehicle charging station.
- (5) The Discontinued Charging Stations are located at the following on-motorway service areas:

Table i List of Discontinued Charging Stations at Tank & Rast sites

Location name	Motorway location operator	Motorway	Postal Code	Latitude	Longitude
[discontinued site]	[...]	[...]	[...]	[...]	[...]
[discontinued site]	[...]	[...]	[...]	[...]	[...]
[discontinued site]	[...]	[...]	[...]	[...]	[...]
[discontinued site]	[...]	[...]	[...]	[...]	[...]
[discontinued site]	[...]	[...]	[...]	[...]	[...]
[discontinued site]	[...]	[...]	[...]	[...]	[...]
[discontinued site]	[...]	[...]	[...]	[...]	[...]
[discontinued site]	[...]	[...]	[...]	[...]	[...]
[discontinued site]	[...]	[...]	[...]	[...]	[...]
[discontinued site]	[...]	[...]	[...]	[...]	[...]
[discontinued site]	[...]	[...]	[...]	[...]	[...]
[discontinued site]	[...]	[...]	[...]	[...]	[...]
[discontinued site]	[...]	[...]	[...]	[...]	[...]
[discontinued site]	[...]	[...]	[...]	[...]	[...]
[discontinued site]	[...]	[...]	[...]	[...]	[...]
[discontinued site]	[...]	[...]	[...]	[...]	[...]
[discontinued site]	[...]	[...]	[...]	[...]	[...]
[discontinued site]	[...]	[...]	[...]	[...]	[...]
[discontinued site]	[...]	[...]	[...]	[...]	[...]
[discontinued site]	[...]	[...]	[...]	[...]	[...]
[discontinued site]	[...]	[...]	[...]	[...]	[...]

Location name	Motorway location operator	Motorway	Postal Code	Latitude	Longitude
[discontinued site]	[...]	[...]	[...]	[...]	[...]
[discontinued site]	[...]	[...]	[...]	[...]	[...]
[discontinued site]	[...]	[...]	[...]	[...]	[...]
[discontinued site]	[...]	[...]	[...]	[...]	[...]
[discontinued site]	[...]	[...]	[...]	[...]	[...]
[discontinued site]	[...]	[...]	[...]	[...]	[...]
[discontinued site]	[...]	[...]	[...]	[...]	[...]
[discontinued site]	[...]	[...]	[...]	[...]	[...]
[discontinued site]	[...]	[...]	[...]	[...]	[...]
[discontinued site]	[...]	[...]	[...]	[...]	[...]
[discontinued site]	[...]	[...]	[...]	[...]	[...]
[discontinued site]	[...]	[...]	[...]	[...]	[...]
[discontinued site]	[...]	[...]	[...]	[...]	[...]
[discontinued site]	[...]	[...]	[...]	[...]	[...]

Source: E.ON

- (6) In accordance with paragraph 18 of the Commitments, E.ON's obligation to terminate the operation of the Discontinued Charging Stations includes the provision of performance data, hand-over and repair protocols in relation to the Discontinued Charging Stations to Autobahn Tank & Rast GmbH or a third party designated by the latter.
- (7) The commitment to terminate the operation of the Discontinued Charging Stations does not require the transfer of any further assets as the Discontinued Charging Stations are owned by Autobahn Tank & Rast GmbH. If E.ON installs any own assets at the Discontinued Charging Stations until the end of the Discontinuation Period, these assets would be transferred to either Autobahn Tank & Rast GmbH or to the new operator which has been selected by Autobahn Tank & Rast GmbH.

II. The Further Discontinued Charging Stations

- (8) The Further Discontinued Charging Stations relate to potential electric vehicle charging stations to be installed at the on-motorway service areas [...].
- (9) The Further Discontinued Charging Stations are located at the following on-motorway service areas:

Table ii List of Further Discontinued Charging Stations at Eurogarages' locations

Location name	Motorway location operator	Motorway	Postal Code	Latitude	Longitude
[discontinued site]	[...]	[...]	[...]	[...]	[...]
[discontinued site]	[...]	[...]	[...]	[...]	[...]

Source: E.ON

- (10) The commitment to not to operate the Further Discontinued Charging Stations does not require the transfer of any assets.

III. [...]

- (11) [...].

- (12) [...]:

(i) [...].

(ii) [...].

(13) [...].

(14) [...].

Part 3 – Description of the Czech Divestment Business

- (1) The Czech Divestment Business consists of Innogy's electricity retail business (comprising the retail of electricity to low-voltage and high-voltage customers) and gas retail business (comprising the retail of gas to small customers and large customers), its electricity and gas wholesale businesses, certain of its electricity generation activities, and a wide range of non-core activities. The Czech Divestment Business will neither include the gas distribution business nor the gas storage business.
- (2) More specifically, E.ON commits to procure the sale of the Czech Divestment Business comprising of the following business lines, as currently operated in Czech Republic:
 - (a) the retail supply of electricity to low-voltage and high-voltage customers;
 - (b) the retail supply of gas to small customers (including households and small commercial customers) and large customers (including medium and large commercial customers);
 - (c) the generation of electricity, via several small generating facilities through the Czech Republic;
 - (d) the distribution of electricity, via the construction and operation of local distribution systems (but, for the avoidance of doubt, not the gas distribution networks currently operated by innogy Grid Holding a.s. ("IGH") and IGH's subsidiaries);
 - (e) the trading of electricity and gas in relation to surplus volumes;
 - (f) the generation of heat;
 - (g) the distribution of heat;
 - (h) the provision of e-mobility services, via electric vehicle ("EV") Charging Stations and limited sales of private EV Charging Stations;
 - (i) the provision of compressed natural gas ("CNG") motor fuels, via the construction and operation of CNG filling stations and the sale of CNG fuel;
 - (j) the distribution of photovoltaic systems, via the installation of solar panels and battery electricity storage systems for residential homes;
 - (k) the provision of energy consulting and auditing services to business customers;
 - (l) the provision of home insurance services, by acting as an intermediary between customers and insurance partners;
 - (m) the provision of heating and cooling services to business and household customers;
 - (n) the provision of lighting products to public, municipal and business customers; and
 - (o) the provision of telecommunication services, including internet connections and last mile broadband services.

III. Legal and Functional structure of the Czech Divestment Business

- (3) The Czech Divestment Business has the following legal and functional structure:
 - (a) innogy Česká republika a.s. ("**innogy Česká republika**") is incorporated and based in Prague, where it has its registered place of business and management. The entity was first incorporated in 2012, and since 2013 it has controlled the Innogy entities in the Czech Republic. Through its subsidiaries, the entity carries out and coordinates activities in Innogy's business lines in the Czech Republic;
 - (b) innogy Česká republika is indirectly 100% owned by Innogy SE; and

- (c) under the main innogy Česká republika entity sits: innogy Energie s.r.o. ("**innogy Energie**"), innogy Energo s.r.o. ("**innogy Energo**"), innogy Zákaznické služby, s.r.o. ("**innogy Zákaznické služby**"), innogy TelNet Holding, s.r.o., Magnalink, a.s., CERBEROS s.r.o., HELIOS MB s.r.o., CNGvitall s.r.o. ("**CNGvitall**"), TEPLO T s.r.o., Ginger Teplo, s.r.o. and innogy Energetika Plhov - Náchod, s.r.o.
- (4) Further information about the business of these entities is set out at paragraphs (5)-(11) below.
- (5) **innogy Energie** is the primary retail entity of the Czech Divestment Business and its core business is the retail sale of natural gas and electricity. innogy Energie is also active in providing certain non-core activities to end-customers, including supplying: (i) energy consulting and auditing services to business customers; (ii) household insurance policies; and (iii) lighting products to public, municipal and business customers, focusing in particular on modern LED solutions.
- (6) **innogy Energo** carries out the following functions: (i) the generation and distribution of heat; (ii) the generation, distribution and trading of electricity; and (iii) e-mobility and the sale of CNG. innogy Energo operates two local distribution systems for electricity and is also active in the lease of real estate and construction. innogy Energo also is active in a number of non-core activities, providing heating / refrigeration systems and facilities, as well as installation services for solar panels and battery electricity storage systems.
- (7) **innogy Česká republika** and **innogy Zákaznické služby** are the primary service entities within the Czech Divestment Business. innogy Česká republika provides other companies in the Czech Divestment Business with specific managerial and technical expertise services. Such services include, *inter alia*, financial and risk management, accounting, IT services, human resources management. innogy Zákaznické služby's primary business is providing sales and customer care services for customers of the Czech Divestment Business. innogy Zákaznické služby also provides invoicing, payment processing and reporting functions to other companies in the Czech Divestment Business.
- (8) innogy Česká republika and innogy Zákaznické služby also provide services to IGH and its subsidiaries pursuant to a number of service level agreements ("**SLAs**").
- In February 2019, innogy Česká republika transferred its stake in IGH to RWE Czech Gas Grid Holding B.V. Further in April 2019, RWE Czech Gas Grid Holding B.V. signed an agreement to transfer its shares in IGH to CGN Holdings S.à.r.l (a Macquarie entity, "**Macquarie**") (the "**IGH Transfer**"). Consummation of the IGH Transfer is still outstanding. [...].
- (9) **innogy TelNet Holding, s.r.o.** is the holding company for the entities within the Czech Divestment Business which provide telecommunications services in the Czech Republic (**Magnalink, a.s., CERBEROS s.r.o.** and **HELIOS MB s.r.o.**).
- (10) **CNGvitall** carries out the operation and servicing of CNG filling stations, operating 21 CNG filling stations and offering project and construction services to customers interested in building their own CNG stations. E.ON understands that Innogy is currently working to merge the CNGvitall, into innogy Energo.
- (11) **Ginger Teplo, s.r.o.** and **innogy Energetika Plhov - Náchod, s.r.o.** are newly incorporated companies within the Czech Divestment Business and E.ON understands that they have not yet started to perform any business activities. **TEPLO T s.r.o.**, in which innogy Energo acquired an 80% stake in early 2019, operates a heating generation and distribution business in the city of Tišnov, Czech Republic.

IV. Composition of the Czech Divestment Business

(12) In accordance with paragraph 11 of the Commitments, the Czech Divestment Business includes, but is not limited to:

(a) the following main tangible assets:

- (i) all of the shares in innogy Česká republika, including all of innogy Česká republika's shares in the following subsidiaries: innogy Energie., innogy Energo, innogy Zákaznické služby, innogy TelNet Holding, s.r.o., Magnalink, a.s., CERBEROS s.r.o., HELIOS MB s.r.o., CNGvitall, Ginger Teplo, s.r.o., TEPLA T s.r.o. and innogy Energetika Plhov - Náchod, s.r.o.;
- (ii) all customer contact centres, customer care centres and other real estate owned and operated by the Czech Divestment Business subject to the real estate assets excluded at paragraph (13)(c) below;
- (iii) the IT systems and material software used by the Czech Divestment Business (for this purpose, the Czech Divestment Business will include a stand-alone IT system that will be separated from [...] as well as from the other entities of Innogy and its Affiliated Undertakings over a transitional period of up to [...] after Closing and will also include the supply of any necessary transitional services during that period);
- (iv) all generation plants owned and operated by the Czech Divestment Business;
- (v) all CNG-related assets owned and operated, and sites being constructed, by the Czech Divestment Business;
- (vi) all e-mobility assets, including public EV charging stations owned and operated, and sites being constructed, by the Czech Divestment Business;
- (vii) all car-fleets leased, owned and operated by the Czech Divestment Business subject to the car fleet excluded at paragraph (13)(c) below; and
- (viii) a 1.76% shareholding in Union Group a.s. (a Czech financial services shell company) via innogy Energie, and a 20% shareholding in Teplo Votice s.r.o. via innogy Energo (a Czech company active in the generation and distribution of heat in the town of Votice).

(b) the following main intangible assets:

- (i) the following main licences, permits and authorisations:
 - (a) the retail gas and electricity licences owned by innogy Energie and innogy Energo;
 - (b) the heat generation and electricity generation licences held by innogy Energo;
 - (c) the electricity distribution licence held by innogy Energo through which it operates two local distribution systems; and
 - (d) the CNG licences held by CNGvitall and innogy Energo for the "assembly, repairs, inspection and tests of pressure devices and gas containers" and for the "assembly, repairs, inspections and tests of gas devices and filling containers with gas".
- (ii) the following main contracts, agreements, leases, commitments and understandings:
 - (a) customer contracts held by entities within the Czech Divestment Business;

- (b) energy procurement contract with [...];
 - (c) wholesale supply contracts with [...];
 - (d) distribution agreements with [...] relating to the granting of access to regional distribution systems operated by entities within the Czech Divestment Business;
 - (e) framework contracts for the collection of payment on behalf of distribution system operators from household customers;
 - (f) business space leases with [...];
 - (g) SLAs under which the Czech Divestment Business is entitled to receive services from entities within Innogy and its Affiliated Undertakings or RWE and its Affiliated Undertakings (such as facility management, procurement, corporate services and finance support functions, including commodity back-office, risk controlling, accounting and controlling services); and
 - (h) SLAs pursuant to which the Czech Divestment Business provides services to IGH. As noted at paragraph (8) of this part of the Schedule, services pursuant to these SLAs are expected to continue following completion of the sale of the stake in IGH to Macquarie, [...].
- (iii) the brand and IP rights together with the trademark rights and other intellectual property rights (including logos) held by the Czech Divestment Business subject to the brand and IP rights excluded under paragraph (13)(a) of this part of the Schedule;
 - (iv) an exclusive, non-revocable licence in relation to the IP rights, together with the trademark rights and other intellectual property rights (including logos), relating to the “innogy” trademarks owned by Innogy SE in the Czech Republic at the option of the Purchaser of the Czech Divestment Business for the Czech Divestment Business’s activities in the Czech Republic, subject to the brand and IP rights excluded under paragraph (13)(a) of this part of the Schedule; and
 - (v) customer, credit and other records relating to the Czech Divestment Business, to be transferred in full or in part (excluding all information relating to activities that are not included in the Czech Divestment Business);
- (c) the Key Personnel of the Czech Divestment Business as listed in Annex 3.1;
 - (d) the personnel employed by the Czech Divestment Business, subject to the personnel excluded under paragraph (13)(d) of this part of the Schedule; and
 - (e) the arrangements for the supply of transitional services (i.e. IT or other support services) by or on behalf of E.ON for a transitional period of up to [...] after the Closing for the Czech Divestment Business.
- (13) The Czech Divestment Business shall not include:
- (a) any brand or IP rights, together with the trademark rights and other intellectual property rights (including logos), that are not used for the Czech Divestment Business;
 - (b) the legal entity innogy Gas Storage s.r.o., together with its subsidiaries (which operate the gas storage business in the Czech Republic), and the personnel ([...] employees (full-time equivalent)) currently employed by innogy Česká republika, which will be transferred to RWE or its Affiliated Undertakings;

- (c) the legal entity IGH together with its subsidiaries (which operates the gas distribution business in Czech Republic) and the personnel, real estate assets and car fleet that will be transferred to Macquarie pursuant to the IGH Transfer;
 - (d) the [...] personnel currently located within the Czech Divestment Business who are fully dedicated to the gas procurement function of Innogy's and its Affiliated Undertakings' business in Slovakia, pursuant to SLAs between innogy Česká republika and innogy Slovensko, s.r.o. Such personnel are to be retained by E.ON or Affiliated Undertakings and the SLAs between innogy Česká republika and innogy Slovensko, s.r.o will be terminated; and
 - (e) the SLAs and consulting agreements whereby the Czech Divestment Business provides services to other entities of Innogy and its Affiliated Undertakings operating primarily outside of the Czech Republic (such as to Innogy Slovakia).
- (14) If there is any asset or personnel which is not covered by paragraph (12) of this part of the Schedule but which is both used (exclusively or not) in the Czech Divestment Business and necessary for the continued viability and competitiveness of the Czech Divestment Business, that asset or adequate substitute will be offered to potential purchasers.

Annex 3.1 – Czech Key Personnel

The list below includes the Key Personnel of the Czech Divestment Business.

Name	Entity	Role	Description of function
[...]	innogy Energie	Chairman of the Executive Directors, CEO	Leadership position
[...]	innogy Energie	CFO	Leadership position; P&L responsibility
[...]	innogy Energo	CEO	Leadership position for B2M and B2B business, including power and heat production

Part 4 – Description of the Hungarian Divestment Business

- (1) The Hungarian Divestment Business comprises the retail electricity business in the Competitive Offering of E.ON Energiakereskedelmi Kft. (“**E.ON EKER**”) in Hungary. It will not include the retail electricity business in the USP Offering the retail gas business, the upstream electricity generation and wholesale activities, various non-core activities and any business activities that sit outside of E.ON EKER, such as generation and distribution (together the “**Hungarian Retained Business**”, as further detailed at paragraph (6) of this part of the Schedule). E.ON therefore commits to procure divestment of the following business lines:

- (i) The retail supply of electricity to Competitive-SME Customers; and
- (ii) The retail supply of electricity to Large Customers.

I. Legal and Functional structure of the Hungarian Divestment Business

- (2) The Hungarian Divestment Business currently sits within E.ON EKER, which is a wholly owned subsidiary of E.ON Hungária Zrt., and indirectly wholly-owned by E.ON SE.
- (3) The Hungarian Divestment Business will be sold to the Purchaser of the Hungarian Divestment Business via the sale of all of the shares (*quota*)¹ in E.ON EKER following the reverse carve-out (via a de-merger into a subsidiary of E.ON Hungária Zrt.) of certain activities forming part of the Hungarian Retained Business.
- (4) Following the carve-out, the Hungarian Divestment Business will comprise a legal entity (E.ON EKER) housing E.ON’s retail electricity business in the Competitive Offering, including material support functions. Such support functions include sales, tender support, energy procurement, customer services functions, controlling, research and analytics and market intelligence. In relation to further support functions, including IT, marketing, legal, tax, accounting and HR functions, E.ON shall, at the option of the Purchaser for the Hungarian Divestment Business, either transfer the employees required to provide these functions from their current positions within E.ON and its Affiliated Undertakings to the Hungarian Divestment Business and/or offer these functions through transitional service agreements (“**TSAs**”).

II. Composition of the Hungarian Divestment Business

- (5) In accordance with paragraph 14 of the Commitments, the Hungarian Divestment Business includes, but is not limited to:
- (i) the following main tangible assets:
 - (a) lease agreements for one call centre and a customer service point for the Competitive Offering as well as other office space owned or leased by E.ON EKER for the Competitive Offering;
 - (b) IT systems and material software used by the Hungarian Divestment Business. The Hungarian Divestment Business will also include the supply of IT transitional services for a period of up to [...] after the Closing for the Hungarian Divestment Business
 - (ii) the following main intangible assets:

¹ Ownership interests in limited liability Hungarian companies, like E.ON EKER, are known as quotas (‘üzletrészek’ in Hungarian).

- (a) the following main licences, permits and authorisations: the Competitive retail electricity open market licence;
 - (b) the main contracts, agreements, leases, commitments and understandings include: (i) customer contracts for electricity retail supply in the Competitive Offering; and (ii) electricity procurement contracts for the Competitive Offering;
 - (c) an exclusive, non-revocable licence in relation to the intellectual property rights together with the trademark rights (including logos) relating to the “E.ON” trademarks owned by E.ON or its Affiliated Undertakings in Hungary for a transitional period of [...], at the option of the Purchaser of the Hungarian Divestment Business for the Hungarian Divestment Business’s use in the business lines set out at paragraph (1) of this part of the Schedule;
 - (d) other brand and IP rights together with the trademark rights and other intellectual property rights (including logos), if any, held by the Hungarian Divestment Business for the use in the business lines set out at paragraph (1) of this part of the Schedule; and
 - (e) customer, credit and other records relating to the Hungarian Divestment Business, to be transferred in full or in part (excluding all information relating to activities that are not included in the Hungarian Divestment Business).
- (iii) the Key Personnel of the Hungarian Divestment Business listed in Annex 4.1;
 - (iv) the personnel listed in Annex 4.2, it being understood that the Purchaser for the Hungarian Divestment Business shall have the option to request that specific functions (as indicated in Annex 4.2) not be transferred with the Hungarian Divestment Business and be replaced by a TSA; and
 - (v) the arrangements, at the option of the Purchaser for the Hungarian Divestment Business, for the supply of transitional services (i.e. IT, legal services, HR, Finance, tax, accounting, non-energy procurement services) by or on behalf of E.ON or its Affiliated Undertakings for a transitional period of up [...] after Closing for the Hungarian Divestment Business.
- (6) The Hungarian Divestment Business shall not include the Hungarian Retained Business, specifically.
- (i) Activities (including assets, services, personnel) in the retail supply of electricity to Residential Customers and USP-SME Customers in Hungary.
 - (ii) Activities (including assets, services, personnel) in the retail supply of gas to Competitive customers in Hungary.
 - (iii) Activities (including assets, services, personnel) in upstream electricity generation and wholesale supply² and other activities ancillary to upstream activities ([...]).
 - (iv) Customer solution activities (including assets, services, personnel) that are held within E.ON EKER and namely: lighting solutions; (part of) street lighting (note, the majority of street lighting activities are conducted by the distribution system operator); e-mobility; photovoltaic systems; heating and cooling facilities; integrated energy solutions (assistance for customers in the operation and maintenance of energy systems); telecommunications (fibre optics rental); car hire; and insurance products.

² As described at para. 3424 and Footnote 2431 of the Form CO, this covers [...].

- (v) For completeness, any business activities (including assets, services, personnel) that sit outside of E.ON EKER, such as distribution, energy audit and generation activities.
 - (vi) Any brand or IP rights, together with the trademark rights and other intellectual property rights (including logos), that are not used for the Hungarian Divestment Business.
- (7) If there is any asset or personnel which is not covered by paragraph (5) of this part of the Schedule but which is both used (exclusively or not) in the Hungarian Divestment Business and necessary for the continued viability and competitiveness of the Hungarian Divestment Business, that asset or adequate substitute will be offered to potential purchasers.

Annex 4.1 – Key Personnel of the Hungarian Divestment Business

The list below includes the Key Personnel for the Hungarian Divestment Business.

Name	Current entity	Role	Description of function
[...]	E.ON EKER	Head B2B Sales	Manager with operational responsibility over the divested business.
[...]	E.ON EKER	Head of Power procurement	Energy procurement
[...]	E.ON EHU	Head of Sales Controlling	Manager responsible for the sales controlling function

Annex 4.2 – Hungarian Divestment Business Personnel

The table below sets out (i) the employees currently providing services to the Hungarian Divestment Business, (ii) which of these employees will be transferred to the Hungarian Divestment Business, and (iii) if applicable, how these services will be provided in the event that the employees are not to be transferred.

Function	Number of FTEs currently servicing the divestment business	Are these services part of (i) E.ON shared group services or (ii) housed in E.ON EKER?	Number of FTEs to be transferred to divestment business	How service to be provided if employees not to be transferred
Sales (incl. tender management and call centre)	[...]	[...]	[...]	[...]
Customer Services and Mass Invoicing	[...]	[...]	[...]	[...]
Energy procurement	[...]	[...]	[...]	[...]
Marketing	[...]	[...]	[...]	[...]
Controlling	[...]	[...]	[...]	[...]
IT	[...]	[...]	[...]	[...]
Market Intelligence and Research	[...]	[...]	[...]	[...]
All other support services (Legal, HR, Tax, Accounting, Procurement, Asset management)	[...]	[...]	[...]	[...]