

EDF/Segebel (SPE) More power to boost competition in Belgian energy markets.

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1. Introduction

In September 2009, the Commission received a notification of a proposed concentration whereby Electricité de France (“EDF”) would acquire from Centrica, a UK energy company, a 100% stake in Segebel (hereinafter the “transaction”). Segebel is a Belgian holding company, whose only asset is a 51% stake in SPE S.A. (“SPE”).

EDF and its subsidiaries are active in various electricity markets, including the generation, wholesale and trading of electricity and the retail supply of electricity in France and other countries. EDF is also active, to a lesser extent, in the retail and wholesale markets for natural gas, including Belgium. Although EDF is currently the third largest operator, its presence in Belgium’s electricity markets has so far been relatively limited. However, EDF is currently developing two investment projects for CCGT generation capacity that would significantly expand its market presence in Belgium.

SPE is a Belgian company active in the production, wholesale and trading of electricity and the supply of electricity and gas in Belgium. SPE has a portfolio of power plants and is the second largest electricity generator in Belgium, after the incumbent operator GDF SUEZ (Electrabel). It operates in the end-consumers markets under the Luminus brand.

Once the transaction is completed, the two largest Belgian electricity companies would be controlled by French companies in which the French State holds interests. The French State holds a controlling interest in EDF ⁽²⁾ and, since 2006, has held a 35.91% stake in GDF SUEZ. Electrabel is Belgium’s biggest electricity company and is part of the GDF Suez group ⁽³⁾.

The Commission’s investigation revealed that the transaction would not significantly affect competition on the most affected markets. Nevertheless, despite the low market share of the merging parties, the transaction raised competition concerns with regard to the Belgian electricity generation, wholesale and trading market (hereafter “electricity wholesale

market”). In this market, the operation threatened to remove EDF, which was the most ambitious potential entrant. However, the merging parties offered remedies that addressed these concerns. Consequently, the Commission was able to clear the transaction, with conditions, following its Phase I investigation.

After the case had been notified to the Commission, the Belgian National Competition Authority (the “Belgian NCA”) requested the Commission to refer the EDF/Segebel transaction to the Belgian NCA as far as the Belgian electricity markets were concerned, pursuant to Article 9(3)(b) of the EC Merger Regulation, although the criteria set out in Article 9(2)(a) of the EC Merger Regulation for referral were fulfilled. The Commission exercised its discretion under Article 9(3) and decided not to refer the case to the Belgian authorities.

2. Market definitions

The transaction primarily concerned the Belgian wholesale markets for electricity as well as the market for supply of H-Gas to small industrial and commercial customers in Belgium. Any overlaps between the Parties in other markets, and in France and the Netherlands, were very limited.

Only the market definition relating to the Belgian wholesale electricity market is described here because the transaction raised serious doubts solely as to its compatibility with the common market with regard to this market.

Contrary to its past decisions concerning Belgium ⁽⁴⁾, the Commission took the view that the Belgian electricity wholesale market comprised, apart from locally generated electricity and imports, also electricity products traded on organised and OTC trading platforms (whether or not they were physically or financially settled). This market definition took into account the results of the market investigation from which it became apparent that the conditions of competition in Belgium are homogeneous enough to consider that traded electricity cannot be distinguished from locally generated and imported electricity. This view is consistent with the Commission’s more recent decisions concerning electricity markets ⁽⁵⁾.

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

⁽²⁾ The French State holds 84.6% of the issued ordinary shares of EDF.

⁽³⁾ M.4180 – *Gaz de France / Suez*

⁽⁴⁾ In particular M.4180 – *Gaz de France / Suez*

⁽⁵⁾ In particular Case M.5224 EDF – *British Energy*

On the other hand, the Commission followed its past decisions that defined the geographic scope of the electricity wholesale market as being national in scope. The recent introduction of market coupling mechanisms, linking the day-ahead-electricity markets of France, Belgium, and the Netherlands, was considered insufficient to offset the differences between the Belgian market and the markets of these neighbouring Member States. The fact that the liquidity and composition of traded electricity products in Belgium continues to differ in important respects from those in adjoining Member States was an important consideration in this regard, as it demonstrates that electricity trading is not sufficiently homogeneous and does not allow the substitution of traded products between adjoining electricity markets.

3. Possible coordination risks due to shareholdings by the French State in both GDF Suez (Electrabel) and EDF

As for the analysis of the competitive assessment of the transaction, the Belgian NCA submitted in its referral request that there was a risk of coordination between EDF and GDF SUEZ when taking their strategic business decisions resulting from their common shareholder, the French State, and the common management through the French Government's shareholding agency ("Agence des Participations de l'Etat" or "APE").

The Commission took the view that when an undertaking establishes its own business plan, budget and strategy, in its own commercial interests and in an independent manner, it can be considered as having an independent power of decision in relation to other undertakings where the same State is the main or a major shareholder.

To assess whether the undertaking has such independent power of decision, two aspects were analysed: (i) the existence of interlocking directorships between the undertakings owned by the same acquiring entity; and (ii) the existence of adequate safeguards ensuring that commercially sensitive information is not shared between such undertakings. As regards the first aspect, none of the representatives of the French State appointed to the Board of Directors of EDF is also a member of the Board of Directors of GDF Suez (Electrabel), and *vice versa*. As regards the second aspect, it was confirmed that the members of the Board are bound by governance rules relating to confidentiality and independ-

ence, in accordance with the corporate governance principles applicable to listed companies⁽⁶⁾.

The information provided by EDF indicated that EDF is able to establish its business plans independently of GDF Suez (Electrabel) and in accordance with its own commercial interests. During the market investigation the Commission did not receive any evidence to the contrary. The fact that a governmental agency (APE) is responsible for managing the French State's shareholdings in EDF and GDF Suez (Electrabel) did not call this conclusion into question. Its role is clearly limited and it does not affect the commercial and business autonomy of these companies.

The commercial independence of EDF is demonstrated by its plans to expand its business in Belgium, in particular by preparing the construction of significant new CCGT generation capacity. These expansion plans, through their impact on Belgium's electricity wholesale prices, would be more likely to have a negative effect on the revenues of GDF Suez (Electrabel) than on any other market participant in the Belgian electricity wholesale market. EDF's expansion plans thus refute the assertion that the French State is exerting its influence on EDF and GDF SUEZ with a view to increasing the profits of both groups.

Consequently, since EDF can be regarded as a company with its own powers of decision independent of GDF Suez (Electrabel), and is actually a competitor of GDF Suez (Electrabel), the alleged risk of coordination with GDF Suez (Electrabel) in the Belgian electricity markets due to the companies having the same major shareholder was considered unfounded.

4. Competition concerns identified by the Commission

Even though the parties' combined *current* market shares in the Belgian electricity wholesale market were relatively modest, competition concerns were identified as the operation would give rise to horizontal unilateral effects. The Commission found that the operation would significantly affect the incentives for the merged entity to continue to develop EDF's planned projects in additional CCGT generation capacity. These projects are sizeable and likely make EDF the most ambitious entrant into the Belgian electricity wholesale market. Consequently,

⁽⁶⁾ They follow the governance principles applicable to listed companies, as described in the guidelines published on 17 December 2003, entitled "Enforcement of the Financial Security Act with regard to the chairman's report on internal control procedures established by the company" by the *Association Française des Entreprises Privée* (AFEP) and the *Mouvement des Entreprises de France* (MEDEF).

the operation would significantly affect competitive conditions on this market *in the future*.

With regard to the two EDF CCGT projects, the Commission identified a number of plausible scenarios under which the incentives for EDF to develop one or both of its CCGT projects would be significantly reduced after the merger, taking into account the negative impact of the additional capacity on EDF and SPE's combined electricity sales on prices. A company considering investing in new generation capacity takes into account not only the stream of revenue generated on the project itself (as any entrant with no existing installed capacity would do), but also the impact of the added capacity on overall price levels and hence on the profits earned by all the power plants in its portfolio. Post-merger, the combined entity would have a larger portfolio than EDF alone, which means that the decrease in profits on SPE's installed base would be factored into EDF's investment decisions. In this respect, the analysis carried out by the Commission indicated that the additional capacities planned by EDF would have a significant impact on prices, and hence on the margins earned by SPE's installed power plants, which would significantly reduce the profitability of these projects for the combined entity⁽⁷⁾.

EDF is not the only entrant in the Belgian electricity wholesale market. E.ON recently also entered this market through the acquisition, from GDF SUEZ, of 1,441 MW of existing generation capacity located in Belgium. However, in contrast to EDF, E.ON's entry does not bring any new generation capacity to Belgium. New generation capacity leads to more effective competitive pressure, as this directly affects the balance between supply and demand in Belgium. Consequently, the fact of E.ON's entry cannot offset the negative effects that the proposed transaction would have in reducing the incentives for EDF to pursue its ambitious expansion strategy.

Therefore, the view was taken that there were serious doubts with regard to the incentives of the merged entity to further develop EDF's two planned CCGT projects after the merger. The operation would remove EDF as the most ambitious potential entrant into the Belgian electricity wholesale market and, thus, remove the improvement in competitive conditions on the Belgian electricity wholesale market that would have been expected in the absence of the transaction.

The Commission did not identify any serious competition issues with regard to coordinated or non-horizontal unilateral effects resulting from the

⁽⁷⁾ SPE also had a pre-merger investment project in CCGT generation capacity. However, it was considered that the merged entity would have no incentive to delay or decline investing in this project.

transaction on the remaining Belgian electricity markets⁽⁸⁾.

5. Remedies

In order to address the identified competition concerns related to the incentives for the merged entity to continue to develop EDF's investment projects, the Parties submitted commitments to the Commission. The accepted commitments were:

- (i) The immediate divestiture of the assets of one of the two companies set up to implement EDF's planned CCGT projects; and,
- (ii) The divestiture of the assets of the other company in the event that, by a certain date⁽⁹⁾, the new entity has not taken a positive investment decision to construct the CCGT project in question or has decided not to proceed with the investment. EDF must invest or divest.

By divesting the assets, EDF is placing them in the hands of another market participant whose incentives to develop the divested assets are equivalent to those of EDF prior to the proposed transaction.

The Commission therefore concluded that the remedy package removed, in an appropriate and proportional manner, the concerns that it had identified. This was confirmed by the market test of the proposed remedies. Thus, Belgian consumers and businesses will not be disadvantaged, as the incentives to commission new capacity are restored to the pre-transaction levels.

6. Decision on the Belgian referral request

The Belgian NCA requested, pursuant to Article 9(3)(b) of the EC Merger Regulation, that the Commission should, as far as the Belgian electricity markets were concerned, refer the transaction to it with a view to assessing the operation under Belgian competition law.

According to Article 9(3) of the EC Merger Regulation the Commission can refer all or part of a case to the competent authorities of the Member State

⁽⁸⁾ In particular, the Commission assessed whether the increase in multi-market contacts (defined as interactions on different markets) between EDF and GDF Suez (Electrabel) as a result of the proposed transaction was likely to lead to coordinated effects. In this case, the market investigation did not provide any credible indication that factors which currently constrain the incentives of EDF or GDF Suez (Electrabel) to coordinate would be relaxed by the increase in multi-market contacts resulting from the transaction in a way that would make coordination easier, more stable, or more effective.

⁽⁹⁾ The exact date of the final investment decision constitutes a business secret.

concerned where a concentration threatens to significantly affect competition in a market within the relevant Member State which represents all the characteristics of a distinct market⁽¹⁰⁾.

The Commission concluded that the conditions laid down in Article 9(2)(a) of the EC Merger Regulation were fulfilled, because the geographic scope of the relevant markets were at most national. Further, it had serious concerns that the reduction in the incentives of the post-merger entity to develop EDF's CCGT projects might significantly affect conditions of competition on the Belgian electricity wholesale market. Thus, the requirements for a referral as set out in Article 91(2)(a) were fulfilled.

Nevertheless, the Commission had to analyse whether it was appropriate to refer the case to the Belgian NCA under the provisions of Article 9(3)(a) of the EC Merger Regulation. The Commission decided that the Commission was the authority best placed to review the transaction since (i) it has developed,

in recent years, significant expertise in the Belgian electricity markets and there were no compelling reasons to refer the case⁽¹¹⁾, and (ii) the competition concerns highlighted by the Belgian NCA extended beyond Belgium, thus requiring a cross-border analysis for which the Commission was better equipped. Furthermore, adequate remedies had already been proposed by the parties and the fact that it was uncertain whether these remedies could be obtained by the Belgian NCA⁽¹²⁾ was also taken into account.

For these reasons, the Commission decided to deal with the transaction itself.

7. Conclusion

In view of the above, the Commission issued, on 12 November 2009, an Article 6 decision on the competition aspects of the transaction, clearing the transaction with commitments in Phase I, and a decision under Article 9, rejecting the referral request by the Belgian Authorities.

⁽¹⁰⁾ The Belgian NCA argued that various threats to competition would result from the transaction, *inter alia* due to the French State's shareholding in EDF and GDF Suez (Electrabel) and the alleged risk of coordination between these groups.

⁽¹¹⁾ Point 13 of the Commission Notice on Case Referral in respect of concentrations (2005/C 56/02), OJ C 56

⁽¹²⁾ Under Belgian law, mergers are automatically cleared if the combined market share of the merging parties remains below 25%. The market definition for the wholesale and generation market adopted for this Decision (see above) that included electricity trading activities, made it unlikely that these market shares would be attained.