II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 7 February 2001

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

(Case COMP/M.1853 — EDF/EnBW)

(notified under document number C(2001) 335)

(Only the English text is authentic)

(Text with EEA relevance)

(2002/164/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to the Agreement on the European Economic Area, and in particular Article 57(2)(a) thereof,

Having regard to Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings [1], as last amended by Regulation (EC) No 1310/97 [2], and in particular Article 8(2) thereof,

Having regard to the Commission Decision of 2 October 2000 to initiate proceedings in this case,

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

Having regard to the opinion of the Advisory Committee on Concentrations, [3]

Whereas:

(1) On 31 August 2000, the Commission received a notification pursuant to Article 4 of the Council Regulation (EEC) No 4064/89 (the Merger Regulation) of a proposed concentration whereby the undertaking Electricité de France (EDF), France, alongside Zweckverband Oberschwäbische Elektrizitätswerke (OEW) acquires within the meaning of Article 3(1)(b) of the Merger Regulation joint control of the undertaking Energie Baden-Württemberg AG (EnBW).

(2) On 2 October 2000, the Commission decided, in accordance with Article 6(1)(c) of the Merger Regulation and Article 57 of the EEA Agreement, to initiate proceedings in this case.

(3) The hearing took place on 20 and 21 December 2000.

[1] OJ L 395, 30.12.1989, p. 1; corrected version in OJ L 257, 21.9.1990, p. 13.
[2] OJ L 180, 9.7.1997, p. 1.
[3] OJ C 53, 28.2.2002.

(4) The Advisory Committee discussed the draft of this Decision on 31 January 2001.

I. THE PARTIES AND THE OPERATION

(5) EDF is a wholly State-owned company which is active in all fields of supply and transport of electricity in France. It is the operator of the national transmission grid. Through its subsidiary EDF International (EDFI), a holding company, EDF has shareholdings in electricity companies in many European countries, including Austria, Belgium, Italy, Luxembourg, Netherlands, Portugal, Spain, Sweden, Switzerland and the United Kingdom. The most important shareholdings are set out in recital 85. Outside France, EDF is also active in electricity trading through EDF Trading Ltd. (EDFT), which is jointly controlled by EDF and SA Louis-Dreyfus & Cie, France. Furthermore, EDF is active in the construction, operation, and maintenance of electrical plants and power networks and provides waste recycling and street lightening services.

(6) OEW is an association of nine public districts in south-west Germany. Its main purpose is to hold shares in companies active in the energy sectors. Through its wholly owned subsidiary OEW Beteiligungsgesellschaft mbH, OEW holds 34,5 % of the shares in EnBW.

(7) EnBW is a vertically integrated electricity utility active in all fields of supply and transport of electricity mainly in south-west Germany. Furthermore, EnBW has activities in electricity trading. Other business activities comprise the supply of gas and district heating, telecommunication, waste recycling and financial services.

(8) Prior to the proposed concentration, Landesstiftung Baden Württemberg GmbH, a wholly owned subsidiary of *Land* Baden Württemberg held 25,005 % in EnBW. The remaining shareholders of EnBW were and still are OEW with a stake of 34,5 %, Landeselektrizitätsverband Württemberg (12,04 %), Gemeindeelektrizitätsverband Schwarzwald Donau (8,82 %), Technische Werke der Stadt Stuttgart GmbH (9,00 %) and Badischer Elektrizitätsverband (5,40 %).

(9) In 1999, the *Land* Baden-Württemberg organised a tender for the purpose of the sale of its shares in EnBW. EDFI won the tender and acquired 25,005 % of the shares in EnBW. EDFI has since increased its share in EnBW to 34,5 % and has thus reached parity with OEW under the Shareholder Agreement.

II. CONCENTRATION

(10) As a result of the proposed concentration, EnBW will become a joint venture jointly controlled by EDFI and OEW. EDFI and OEW together hold the majority of the voting rights in EnBW. The Shareholder Agreement sets out binding rules concerning the exercise of the voting rights and the influence on EnBW with respect to its market strategy and commercial policy, and provides for a joint decision making procedure, in form of vote pooling. Vote pooling will ensure the uniform exercise of EDFI's and OEW's voting rights in the Shareholder Meeting. A Shareholder Committee will ensure the proper functioning of the vote pooling. EDFI and OEW each delegate up to four members of the Shareholder Committee. Before a decision is taken either by the Supervisory Board or by the Shareholders' Meeting of EnBW, the Shareholder Committee will deal with the matter. If unanimity cannot be reached in the Shareholder Committee, EDFI and OEW must vote against the resolution proposed at Supervisory Board or Shareholder Meeting level.

(11) The proposed operation, therefore, constitutes a concentration within the meaning of Article 3(1)(b) of the Merger Regulation.

III. COMMUNITY DIMENSION

(12) EDF, OEW and EnBW had a combined aggregate worldwide turnover of more than EUR 5 000 million in 1999 (EUR 32 057 million for EDF, EUR 57 million for OEW and about EUR 4 111 million for EnBW). EDF and EnBW each had an aggregate Community-wide turnover in excess of EUR 250 million in 1999 (EUR 30 484 million for EDF and EUR 4 040 million for EnBW). Neither EDF nor EnBW achieve more than two-thirds of its aggregate Community-wide within one and the same Member State. The notified operation therefore has a Community dimension within the meaning of Article 1(2) of the Merger Regulation.

IV. COMPETITIVE ASSESSMENT

A. *RELEVANT PRODUCT MARKETS*

(13) The proposed concentration has to be seen against the background of the state of liberalisation of the electricity markets in France. The French Electricity Law of 10 February 2000 ([4]) ('the Electricity Law') has been adopted in order to implement the Directive 96/92/EC of the European Parliament and of the Council of 19 December 1996 concerning common rules for the internal market in electricity ([5]).

(14) Pursuant to Article 22 of the Electricity Law, the eligible customers defined by decree in accordance with Article 19 of Directive 96/92/EC include all French large industrial customers with a demand per site of 16 GWh/year or more, which represents approximately 30 % of consumption in France. Since 20 May 2000 customers with a demand per site of 16 GWh/year are eligible. On 31 August 2000, a list of 1 206 companies was published which by this means have made known their eligibility.

(15) A further decree is currently in preparation that will qualify more industrial consumers as eligible customers by lowering the 16 GWh threshold to 9 GWh/year. Following this increase in the number of eligible customers, the market for these customers would represent approximately 34 % of consumption in France, i.e. an increase of 4 % compared with the present situation.

(16) Furthermore, Article 22 II of the Electricity Law provides that independent authorised electricity generators which purchase electricity for resale to eligible customers are also considered as eligible customers. The same rule applies to Distributeurs non-nationalisés (DNN) if they supply electricity to eligible customers in their local distribution and supply area.

(17) Article 12 to 16 of the Electricity Law concern the transport of electricity. EDF is the French high-voltage transmission system operator (TSO) responsible for operating, maintaining and developing this system in France. A special division, RTE, has been created in EDF for this purpose. Its director has been nominated by Ministerial Order. EDF and some 150 DNN are the responsible French distribution system operators (DSO). The DNN include the municipal and regional distribution entities.

(18) The Electricity Law provides for a right of access to the transmission and distribution grid (regional distribution of electricity). France has chosen a regulated access system. The decree regarding the conditions of access to and use of the transmission and distribution networks, including in particular the network usage tariffs, is under preparation. Tariffs for the use of the transmission and distribution networks will be proposed by the Electricity Regulation Committee (CRE) and approved by the minister in charge.

(19) The definition of the relevant product market for the purposes to the assessment of the proposed concentration has to take into account the current state of liberalisation in France. A distinction should be drawn between the supply to eligible customers that are free to choose their supplier and the supply to non-eligible customers, which cannot yet choose their supplier (see also the Commission's Decision in Case IV/M.1557 — EDF/Louis-Dreyfus ([6])). The assessment below will focus on the supply to eligible customers.

B. *RELEVANT GEOGRAPHIC MARKET*

(20) In its Decision in EDF/Louis-Dreyfus the Commission considered the French supply market to be clearly national in scope due to regulatory restrictions and technical constraints.

(21) The Commission's investigations in the present case have shown that the market for the supply to eligible customers of electricity is not larger than national. Before the recent liberalisation of the French market, no significant imports of electricity could take place.

(22) Moreover, to a certain extent, imports are (and will be at least for some time) constrained by the limited character of interconnector capacity. According to publicly available information the interconnector capacity between France and its neighbouring countries amounts to approximately 20 to 25 GW. However, due to technical limitations the usable interconnector capacity is approximately 10 GW. Compared with the installed generation capacity in France of approximately 110 GW, the import capacity is less than 10 %.

([4]) *Loi nº 2000 — 108 relative à la modernisation et au développement du service public de l'électricité*

([5]) OJ L 27, 30.1.1997, p. 20.

([6]) OJ C 323, 11.11.1999, p. 11.

(23) In this context, the parties submit that the available import capacity is in reality much higher. Given the relatively high exports from France to neighbouring countries, a similar amount of imports would outbalance the flow of export electricity with the result that full installed capacity would be again available for additional import electricity. However, this superposition effect of import and export flows can only occur to the extent that electricity flows in both directions take place at exactly the same time. The increase in available capacity due to the superposition is therefore in reality uncertain.

(24) In 1999, approximately 4 TWh of electricity were imported into France ([7]). Compared with the total consumption on the French market of 430 TWh ([8]), the proportion of imports was thus just under 1 %. With electricity consumption of eligible customers accounting for 130 TWh, the proportion of imports would have been 3 %.

(25) Consequently, the geographic market for the supply of eligible customers is France.

C. *COMPETITIVE ASSESSMENT*

1. DOMINANT POSITION OF EDF

1.1. ***EDF has extremely high market shares in the market for eligible customers and is the main electricity generator and supplier in France***

(26) EDF enjoys a dominant position in France as far as the supply to eligible customers is concerned. The parties submit in their notification that EDF accounts for more than 80 % of the market for the supply of eligible customers, auto production included. According to the parties auto-generators and independent producers generated 31 TWh in 1999. Independent production accounted for 24,8 TWh and auto-production, which in fact does not form part of the market, accounted for around 6,2 TWh in 1999. At present, the consumption of eligible customers represents approximately 130 TWh. Assuming that the entire auto production of 6,2 TWh was generated by eligible customers, the quantity delivered by the market would have been 123,8 TWh. Of this quantity, at least 117 TWh, i.e. about 95 %, must have been delivered by EDF. Indeed, in 1999, only 6,8 TWh produced by the independent generators (excluding EDF and auto producers) were delivered to customers other than EDF. For 2000, the market share of EDF may be slightly less since some foreign suppliers, in particular German electricity companies, were able to conclude supply contracts with some eligible customers.

(27) EDF's dominant position in the market for supply to eligible customers has to be seen in the light of its importance as a generator in France. EDF is the principal generator of electricity in France. Its installed generating capacity in France of 103,5 GW comprises nuclear (63 GW), fossil fuel (17,2 GW) and hydroelectric (23,3 GW) power stations. In 1999, EDF's output was 469 TWh out of 500 TWh of total electricity generation, which corresponds to a share of 93,8 %. Of EDF's total output 80 % derived from nuclear, 15 % from hydroelectric and 5 % from fossil fuel power generation ([9]).

(28) Total consumption in France in 1999 was 430 TWh. EDF's total electricity supply in France was 417,6 TWh , which corresponds to a share of 97 %.

1.2. ***Other electricity generators have only have a marginal share of generation and supply electricity mainly to EDF***

(29) Beside EDF there are three other electricity generators active in France ([10]). Compagnie Nationale du Rhône (CNR) has an installed generation capacity of 2,785 GW and produces electricity on the Rhône which it, however, sells to EDF (18 TWh in 1999). EDF holds one sixth of the CNR share capital and nominates one out of its 30 directors. EDF has managed CNR since 1946. At present, it is negotiating the conditions of its exit from CNR on the basis of Article 50 of the Electricity Law. Société Nationale d'Electricité et de Thermique (SNET) in which EDF holds a stake of 19 %, has an installed capacity of 2,6 GW and generated 6,8 TWh in 1999, of which a certain amount was supplied to eligible customers. Harpen AG, which belongs to RWE group generates electricity in seven small-scale hydro power plants (installed capacity: 0,57 GW). However, the entire output of the power plants, 0,2 TWh (159,4 GWh) in 1999, is supplied to EDF.

(30) Compared with the overwhelming position of EDF in terms of generation, the role which the three potential independent supplier could play for the supply of eligible customers, is not significant. Even if both CNR and SNET were already able to supply their entire production to eligible customers, their common output would only

([7]) *Source*: Unipede; Eurostat; VDEW.
([8]) EDF Annual Report 1999, p. 9.
([9]) EDF Annual Report 1999, p. 8.
([10]) Société Nationale des Chemins de Fer (SNCF) produces 1,5 to 2 TWh which are, however, used for its captive use.

cover 19 % of the total French market for the supply of eligible customers which represents some 130 TWh. This has been also recognised by CRE in its Annual Report where it states that 'in the next few years competition with EDF will result much more from the action of foreign operators than from the presence of important producers installed in the national territory' ([11]).

(31) Moreover, the Electricity Law contains significant restrictions which further limit the margin of manoeuvre of the independent electricity generators for the supply of eligible customers. Article 22 IV of the Electricity Law together with Article 2 of the Decree No 2000-1069 of 30 October 2000 provides that authorised electricity generators can only purchase electricity for resale to eligible customers for an amount of 20 % of their respective installed generation capacity. This significantly restricts the ability of the independent electricity generators to play a more active role in the market for supply of eligible customers. The position of the independent electricity generators in terms of overall production is already marginal since they represent less than 5 % of French total production. By limiting the volumes which independent electricity generators can purchase in order to supply to eligible customers to 20 % of the respective generation capacity, however, it is excluded that these companies may become a significant supply alternative for eligible customers in the future. In assessing the consequences of the 20 % limitation, an expert group of 'inspecteurs des finances' reached the following conclusion in a report for CRE: 'For all that, the clause referred to above can appear, in itself, to constitute barriers to the trade of electricity (in relation to both financial markets and to bilateral trades) ... Within this framework, it seems unfavourable to those French producers who are independent from EDF, insofar as it has the effect of fixing the existing hierarchy of market shares, while preventing EDF's competitors from competing with EDF by completing their offers to purchase which would enable them, justifiably, to compensate for their modest production capacity' ([12]).

1.3. *The situation with regard to possible entry into the French market*

1.3.1. **General**

(32) The Commission's investigations have shown that it is not impossible for newcomers to enter the French market. In particular, in some instances, foreign suppliers have won bids organised by eligible customers for delivery of electricity. It remains, however, that it is still difficult for newcomers, in particular foreign suppliers, to start supply activities in France.

(33) In order to become active in a foreign market, an electricity supplier can source the electricity by using generation capacity situated in France, by purchasing it from another producer in the framework of trading activities or by importing electricity produced in its own plants abroad.

1.3.2. **Difficulties in entering the French market**

1.3.2.1. *Newcomers have only marginal chances to gain access to generation capacity in France*

(34) Access to generation capacity in France would only realistically be possible if EDF granted such access since EDF is the main generator in France. The potential three independent generators currently supply electricity mainly to EDF or generate it for captive use. There are a number of large industrial customers which generate electricity for auto-production, but which are bound by long-term contracts (12 years) with EDF for excess production as part of the cogeneration programme ([13]).

(35) In this respect, the parties argue that the authorisation procedure for new production facilities above 4,5 MW ([14]) per unit, as laid down in the Electricity Law and the Decree No 2000-877 of 7 September 2000, enables all Community operators to set up own production facilities in France. However, the build-up of generation capacity is a long-term process and involves high investments, that is to say, high sunk costs, which cannot be used other than for generation of electricity. Moreover, it would require customers to be prepared to sign long-term supply contracts of 10 to 15 years in order to secure, to a certain extent, the up-front high investment. In addition, a spot market does not exist in

([11]) CRE, Activity Report, 30 June 2000, p. 7.

([12]) 'Rapport sur le mécanisme d'ajustement des flux électriques par le gestionnaire du réseau public de transport d'électricité (GRT) et sur la création en France d'un marché de l'électricité', September 2000, p. 38.

([13]) In this context, CNR criticises in its Activity Report (p. 6) that 'EDF purchase obligations — and moreover at subsidised prices — relative to cogeneration, decided well before the 10 February 2000 law, allow this system to continue to supply EDF exclusively, whereas it is one of the rare national systems capable of being competitive on the eligible market'.

([14]) The installation of new generation capacity requires an authorisation from the Minister of Energy if the capacity installed exceeds 4,5 MW. Below this threshold, a simple declaration is sufficient.

France. Therefore, excess production would be either lost or would have to be sold to EDF. Furthermore, the operational costs vary significantly depending on the primary energy used for the operation of such a plant. Fossil fuels, such as coal, oil and gas create much higher operational costs than hydro fuels or nuclear fuels. A power plant using fossil fuels would not be able to compete with the low prices EDF can offer on the basis of its nuclear generation capacity.

(36) Moreover, the existing generation capacity is far from being fully used. On the basis of EDF's installed generation capacity, the theoretical maximum output would be 906,6 TWh (103,5 GW * 24 hours * 365 days) per year. This would amount nearly to the double of EDF's total generation in 1999 which was 469 TWh. In the past, the development of generation capacity was driven by forecasts based on very optimistic assumptions on future growth of demand, which did not materialise. This is confirmed by CRE in its Annual Report where it states that 'in accordance with the trend observed in Europe, but which is much more evident in France, production seems able to meet the foreseeable change in the demand without requiring additional investments in capacity ... The competitivity of power stations now largely paid for generally makes the installation of new significant capacities not economically justifiable in the coming few years. This situation, to which must be added the consequences of the historic monopoly of EDF which produces about 97 % of total consumption explains why the development of competitivity in France, with the eligibility thresholds now reached, will probably not include the installation of new capacities in competition with those of the historical operator' ([15]).

1.3.2.2. *Newcomers have only marginal chances to purchase electricity in the framework of trading in France.*

(37) Trading of electricity at wholesale level requires liquidity, that is to say, an environment where producers are able to sell sufficient quantities to traders. In France, the competitive structure is not favourable for liquidity, which is thus unlikely to develop. Indeed, EDF is the main generator in France and the three potential independent generators only account for 5 % of the total production. Furthermore, the market for supply to eligible customers is still dominated by EDF. As long as there is no significant competition on this market, there are no incentives for trading activities to develop.

(38) In addition, the three potential independent generators are limited in their purchasing activities as trader/supplier. The volumes they can purchase are limited to 20 % of the respective generation capacity, as set in recital 31. This again contributes to the fact that trading activities are likely to remain minimal. In this respect, CRE in its Annual Report has stated with respect to the supply to eligible customers that 'the methods of creating and operating this market must be analysed later with respect to the legislative or regulatory provisions applicable, especially those aiming at putting a ceiling on the amount of electricity producers are authorised to buy with a view to reselling to eligible clients. Depending on the level at which it is set, this ceiling may lead to limiting the trade of electricity, hence the capacity of eligible clients to diversify their suppliers' ([16]). Purchasing electricity from another producer in the framework of trading activities, therefore, is currently not a viable sourcing alternative in France.

(39) ParisBourse wants to launch a spot market for the trading of hourly and daily blocks of electricity. However, ParisBourse's attempt to create a trading market is not yet in place and, therefore, has no practical impact.

1.3.2.3. *Newcomers face difficulties when entering the French market via imports.*

(40) In view of the current state of the French market, foreign suppliers, who wanted to supply electricity to eligible customers in France, have, to date, chosen the option of importing electricity from abroad and using the French grid for transmission of electricity to the customer's site. However, the current conditions for transmission still make it difficult for foreign suppliers to supply eligible customers with electricity imported across the interconnectors.

([15]) CRE, Activity Report, 30 June 2000, p. 9.

([16]) CRE, Activity Report, 30 June 2000, p. 21.

(41) Customers insist on having only one supplier responsible for the entire electricity supply. A full service contract comprises the provision of energy and balancing power. For the latter, however, EDF is the only supplier in France be it directly or indirectly via the network operator, RTE. Since it is usually unattractive for eligible customers to conclude a separate contract with the supplier of balancing power because of additional costs involved for the contract management, foreign supplier also need to purchase balancing power. In this respect, it should be noted that RTE has recently organised an auction with regard to the supply of energy required to compensate losses occurring on the transport network. RTE has announced that it will carry out a similar auction for balancing power in the near future. It is however uncertain when such an auction will actually take place.

(42) In France, suppliers other than EDF were initially forced to purchase balancing power for each individual customer and could thus not avail themselves of the advantages normally inherent in bundling of customers in energy balancing groups, thus limiting the need to buy balancing power. In view of the fact that the amount of balancing power needed could only be roughly estimated, the foreign supplier needed to purchase a sufficient quantity to be safe. If the balancing power was not needed, however, the foreign supplier had no possibility to re-use the balancing power elsewhere. In consequence, the price for the balancing power had the potential to increase the final price for electricity to non-competitive high levels. Furthermore, no provision is made for refunding in case of excess in input of electricity into the grid in France.

(43) Since 1 November 2000 RTE has established a system that allows all suppliers to aggregate consumption by different customers. Foreign supplier are now, in theory, able to balance the fluctuation of their customer's consumption. However, as long as foreign suppliers have not overcome the other barriers to entry and won a sufficient number of customers to effectively outbalance existing fluctuations on consumption, the possibility of forming energy balance groups will probably not deliver significant benefits.

1.3.2.4. *The overwhelming position in electricity generation in France allows EDF to outbid competitors trying to enter the French market*

(44) The Commission asked EDF to provide the number of bids launched by eligible customers where EDF was competing with foreign suppliers in the period from May 2000, that is to say, since the liberalisation entered into force in France. Table 1 shows the outcome of those bids based on the figures submitted by EDF. In its reply to the Statement of Objections EDF stated that these figures may not be exhaustive because there might have been further bids also involving foreign suppliers.

Table 1

Outcome of bids based on EDF figures

	Number of bids	Rate
Ongoing/not decided	42	30 %
Won by EDF	65	47 %
Lost by EDF	33	23 %
Total	140	100 %

(45) Table 2 shows figures obtained by the Commission during its investigation based on the replies by foreign electricity suppliers.

Table 2

Outcome of bids based on replies by foreign electricity suppliers

	Number of bids	Rate
Ongoing /not decided	52	10 %
Won by foreign companies	48	9 %
Lost by foreign companies	437	81 %
Total	537	100 %

(46) Table 1 demonstrates that EDF is able to win a significant amount of bids submitted to eligible customers. EDF won in almost half of the bids, 47 %, and has lost in less than 25 % of the bids. The picture is even clearer when the figures obtained by the Commission in the course of the investigation are taken into account. Foreign suppliers, which bid in the French market to eligible customers were only successful in approximately 9 % of total bids.

(47) According to EDF, only limited information was available on the number of bids made to eligible customers. This information is set out in Table 1. All foreign

suppliers, however, submitted all available information on bids. This information is set out in Table 2 and was not contested by EDF in its reply to the Statement of Objections. It can, therefore, be considered a valid basis for the Commission's assessment. Moreover, in the absence of any French supplier of any importance other than EDF, it can be assumed that these bids, which were lost by foreign suppliers, or at least a vast majority of them were won by EDF. This can largely be confirmed by the bidding lists submitted by the foreign suppliers.

(48) The ability of EDF to systematically outbid foreign suppliers is further supported by the fact that there is no transparent average market price in France. In fact, EDF can significantly influence the price for electricity supply to eligible customers. EDF as an integrated monopoly company is able to respond to competition challenges in the market for eligible customers by moving margins from eligible customers to the sector of customers which cannot freely choose their supplier. In this respect, EDF argued at the Hearing that cross-subsidies are prohibited by law and the regulatory framework. The tariffs are approved by the Minister after opinion by the CRE and the tariffs are subject to a price cap, covering full costs of supply. However, a price cap in no way excludes profitable margins for the supplier. Furthermore, the existence of cross-subsidies cannot be easily proved. The fact that cross-subsidies are a real danger has been also recognised by CRE in its Annual Report where it is stated that 'it is difficult to regulate a dual market since captive consumers must not subsidise the eligible consumers and competition imbalance must be avoided on the eligible consumer market' ([17]).

(49) During the in-depth investigation EDF supplied price data concerning its average prices for eligible customers as well as prices submitted to eligible customers in the context of bids during 2000. Those figures are shown in Table 3.

Table 3

Average prices to eligible customers

Period	Minimum consumption level of eligible customers (GWh/year)	Average price to eligible customers (EUR/MWh)	Average price submitted in bids to eligible customers (EUR/MWh)
1.1–30.4.2000	100	[25–35] *	—
1.5 – November 2000	16	[30–40] *	[20–30] *

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

(50) The data in Table 3 prove that EDF's average price for eligible customers is higher than the prices offered to eligible customers in order to outbid a foreign supplier. The replies of those competitors which participated in bidding procedures also confirm that EDF matched the prices offered by foreign suppliers in order to keep its customers. CRE, in line with these conclusions, states in its Annual Report: 'As of 1 June 2000, the number of eligible clients having changed supplier was low but a certain number of them have obtained, from EDF, significantly lower prices after having checked with various competitive suppliers' ([18]).

2. STRENGTHENING OF EDF'S DOMINANT POSITION

(51) The proposed concentration will strengthen EDF's dominant position on the market for eligible customers in France since it will eliminate EnBW as a potential competitor on the French market, it will heighten EDF's the retaliation potential in Germany, it will increase EDF's foothold in Switzerland and eliminate Watt as potential competitor and it will strengthen EDF's position as a Pan-European supplier.

2.1. *There are incentives of foreign suppliers to enter the French market*

(52) There is a strong incentive for foreign suppliers to be active in France. This is illustrated by the participation

([17]) CRE, Activity Report, 30 June 2000, p. 4.

([18]) CRE, Activity Report, 30 June 2000, p. 9.

of such suppliers in numerous bids for the supply to eligible customers. As far as German suppliers are concerned it is worth noting that, due to the liberalisation in Germany, the electricity price for industrial customers is generally not higher than in France. In fact, for certain customers prices in France appear to be higher than in Germany ([19]). Therefore, German electricity generators can make competitive offers to eligible customers in France and also have a strong incentive to become active in France, in particular since France is the second largest market in the Community.

(53) This incentive is further supported by a tendency towards pan-European supply contracts, that is to say, for the supply of large business customers in more than one Member State. The Commission's investigations have confirmed that there is an increasing demand for such contracts. There are, of course, still significant limitations for a customer to have one and the same supplier all over the Community due to the different levels of liberalisation. However, large business customers are increasingly interested in being supplied by one and the same supplier in more than one Member State. This is in particular true for those customers with sites which meet the varied national requirements allowing them to choose their supplier. Such contracts, of course, also include the supply to companies or sites situated in France. In order to be able to make offers to multi-site customers with subsidiaries in France, it is essential to be active in that market.

2.2. *EnBW is one of the potential competitors particularly well placed to enter the French market*

(54) EnBW is one of the six electricity suppliers at interconnected level in Germany which generate and supply energy and maintain the high voltage grids. It is the fourth largest German electricity utility after E.ON ([20]), RWE/VEW and VEAG for electricity supply at interconnected level and the third largest for electricity supply as a whole in Germany.

(55) EnBW's supply area is in south-west Germany and has a long common border with France, EDF's supply area. EnBW is the owner of the high voltage 380/220 kV transmission grid in its supply area with a length of 3 500 km ([21]). Beside RWE, EnBW is the only German interconnected electricity company that has interconnectors between France and Germany. Two of the four ([22]) Franco-German interconnectors are in the EnBW supply area. EnBW has approximately 1,2 GW interconnector capacity. With that amount of capacity EnBW could export up to 10,5 TWh to France. Together with the [<10]* TWh, which EnBW receives, *inter alia* through its participations in EDF's generation park, EnBW could supply [10-20]* TWh to eligible customers in France. According to these figures, approximately [5-15]* % of consumption by the French eligible customers could be supplied by EnBW.

(56) According to the parties, EnBW's geographic proximity to EDF does not confer a competitive advantage on EnBW. The parties argue that cost and prices of electricity supplied to customers in France do not differ materially depending on whether the electricity originates from EnBW or from an operator, such as E.ON, even though the latter is bound to transit either the EnBW or RWE/VEW area, on its way to France.

(57) That assertion is not correct. In Germany, transmission fees are payable for transmission through grids that are owned by other electricity companies at interconnected level. Electricity generators, whose transmission grids are not in the direct neighbourhood of the French market, have a disadvantage compared to those with grids along the French border, such as EnBW or REW/VEW. As explained the Decision in Case COMP/M.1673 — VEBA/VIAG ([23]), the grid owners are able to apply tariffs to their competitors which are not fully transparent, and it is thus not possible in all cases to detect actual discrimination against these competitors.

(58) As regards electricity exporters situated in countries with no border with France, they would need to pay additional costs, in particular when crossing the borders from third countries to France via Germany or Belgium. Therefore, EnBW's geographic proximity to EDF confers a cost advantage in comparison to the said categories of suppliers. In this respect, a strategic paper on the acquisition of ENBW ([24]) prepared by EDF states, as the first point of the commercial advantages which joint control over EnBW would confer to EDF that 'EnBW will bring with it direct, border access'. If EDF considered the geographic situation of EnBW's supply area on the German-French border to be competitively advantageous for its strategic expansion in the German market, this situation should also confer analogous advantages on EnBW when looking at the French market.

([19]) Prix du gaz et de l'électricité en Europe, Edition October 2000, p. 8.
([20]) E.ON is the result of the VEBA/VIAG merger.
([21]) EnBW own estimates.
([22]) There is a fifth interconnector in the RWE supply area which is normally out of operation.
([23]) VEBA/VIAG, Decision of 13 June 2000.
([24]) EnBW Energie Baden-Württemberg (Allemagne): Acquisition d'une participation de 25,01 % dans le cadre d'une offre portant sur 34,01 %, p. 11.

(59) Furthermore, EnBW has access to generation capacity situated in France under a number of contractual long-term agreements with EDF including certain capacity reservations of the French nuclear power plants Fessenheim ([...]*) and Cattenom ([...]*) as well an agreement providing for supply of base load power and of ad hoc peak load power from EDF to EnBW. In 1999, EnBW received [...]* TWh from Fessenheim and [...]* TWh from Cattenom and [...]* TWh base load from EDF.

(60) According to the parties, EnBW receives on average a total of [<10]* TWh per year under all existing agreements between EDF and EnBW. The quantities are as a rule made available to EnBW at the Franco-German interconnector of Sierentz/Kuhmoos. According to the notification, EnBW uses the imports to supply its German customers. However, there are no legal or contractual impediments which would prevent EnBW from supplying the quantities received from EDF to eligible customers in France. This was explicitly confirmed by representatives of both EDF and EnBW in a meeting with the Commission on 17 November 2000.

(61) The parties argue that RWE/VEW, E.ON, Electrabel and other Community-situated electricity companies are considerably larger than EnBW and accordingly are more likely to have the financial strength, resources and planning ability to sustain entry of the French market for eligible customers. In their view, even after optimising its production capacity, EnBW would have insufficient capacity for its own market. EnBW generates some 40,5 TWh and sells some 55 TWh buying the difference from various sources including EDF.

(62) In view of the replies received from the Community-situated electricity generators, however, existing production capacity or surplus in production is not a decisive element when considering entry to the French market. In particular in Germany, the electricity generators can sell their over-capacity production to the electricity exchanges or to other electricity generators at interconnected level on a bilateral basis. If an electricity company decides to deliver electricity to the French market, it can therefore do so by purchasing the amount of electricity required from either the trading market or other producers. It, therefore, can be concluded that own surplus generation is not necessarily a decisive advantage of large utilities in comparison with EnBW.

(63) Other candidates for potential entry into France are situated in Germany, Belgium and Spain. As far as foreign suppliers from Spain are concerned, the major difficulty in entering the French market lies in the limited interconnector capacity of approximately 1 GW. German suppliers other than RWE/VEW have no direct access into France. Therefore, it appears that only RWE/VEW and Electrabel are as well placed as EnBW. However, neither RWE/VEW nor Electrabel have comparable access to generation capacity in France to that of EnBW. RWE/VEW has access to generation capacity in France via Harpen AG. However, Harpen AG's production is marginal (0,2 TWh) and, in addition, the entire output is supplied to EDF. Electrabel has a participation in the nuclear production units of CHOOZ B and Tricastin in France, which date from 1984 and 1975 respectively. Since these contracts were based on an equivalent participation of EDF in the Belgian nuclear production unit of Tihange, the production of the French units is not available for supply in France.

(64) It can therefore be concluded that EnBW would be one of the strategically best-placed companies to enter the French market for supply to eligible customers. Since one third of EnBW's potential supply to eligible customers (see recital 55) originates from French production, EnBW does not have to pay cross-border transmission fees for these quantities. In this respect, EnBW's position is unique compared with that of all other competitors.

2.3. *Without the present operation EnBW should have a strong incentive to enter the French market*

(65) For the purposes of entering the French market, EnBW would profit not only from its competitive potential and its geographic situation, which make it one of the best-placed candidates, but also from the tendency towards pan-European supply. Industrial customers in EnBW's supply area comprise important German companies active in electric and metal-using industries as well as companies in the mechanical engineering industry with further production sites in the Community.

(66) EnBW has created local subsidiaries in Austria, the Netherlands, Italy, Poland and Spain [25]. It already supplies [...]* of its large industrial customers in the framework of 'Pan-European supply contracts' in more than one Member State. The most important of such supply contracts are [...]*. In EnBW's view suitable customers for Pan-European supply contracts are large industrial customers with several production sites or premises in at least two European countries. In EnBW's view, the minimum consumption per site to be considered for a Pan-European supply contract should be 5 to 10 GWh. [...]* of EnBW's present customers would already qualify under these criteria for Pan-European supply contracts.

[25] EnBW, Annual Report 1999, p. 28.

(67) EDF and EnBW have traditionally close cooperation due to their neighbouring locations in a number of electricity fields, including joint operation of generation utilities and transport of electricity generated by EDF through EnBW's network for export to Switzerland, Italy and Austria.

(68) The parties argue that given the longstanding links between the two companies, it would be unrealistic to expect EnBW to actively try and challenge EDF's market position in France. However, these links are not sufficient to rule out the possibility that EnBW would become active in France and compete with EDF, if it were not controlled by the latter. This view is further supported by the fact that EnBW has already participated in bids launched by French eligible customers.

2.4. *By acquiring EnBW, EDF would become in general less exposed to competition in France*

(69) The proposed concentration will increase EDF's potential for retaliation in Germany. EDF enjoys a very strong position in the market for supply to eligible customers in France. The acquisition of EnBW, however, confers on EDF the possibility to be active on the fully liberalised German market via an existing highly aggressive competitor, whilst EDF's position in its 'home' market, France, is still well protected due to its very strong position in the French market in terms of capacity and secured (non-eligible) customers.

(70) EnBW' s importance in Germany is also illustrated by the fact that, in June 1999, EnBW became the first German power utility to offer its standard-rate customers a choice of different electricity prices. EnBW, through its subsidiary Yello Strom GmbH (Yello Strom), has made a substantial contribution to opening up the German market for supply to small customers to competition. Yello Strom will launch a similar competitive initiative for large and small industrial customers.

(71) Before the transaction, EDF was less able to counter market entry by German interconnecting companies in France by launching retaliation campaigns in Germany, since EDF was not present on the German market. After the transaction, however, EDF will be in a position to use its presence in Germany at least to a certain extent in order to deter actual competitors such as RWE, E.ON and HEW from pursuing aggressive competition in the market for supply to eligible customers in France. Since those competitors do not have a similar potential for retaliation in France, they would be further discouraged from aggressively challenging EDF's position in France.

(72) In this context, the parties argue that no EDF policy exists to launch retaliation campaigns in Germany nor will such policy exist in the future. However, in the course of the Commission's investigation several competitors stated that EDF's increased potential for retaliation would be one of the major consequences of the proposed concentration. Furthermore, EnBW itself indicated in a meeting with the Commission and representatives of EDF on 17 November 2000 that, even in the current situation, EnBW would have to take into consideration the possibility of retaliation by EDF in Germany if EnBW entered the French market to any significant extent. It is clear that such a strategy, which is already anticipated by EnBW, would be much easier and would have much stronger effects if EDF had a strong foothold in Germany following the proposed concentration.

(73) At the Hearing OEW stated, that following the concentration, EnBW will not be under the sole control of EDF, but will be jointly controlled by EDFI and OEW and that OEW's participation in EnBW would be a sufficient safeguard against any possible retaliation by EDF in Germany following the transaction.

(74) It is true that following the concentration EnBW will be jointly controlled by EDF and OEW. However, pursuant to the Shareholder Agreement EDF is the sole industrial partner whereas OEW will be the regional partner. [...]*. As long as OEW's regional interests and its profit interest are sufficiently respected, it appears very unlikely that OEW has, be it, an incentive to actively oppose the business strategy EDF chooses within EnBW. [...]*. Moreover, strategies of retaliation do not necessarily affect any of the said interests. Therefore, it remains that the proposed concentration would also lead under the aspect of an increased potential for retaliation to a significant strengthening of EDF's dominant position in France.

2.5. *Through EnBW's controlling shareholding in WATT, EDF would considerably strengthen its foothold in Switzerland*

(75) In Switzerland, there are seven vertically integrated 'Überlandwerke': Atel (Aare-Tessin AG für Elektrizität, Olten), BKW (BKW FMB Energie AG, Bern), CKW (Centralschweizerische Kraftwerke AG, Luzern), EGL (Elektrizitätsgesellschaft Laufenburg AG, Laufenburg),

EOS/Energie Ouest Suisse, Lausanne), EWZ (Elektrizitätswerk der Stadt Zürich, Zürich) and NOK (Nordostschweizerische Kraftwerke AG, Baden). These companies are the transmission system operators which operate the Swiss transmission grid, with a total circuit-length of 6 633 km. ETRANS AG is the system coordinator in the Swiss transmission grid. The seven 'Überlandwerke' have the following shares in ETRANS AG based on their respective share of the Swiss transmission grid: Atel (18,8 %); BKW (11,5 %), CKW (5,0 %), EGL (13,2 %), EOS (14,5 %), EWZ (12,9) and NOK (24,1 %).

(76) The parties declare that EDF has no controlling shareholding in Atel [26]. However, EDF has enjoyed a close commercial relationship with Atel for a long time. This relationship is in particular based on various long term supply agreements between the two companies. In 1999, Atel generated 7,6 TWh and sold 29 TWh, of which 80 % were exported (55 % went to Southern Europe, in particular Italy). Atel accounts for 40 % of Swiss exports and 32 % of Swiss imports. In 1999, 22 TWh were imported into Switzerland from France. The bulk of EDF's electricity exports to Switzerland were not sold to Swiss clients but were re-exported.

(77) EnBW, Bayernwerk AG (E.ON) and NOK jointly control Watt AG [27] (WATT). EnBW and E.ON each have a stake of 24,5 % and NOK has a stake of 34,5 %, the remaining 16,5 % are held by Crédit Suisse S.A. WATT holds controlling stakes in two out of the seven 'Überlandwerke' EGL and CKW as well as in two other electricity companies KWL (Kraftwerk Laufenburg) and KWR (Kraftübertragungswerke Rheinfelden).

(78) In 1999, EGL and CKW sold around 21 TWh and 4 TWh respectively, which corresponds to more than $^1/_3$ of the total sales of the Swiss Überlandwerke. NOK, which is not in competition with Watt and its subsidiaries, sold around 21 TWh in 1999.

(79) As a result of the proposed concentration, EDF would considerably strengthen its foothold in Switzerland by obtaining a controlling stake in WATT (and, indirectly, in WATT's subsidiaries). Furthermore, this new acquisition would enable EDF to control nearly half of the Swiss interconnectors in terms of total numbers and more than 50 % of total interconnector capacity.

(80) There are 36 interconnectors between Switzerland and its neighbouring countries. Table 4 shows the ownership of interconnectors in Switzerland and the respective interconnector capacity.

(81) *Table 4*

Interconnectors between Switzerland and its neighbouring countries

Company	Number of interconnectors	Percentage	Transmission capacity (MW)	Percentage
EGL	16	44 %	13 765	51,8 %
Atel	5	14 %	4 854	18,3 %
EOS	6	16 %	3 854	14,4 %
NOK	3	8 %	2 001	7,5 %
BKW	2	5 %	1 435	5,4 %
KWB	2	5 %	396	1,5 %
RHOW	1	4 %	240	0,9 %
AWAG	1	4 %	53	0,2 %

(82) Due to its geographical position, its high voltage connections to France, Germany, Italy and Austria and the flexibility of Swiss hydraulic power, Switzerland is a turntable for peak load for its own and other European utilities' seasonal and daily requirements. In this respect, Switzerland is particularly important for French electricity supply of peak load. 80 % of EDF's total output in 1999 was generated in nuclear power stations. Nuclear power generation is steady and, therefore, suitable for base load. However, nuclear power generation is also rather inflexible and thus not suitable to satisfy peak load demand. Electricity exports from Switzerland to France account especially for peak load, exports from France to Switzerland, however, mainly for base load.

[26] EDF through EDFI and RWE each have a 20 % participation in Motor Columbus, a holding company with a majority stake (56,6 %) in Atel. In addition, EDF has a direct participation in Atel of 1,2 %. The remaining shareholders in Motor Columbus are the Swiss Bank UBS with a share of 37,2 % and other institutional investors which have together 22,8 %. EDF and RWE are, therefore, the only shareholders in Motor Columbus which have a strategic commercial interest. They are both represented in the Conseil d'Administration of Motor Columbus and of Atel.

[27] See Commission Decision of 4 December 1997 in Case IV/M. 958 WATT AG II, (OJ C 116, 16.4.1998, p. 2).

(83) Through the proposed concentration EDF would be in a position to control a large part of the Swiss generation and supply of peak load. Competitors which want to supply eligible customers in France need to provide base load as well as peak load. Where such competitors are not able to satisfy peak demand themselves, they need arrangements with other suppliers for peak load, in particular Swiss suppliers. The proposed concentration will considerably restrict the choice of Swiss peak load supply for such suppliers.

(84) Furthermore, the proposed concentration would also lead to the elimination of EGL as a potential competitor in the French market. EGL is currently approaching eligible customers in France. In this respect, EGL would be able to supply the full range of electricity products directly to French eligible customers as well as to other suppliers of such customers. However, following the concentration, such competition would be excluded on a lasting basis. EDF's dominant position in France would therefore be strengthened.

2.6. *The acquisition of joint control over EnBW would significantly contribute to EDF's outstanding position as Pan-European supplier*

(85) Throughout the last years, EDF, through EDFI, has systematically acquired participations, either directly or as part of investment consortiums, in the fields of power generation, transmission and distribution all over Europe. Table 5 shows that EDF is already active in a number of Member States.

Table 5

EDF's presence in Member States

Country	Company	Participation of EDFI
Austria	Estag	25 % held via SIA a joint venture between EDFI (80 %) and Gaz de France (20 %) (IV/M. 1107)
Spain	Elcogas	29,13 %, main remaining shareholders are Endesa (30,53 %), and Iberdrola (11,1 %)
Italy	Ise	75 % held via Finel a joint venture between EDFI (40 %) and Edison (60 %) (IV/M. 568)
Portugal	Tejo Energia; Pegop; Carbopego	Tejo Energia; Pegop 10 % Carbopego $^1/_3$ as part of a consortium with National Power and Endesa
Sweden	Granninge	34,2 % together with its subsidiary Skandrenkraft (IV/M. 1169)
United Kingdom	London Electricity-Sweb	100 % (IV/M. 1345, IV/M. 1606)

(86) Table 5 shows that EDF already has access to a number of different markets in the Community. This is true at least for the cases where EDF has either sole control or joint control over national electricity suppliers. However, EDF is not present in Germany which is the most important market in Europe. Following the proposed concentration, EDF would have a strong foothold in Germany and would be in a unique position to offer truly Pan-European services to industrial and commercial customers.

(87) EDF's dominant position in France makes it very difficult for any other European supplier to provide such service at the same level as EDF would be able to do. Firstly, foreign suppliers can only supply electricity to their customers in France where those customers have a demand per site of 16 GWh/year or more. If customers have a demand per site below 16 GWh/year, they cannot choose to be supplied by their foreign suppliers since they are still supplied by EDF exclusively. Where, for instance, such customers have different production sites in France with demand which differs according to the site, some sites below and some sites above 16 GWh/year, only EDF would be able to offer a true multi-site supply to such customers. This significantly restricts the possibilities for foreign suppliers to offer multi-site supply to their customers situated in France. Secondly, as described in section 1.3, foreign suppliers face significant difficulties where they supply eligible customers in France. Therefore, foreign suppliers are still at a great disadvantage if they want to offer multi-site supply to their customers in France.

(88) France has a strategic position in Europe, due to its interconnections with Spain, the United Kingdom,

Belgium, Germany, Switzerland and Italy. When, for example, German suppliers are requested by their customers to supply sites in the United Kingdom or Spain, they would have to transit electricity through France. The Commission's investigations revealed that the difficulties faced by such transits are such that competitors are not in a position to supply such customers if they do not manage to purchase electricity locally.

(89) EDF, by contrast, is already in a very different situation. It is still the dominant operator in France. Through a policy of systematic strategic acquisitions EDF has managed to be active in nearly all Member States, in particular in fully liberalised markets such as the United Kingdom, at a time where foreign competitors could not, in turn, enter the French market. However, before the proposed concentration, EDF's presence outside France had a significant gap since it had no foothold in Germany. The acquisition of joint control over EnBW and its strong Yello Strom brand in Germany would close this gap. It would further strengthen EDF's position as a Pan-European supplier and, thus, indirectly, its dominant position in the French market for supply to eligible customers.

V. COMMITMENTS SUBMITTED BY THE NOTIFYING PARTIES AND MODIFICATIONS TO THE OPERATION

COMMITMENTS

(90) The notifying parties submitted commitments in order to remove the competition concerns identified by the Commission. In summary, the commitments comprise the following elements:

Relations with CNR

(91) CNR will, as from 1 April 2001, be put in a position so as to ensure on its own both the operation of its power plants and the commercialisation of the power so generated. EDF and CNR have signed common declarations setting out the contractual framework to render CNR a fully independent electricity producer. EDF undertakes to conclude with CNR by 31 March 2001 at the latest binding agreements, which will implement these declarations. For commercialisation of the electricity generated EDF undertakes not to make any claim to the electricity generated by CNR or part thereof as from 31 March 2001. However, in order to allow CNR to develop progressively the marketing of its entire production, EDF undertakes to purchase, between 1 April 2001 and 1 April 2006, upon request of CNR, part of its production. The quantities to be so purchased as well as the purchase price will be the subject of a contract to be concluded between EDF and CNR prior to 31 March 2001 in accordance with the joint declarations of 15 January 2001.

(92) EDF undertakes to renounce the exercise of its voting rights in CNR and to withdraw its representative from the CNR board of directors. A trustee will act as a caretaker of EDF's shares in CNR.

Access to generation capacities in France

(93) EDF undertakes to make available to competitors access to in total 6 000 MW generation capacities located in France, 5 000 MW in the form of virtual power plants (VPP) and 1 000 MW in the form of back to back agreements to existing cogeneration power purchase agreements.

Virtual power plants

(94) The VPP will comprise 4 000 MW of baseload and 1 000 MW of peakload capacity. Both baseload and peakload VPP will be offered simultaneously, but separately. The VPP contracts will have the duration of three months, six months, one year, two years and three years.

(95) VPP contracts will be awarded through an open, non-discriminatory public auction. The auction will be open to energy utilities and energy traders. Entrants will bid for an integer number of MW of capacity, the smallest bid being 1 MW. Bids will be grouped according to plant type disregarding the duration of the contract. Within each group, bids will be sorted in descending order according to their spread in relation to reference value fixed by EDF. The reference value will reflect EDF's estimates of the French wholesale power market. This reference value is not a reserved price and spreads may be negative. The values will be communicated to the trustee before the invitations to bid are announced.

(96) Capacity will be awarded to bidders according to their rank until the auctioned capacity volume is reached. Bidders who bid for a mix of baseload and peakload plants will have the option to withdraw their bids if they are not awarded the plant portfolio of their choice. When bids are withdrawn, the corresponding capacity will be awarded to non-selected bidders according to their rank.

(97) Successful bidders will buy x MW of generation capacity from EDF for EUR y MW/year (capacity price). Over the duration of the contract, the buyer has the right to call upon EDF at any time in order to request delivery of up to x MW. The required load curve has to be notified one day ahead at 12 noon.

(98) The buyer will pay EDF EURz/MWh for the electricity consumed (energy price). In the case of baseload virtual plants, the energy price reflects nuclear variable costs of a power plant operated by EDF in France. The energy price of peakload virtual power plants reflects the variable costs of a physical peakload unit operated by EDF in France. For the time being, the energy price is [...]* EUR/MWh in the case of a baseload plant and [...]* EUR/MWh in the case of a peakload plant. Energy prices are fixed by EDF after having given the trustee the occasion to verify their level ([28]).

(99) EDF will operate auctions every three months offering baseload and peakload plants. The first auction involving the sale of 1 000 MW will be conducted in four rounds of 250 MW. The principles of the first virtual power plant auction will be announced in May 2001. The first round will take place in the beginning of September 2001. The other rounds will follow at ten-day intervals.

(100) If the trustee testifies that the prices of the auctions are abnormally low in relation to market prices or that the auctions result in bids significantly below EDF's costs, the Commission, upon reasoned request by EDF or the trustee, will decide about the fixing of a reserved price for auctions. In agreement with the trustee, further auctions may be suspended until the Commission has taken a decision. A request aiming at the fixing of a floor price should not be made prior to the completion of the first round of four times 250 MW auction.

Auction of cogeneration power

(101) EDF has signed Power Purchase Agreements with French cogenerators promising to buy all their electricity production over a 12-year period. These contracts still have an average of 10 years to run. EDF undertakes to auction a total of 1 000 MW of the generation capacity available to EDF under these contracts. The capacity would be offered in back-to-back contracts grouping a number of existing co-generation contracts. The first back-to-back contracts will be for a duration of 12 months. Contracts over two and three years will be considered if demand for such contracts develops.

Duration

(102) EDF undertakes to grant access to generation capacities for a period of five years from the date of this decision. This time period is based on the expectation that within the forthcoming five years the electricity market in France might have developed so as to allow sufficient alternative supply sources for the quantities provided by EDF in auctions in order to increase market liquidity.

(103) After the five-year period the Commission, on the basis of a reasoned request by EDF, will decide whether or not these conditions are met and respectively terminate or prolong EDF's obligation to grant access to generation capacities.

(104) EDF and/or the trustee may submit at any time, but not before three years have elapsed since the adoption of this decision, a reasoned request to bring this commitment to an end.

EnBW shareholding in WATT

(105) The parties commit that EnBW will divest, and EnBW agrees to divest, its shareholding in WATT.

EVALUATION

(106) The commitments concerning the relations between EDF and CNR will ensure that from 1 April 2001 CNR will be in a position to become an active competitive force in the electricity sector in France. Since EDF will renounce the exercise of its voting rights in CNR and withdraw its representative from the CNR board of directors, EDF will no longer be involved in CNR's commercial policy and market conduct. On the basis of the technical operation agreement and the commercialisation agreement to be concluded between EDF and CNR, CNR will progressively be in a position to develop the marketing of its entire production on the market for supply to eligible customers.

([28]) Whilst the capacity price is determined by the individual bid, the energy price that means the price for the electricity drawn from the capacity acquired is fixed by EDF on the basis of its variable costs. By contrast, the reference value is no fixed price, but only a technical instrument for carrying out the auction.

(107) The access to 6 000 MW generation capacity via auctions corresponds to approximately 39 to 41 TWh. This amounts to 30 or 32 % of the market for eligible customers which is currently 130 TWh. The access to generation capacity will enable foreign suppliers to become active on the market for supply to eligible customers to a significant extent. After the envisaged reduction of the threshold for eligible customers to 9 GWh/year, the market for eligible customers in France will amount to around 150 TWh. On the other hand, it can be expected that CNR and SNET will directly contribute to the liquidity of this market with some 10 TWh in the forthcoming years. Thus, together with the around 40 TWh made available by EDF through auctions, around one third of the eligible market can be marketed by competitors with electricity generated in France.

(108) Furthermore, German suppliers will also be able to gain a foothold in France and thus become sufficiently strong in France in order to cope with EDF's potential for retaliation resulting from its presence in Germany.

(109) Finally, the access to generation capacity in France will put foreign suppliers in a better position regarding Pan-European supply contract since they will be able to supply customers with eligible production sites in France through a VPP contract with EDF.

(110) At present it is uncertain how the French market will evolve and no provision is made for an automatic termination of this commitment at a given date. A period of five years was deemed the minimum time necessary to allow sufficient alternative supply sources to develop in order to reach sufficient liquidity in France. After this period, the Commission will decide whether or not these conditions are met. If the Commission concludes that the conditions are in fact met, it will terminate the commitment. After a period of three years following the adoption of this decision, EDF and/or the trustee may submit to the Commission a reasoned request to bring this commitment to an end. In that case, the Commission will decide whether the conditions outlined above are already met.

(111) The divestiture of EnBW's participation in WATT will restore the status quo ante in Switzerland.

(112) Therefore, the commitments offered by EDF are appropriate to eliminate the strengthening of EDF's dominant position on the market for eligible customers in France since they outbalance the loss of EnBW as a potential competitor, the retaliation potential in Germany, the increased foothold in Switzerland and elimination of WATT as potential competitor and the strengthening of EDF's position as a Pan-European supplier.

VI. **SUMMARY**

(113) It can be concluded from the above that the proposed concentration in its modified form would not lead to the creation or strengthening of dominant positions, as a result of which effective competition would be impeded in a substantial part of the common market, on condition that the commitments set out in the Annex are fully complied with. The operation is therefore to be declared compatible with the common market and with the functioning of the EEA, pursuant to Article 8(2) of the Merger Regulation.

HAS ADOPTED THIS DECISION:

Article 1

Subject to full compliance with the commitments, set out in the Annexes, the notified operation whereby Electricité de France and Zweckverband Oberschwäbische Elektrizitätswerke acquire joint control of Energie Baden-Württemberg AG is hereby declared compatible with the common market and the functioning of the EEA Agreement.

Article 2

This Decision is addressed to:

The notifying Parties.

Done at Brussels, 7 February 2001.

For the Commission

Mario MONTI

Member of the Commission

ANNEX

The full English text of the Commitments referred to in Article 1 may be consulted on the following Commission website:

http://europa.eu.int/comm/competition/index_en.html