COMMISSION DECISION

of 14 November 2006

declaring a concentration compatible with the common market and the functioning of the EEA Agreement

(Case COMP/M.4180 — Gaz de France/Suez)

(notified under document number C(2006) 5419)

(Only the French text is authentic)

(2007/194/EC)

On 14 November 2006 the Commission adopted a Decision in a merger case under Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings [1]*, and in particular Article 8(2) of that Regulation. A non-confidential version of the full Decision can be found in the authentic language of the case on the website of the Directorate-General for Competition, at the following address: http://ec.europa.eu/comm/competition/index_fr.html*

A. THE PARTIES

(1) GDF is an energy group present across the gas chain and related energy services and is active in exploration, production, transport, storage, distribution and natural gas sales, mainly in France, but also in Belgium, Germany, the United Kingdom, Luxembourg, Hungary and Spain. In Belgium, Gaz de France, along with Centrica, exercises joint control over SPE [2], which is present in the Belgian electricity and natural gas markets and provides energy services.

(2) The Suez Group is active in the utility industry and utility services. The group is structured around four operational business units in two areas of activity namely energy and the environment. Suez's main energy subsidiaries are Electrabel (electricity and gas), Distrigaz (gas), Fluxys (transport and storage of gas), Elyo (renamed Suez Energy Services in January 2006), Fabricom, GTI, Axima and Tractebel Engineering in the energy service sector. According to the information provided by the parties, Suez Energie Europe holds a minority stake of 27,5 % in Elia, manager of the electricity transmission network in Belgium.

B. THE OPERATION

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

(4) The merger can only take place once the French Parliament has amended the law of 9 August 2004, in order to bring the French State's stake in GDF under 50 %.

(5) In view of the above, the notified operation qualifies as a concentration within the meaning of Article 3(1)(a) of Regulation (EC) No 139/2004 (the Merger Regulation).

C. COMPETITION ANALYSIS

1. Competition concerns raised by the merger

(6) In the Decision, the Commission considers that the merger would significantly impede effective competition in four areas: gas in Belgium, gas in France, electricity in Belgium and district heating in France.

Gas in Belgium

(7) Concerning gas in Belgium, significant impediments to effective competition are identified on the following (nationally defined) markets for the supply of H and/or L gas:

— to dealers (i.e. the *'intercommunales'*, 'default suppliers' such as ECS (Electrabel Customer Solutions) and newcomers on the gas supply market in Belgium such as Essent and Nuon),

[1] OJ L 24, 29.1.2004, p. 1.

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

— to large industrial customers,

— to small industrial and commercial customers,

— to household customers; the decision leaves the question open as to whether these markets are in geographical terms either national or narrower (i.e. regional, in the form of Brussels, Flanders and Wallonia with their respective liberalisation calendars),

— gas-fired power plants.

In all these markets, the parties would have very high combined market shares and hold a dominant position.

(8) The merger would remove the best-placed competitor of the incumbent. Moreover, no other company would be able to reproduce the same level of competitive constraint as GDF. GDF's substantial market shares are arguably due to a number of specific assets and advantages enjoyed by GDF which no new entrant would possess to the same extent. For instance, GDF is the historic operator in a large neighbouring country, with access to a large and diversified gas portfolio, including LNG; GDF has priority access to H gas storage in Belgium; it owns L gas storage capacity in France near the border with Belgium; it is co-owner of certain transit pipelines through Belgium; and it shares control of certain entry points with concomitant capacity reservations on entry points. Moreover, for L gas, new competitors on the Belgian market like Nuon and Essent can only source gas from Suez and GDF, who hold long-term contracts with […] (*) and covering all […] *'s exports to Belgium and France.

(9) Finally, the Decision underlines that there are high barriers to entry which strengthen the horizontal effects resulting from the addition of market shares described above. The barriers relate to access to gas (the merging parties have access to most of the gas imported into Belgium, and they hold almost all the long-term import contracts), access to infrastructures (including the parties' control over Fluxys, the network operator, management of the transit network by Distrigaz, insufficient entry capacity, network congestion), access to LNG (the only terminal in Belgium, in Zeebrugge, is managed by Fluxys LNG, a Suez affiliate), access to H gas storage in Belgium (the French storage capacity, owned by GDF, is the best alternative outside Belgium), quality specifications and the lack of liquidity on the Zeebrugge hub. While many of these entry barriers pre-existed the merger, a number of them are strengthened by it (e.g. pipeline ownership, capacity and storage reservations).

Gas in France

(10) Concerning gas in France, the geographic markets taken into account are based on the division of the country into five balancing zones, North, West, East, South and South-West. While the latter's main transport network is managed by Total Infrastructure Gaz France (TIGF), a wholly owned subsidiary of Total, the first four are managed by GDF Réseau Transport (GRTgaz), a wholly owned subsidiary of GDF. According to the market investigation, the five balancing zones remain characterised by separate competitive conditions, as illustrated particularly by the congestions occurring between the different zones.

(11) Taking into account this geographic subdivision into five zones, the Decision identifies significant impediments to effective competition in:

— the markets for the supply of H gas to large customers who have exercised their right to choose their supplier in the North, East, West and South zones, and for L gas in the North zone,

— the markets for the supply of H gas to small customers who have exercised their rights to choose their supplier in each of the five zones, and for L gas in the North zone,

— the markets for the supply of H gas to local distribution companies who have exercised their right to choose their supplier in the North and East zones, and for L gas in the North zone,

— the markets for supply of H gas to household customers as of 1 July 2007 in each of the five geographical zones, and for L gas in the North zone. These markets will remain potential for a number of months. Nevertheless, the creation of the new entity and the consequent disappearance of Suez [1] as a competitor to GDF will have the effect of discouraging other potential competitors, thus strengthening the already high entry barriers to this market,

(*) 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.

[1] The Suez Group has built up a considerable position among large industrial gas-supply customers (via Distrigaz) and already has contacts with several million household customers as a water distributor in France (via Lyonnaise des Eaux), which makes it one of the best-placed operators to compete against GDF once the household customer market opens up on 1 July 2007.

— the markets for the supply of H gas to gas-fired power plants in the North and East zones and the supply of L gas in the North zone. These markets are still potential [1] but, in the light of proposals to bring such plants on stream within the next few years, the operation would have the effect of removing the operator best placed to compete against GDF.

In all these markets, GDF enjoys a dominant position. In all cases, the disappearance of Suez (Distrigaz) from the market strengthens the dominant player by removing one of the best-placed and strongest competitors.

(12) As in the case of Belgium, the Decision explains how significant barriers to entry, relating to access to gas and infrastructures, strengthen the horizontal effects of the merger. As far as access to gas is concerned, the merging parties have access to most of the gas imported into France, and they hold almost all the long-term import contracts. As for gas infrastructure, almost all of it (apart from infrastructure in the South-West, which is owned and run by Total) is owned by GDF, either directly or via its wholly owned subsidiary GRTgaz.

Electricity in Belgium

(13) The Decision identifies significant impediments to effective competition in the following markets:

— the Belgian national market for the production and wholesale of electricity: through the merger, the Belgian incumbent Electrabel (Suez) absorbs its largest competitor, whose power plants are situated on the middle to top parts of the merit curve [2]; this further strengthens the merged entity's capacity to determine prices in the Belgian wholesale market for electricity,

— the national market for auxiliary services and balancing power, in which the merger combines the only two suppliers of most of these services to the transmission network operator Elia,

— the national market for the supply of electricity to large commercial and industrial customers (>70kV), in which besides Electrabel (Suez) only RWE and EDF are currently active (SPE (GDF) has just started operating recently); in this market, the existing dominant position of Electrabel (Suez) is further strengthened by the elimination of one of the only two well-placed competitors (SPE (GDF) and EDF),

— the national market for the supply of electricity to small industrial and commercial customers (<70kV), in which the market share of SPE (GDF) strengthens the already dominant position of Suez,

— the supply of electricity to household customers who can choose their supplier, in which the parties would secure and strengthen their dominant position on the basis of both regional and national definitions of the relevant geographic market.

(14) In addition to the horizontal effects of the merger, the Decision identifies a number of vertical effects which strengthen the already dominant position of Suez in the electricity markets in Belgium.

(15) Since gas is an input for electricity generation, the Decision identifies the ability of and incentives for the parties to increase the cost of gas, and in particular to increase the cost of the flexible supply of gas to gas-fired power plants.

(16) The Decision also highlights that the parties will have access to the details of the most important cost element of rivals' gas-fired power plants, and hence to their pricing and production policy.

(17) Since the parties are the prime suppliers of auxiliary services and balancing power to Elia, the Decision identifies the ability of and incentives for the parties to increase the cost of auxiliary services and balancing power to rivals.

(18) A fourth vertical concern identified in the Decision is the elimination of the only competitor to Suez at present capable of making dual fuel offers (gas + electricity) to small businesses and household customers.

(19) The Decision explains how substantial barriers to entry relating to (i) access to electricity generation capacity, (ii) green and CHP certificates, (iii) the illiquid nature of the electricity trading market, and (iv) access to transmission and distribution infrastructure strengthen the horizontal effects of the merger.

District heating in France

(20) Among the several 'energy-related services' in which both parties are active, the operation raises competition concerns for one of them: the nationally defined market for the public service delegation of managing district heating systems in France.

[1] At the date of this Decision, GDF operated the only gas-fired electricity generating plant in France and supplied the gas for it.

[2] In a competitive market, electricity prices are set by the power plant with the highest marginal costs producing electricity at any given moment, i.e. the producer at the top of the supply curve (often called the 'merit curve' in the electricity sector).

(21) Long-term contracts (12 to 24 years) to manage district heating systems are currently granted by the municipalities concerned on the basis of an official tendering process, in which in practice only a handful of France-based specialised companies participate. These suppliers are: Dalkia (Veolia Group), SES-Elyo (Suez Group), Soccram (Thion Group) and Cogac (Cofathec-Coriance, GDF Group). Cogac (GDF Group) has a substantial shareholding in and arguably joint control of Soccram (Thion Group).

(22) After the merger, the parties will be the largest player in the market. The merger removes Cogac (GDF Group), which has been a 'maverick' in the market, thus leading to non-coordinated effects.

(23) The position of GDF as the dominant supplier of gas to anyone participating in a tender to manage a district heating system in France is a further factor reducing competitive pressures in this market.

2. **Commitments offered by the parties**

(24) In order to remedy the competition concerns identified by the Commission, on 20 September 2006 the parties submitted a package of commitments.

(25) Most answers to the market test showed that the vast majority of the commitments offered by the parties were not sufficient to remove the competition concerns raised by the notified operation.

(26) After being informed by the Commission on the results of the market test, the parties modified their initial commitments on 13 October 2006.

The commitments proposed on 13 October 2006

(27) The commitments offered by the parties consist of five main elements:

— the divestiture of Suez Group's shareholding in Distrigaz. In this context, the merged entity may request Distrigaz to supply it with gas for the needs of its electricity generating plants and of ECS's customers. However, since the duration of the related contracts is […] * years (from the date of the divestiture of Distrigaz) for most of the volumes concerned, those supply volumes will be limited and decreasing in time,

— the divestiture of Gaz de France's 25,5 % shareholding in SPE,

— the relinquishment of any control — de facto or *de jure* — over Fluxys SA, which will be the transmission operator of all regulated gas infrastructures in Belgium (transport/transit, storage, Zeebrugge LNG terminal) after the reorganisation of its activities. In this scheme, the management committee of Fluxys SA, which will not be controlled by the parties, will be the exclusive decision maker as regards the global investment programmes concerning the regulated gas infrastructures,

— a package of complementary measures concerning gas infrastructures in Belgium and in France,

— the divestiture of Cofathec Coriance plus Cofathec Service's heating networks, excluding Cofathec Coriance's holding in Climespace and SESAS.

Assessment of these commitments by the Commission

(28) On the basis of its assessment of the information provided by the investigation and, in particular, of the results of the previous consultation of the market operators, the Commission considers that the modified commitments proposed by the parties on 13 October 2006 are clear-cut and sufficient to remove the competition concerns raised by the notified operation, in Belgium and in France, without the need to run a further market test, for the following reasons:

— the divestitures of Distrigaz, of GDF's shareholding in SPE, of Cofathec Coriance and of Cofathec Service's heating networks remove the overlaps between the parties in all markets previously affected by competition concerns. These divestitures also remove vertical foreclosure problems between gas and electricity markets,

— the loss of control by the parties over Fluxys SA and the remedies related to the gas infrastructures in Belgium and in France are sufficient to lower the barriers to entry to a degree that would allow effective competition to develop.

D. **CONCLUSION**

(29) The merger as notified would significantly impede competition in a number of markets. The modified commitments offered by the parties on 13 October 2006 are sufficient to remove the competition concerns identified. Therefore, and subject to the parties' full compliance with the commitments made on 13 October 2006 and repeated on 6 November 2006, the Decision concludes that the merger is compatible with the common market.

(30) The present Commission Decision therefore declares the notified operation compatible with the common market and the functioning of the EEA Agreement pursuant to Article 8(2) of the Merger Regulation.