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PUBLIC VERSION

In the published version of this decision, some information has been omitted pursuant to Article 17(2) of Council Regulation (EC) No 139/2004 concerning non-disclosure of business secrets and other confidential information. The omissions are shown thus [...]. Where possible the information omitted has been replaced by ranges of figures or a general description.

To the notifying party

**Subject: Case M.8871 – RWE/E.ON Transfer Assets
Commission decision pursuant to Article 6(1)(b) of Council
Regulation No 139/2004¹ and Article 57 of the Agreement on the
European Economic Area²**

Dear Sir or Madam,

- (1) On 22 January 2019, the European Commission received notification of a proposed concentration pursuant to Article 4 of the Merger Regulation (the “Concentration”) whereby RWE AG (“RWE”, Germany) acquires, within the meaning of Article 3(1)(b) of the Merger Regulation, joint or sole control over certain generation assets of E.ON SE (“E.ON”, Germany).
- (2) The Concentration is accomplished by way of purchase of assets and shares.³ The E.ON generation assets that are part of the Concentration (the “E.ON Assets”) include the following entities and shares in entities: E.ON Climate & Renewables GmbH (Germany), Amrum Offshore West GmbH (Germany), E.ON Climate & Renewables UK Limited (UK), E.ON Climate & Renewables North America,

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

² OJ L 1, 3.1.1994, p. 3 (the 'EEA Agreement').

³ Publication in the Official Journal of the European Union No C 038, 31.01.2019, p. 22.

LLC (USA), E.ON Wind Sweden AB (Sweden), E.ON Climate & Renewables Italia S.r.l. (Italy). In addition, RWE will acquire 60.08% in Rampion NewCo (UK), which holds 50% of Rampion Offshore Wind Limited (UK), thereby acquiring an indirect stake of 30.1% in Rampion Offshore Wind Limited. Next to these renewable assets, RWE will also acquire from E.ON interests and associated drawing rights in nuclear assets, which encompass a [...] *% minority interest in Kernkraftwerke Lippe-Ems GmbH (“Emsland”, Germany), a 25% minority interest in Kernkraftwerk Gundremmingen GmbH (“Gundremmingen C”, Germany) and 25% co-ownership share of nuclear fuel and waste as well as real estate related to the Gundremmingen nuclear power plant.⁴

- (3) The Concentration is part of a complex asset swap between RWE and E.ON. In a separate case (Case M.8870), E.ON notified to the Commission the proposed acquisition of sole control over the distribution and retail energy business, as well as some production assets, of Innogy SE (“Innogy”, Germany). Innogy is currently controlled by RWE and RWE will keep a large part of Innogy’s generation assets. As partial consideration for E.ON’s acquisition of Innogy, RWE will also receive a 16.67% interest in E.ON’s share capital.
- (4) RWE is referred to as “Notifying Party” and, together with the E.ON Assets, as the “Parties”.

1. THE PARTIES

- (5) RWE is an energy company active across the supply chain, including generation, wholesale supply, transmission, distribution, retail supply and energy-related customer solutions (such as metering, e-mobility, etc.). RWE and its subsidiaries, including Innogy, are active in several European countries, including Czechia, Belgium, France, Germany, Hungary, Italy, Luxembourg, The Netherlands, Poland, Romania, Slovakia and the UK. Following the completion of the asset swap, RWE will, however, cease to be active in distribution, retail supply and energy-related customer solutions.
- (6) The E.ON Assets cover essentially all of E.ON’s current renewable energy generation business⁵ and the minority stakes currently held by E.ON in the RWE-operated and majority owned nuclear power plants of Gundremmingen C and Emsland.

2. THE CONCENTRATION

- (7) Both RWE and E.ON are currently active across the whole electricity supply chain, from generation and wholesale to distribution and retail of electricity (and, to a lesser extent, also of gas).

* Should read: “12.5”.

⁴ In both Emsland and Gundremmingen C, RWE is the other shareholder and operates the nuclear plants prior to this Concentration.

⁵ E.ON’s electricity generation business (in particular from coal, lignite, gas and water as well as Swedish nuclear power plants) and E.ON’s global commodities trading business was spun-off into Uniper SE (Uniper), which was subsequently acquired by Fortum. The Commission has cleared that acquisition by decision of 15 June 2018 (Case COMP/M.8660 – Fortum / Uniper).

- (8) Following the asset swap (as set out in paragraph 3 of this Decision), RWE will be primarily active in the upstream electricity (and gas, to a more limited extent) generation and wholesale markets whereas E.ON will focus on the distribution and retail of electricity and gas (and related services).
- (9) The two parts of the asset swap constitute two separate concentrations.⁶ This decision concerns RWE's acquisition of E.ON's generation assets, whilst E.ON's acquisition of RWE's distribution and retail business, as well as some production assets currently operated by Innogy, will be assessed under Case M.8870.

3. EU DIMENSION

- (10) The undertakings concerned have a combined aggregate worldwide turnover of more than EUR 5 000 million⁷ [RWE: EUR [>40 billion]; E.ON Assets: EUR [>1 billion]]. Each of them has an EU-wide turnover in excess of EUR 250 million [RWE: EUR [>40 billion]; E.ON Assets: EUR [>1 billion]] but they do not achieve more than two-thirds of their aggregate EU-wide turnover within one and the same Member State. The notified operation therefore has an EU dimension.

4. MARKET DEFINITION

- (11) Both RWE and E.ON Assets own and operate electricity generation assets in several European (and non-European) countries. RWE's and E.ON Assets' activities overlap in the generation and wholesale supply of electricity, mainly in Germany and the UK.⁸
- (12) In addition, the overall Transaction results in two vertical links⁹ between the generation and wholesale supply of electricity and:
- (a) The retail supply of electricity: by virtue of the 16.67% minority share that RWE will acquire in E.ON there would be a structural (vertical) link between RWE's upstream activities and E.ON's downstream activities.
- (b) The electricity transmission: RWE jointly (together with Commerz Real AG) controls Amprion GmbH, one of the four German transmission system operators

⁶ Commission Consolidated Jurisdictional Notice [2008] O.J. C95/1, para. 41: "...several transactions, even if linked by condition upon each other, can only be treated as a single concentration, if control is acquired ultimately by the same undertaking(s). ... This excludes...assets swaps".

⁷ Turnover calculated in accordance with Article 5 of the Merger Regulation and the Commission Consolidated Jurisdictional Notice (OJ C 95, 16.4.2008, p. 1).

⁸ The Parties' activities also overlap in France, Italy and Poland, but in these countries the Parties have a minimal presence. In France, E.ON Assets have no operational units. An overlap between the Parties' activities will only materialise once the construction of two E.ON offshore projects is completed but in any case RWE's market share would remain below [0-5]%. Similarly, in Italy and Poland, the Parties' combined market share is well below [0-5]%. In all markets, the increment would be lower than [0-5]%.

⁹ Both Parties are active in the trading of CO₂ allowances (see M.8660 – Forum/Uniper, section 4.5). However, the Transaction does not give rise to horizontally or vertically affected markets in respect of CO₂ allowances and no concerns were raised in the market investigation. For these reasons, these products will not be further discussed in this Decision.

(TSOs).¹⁰ While the vertical link between transmission and generation/wholesale supply is pre-existent, the Concentration might theoretically modify RWE's position in the market for generation and wholesale supply and affect its ability or incentives to carry out foreclosure strategies.

4.1. Generation [...] * wholesale supply of electricity

4.1.1 Product market definition

- (13) The Commission has – with regard to regulatory regimes applicable in other geographic areas – a consolidated case practice of defining the market for the generation and wholesale supply of electricity as encompassing the trading on the wholesale market of the generated electricity within a certain geographic market as well as the electricity that is physically imported into this geographic market via interconnectors, irrespective of the source of generated electricity (such as nuclear, lignite, wind, solar, etc.).¹¹ This market definition is not disputed by the Notifying Party.
- (14) The Commission notes that the Bundeskartellamt (Federal Cartel Office, “FCO”) has typically considered a separate market for renewable-based generation that benefits from public subsidies under the German Renewable Energies Act (Erneuerbare Energien Gesetz, “EEG”).¹² The FCO bases its view on the fact that whilst renewable generation under the EEG exerts competitive pressure on conventional generation (such as nuclear, lignite, gas), conventional assets exert very limited competitive pressure on renewables falling under the EEG. This is because the subsidies under the EEG make renewables significantly less costly than any other technologies and as such, will always be offered to the market place first. As the way in which renewables generation is remunerated develops, this may change in the future.
- (15) The Commission considers that in this particular case the market definition can ultimately be left open as no competition concerns would arise whether the market is defined as encompassing both conventional and renewable generation falling under the EEG or whether a separate market were to exist for conventional generation (including renewables not covered by the EEG-scheme) on the one hand and renewable generation falling under the EEG on the other.
- (16) In the past the Commission has also considered a segmentation between wholesale supply, on the one hand, and balancing and ancillary services¹³, on the other hand.¹⁴ The Commission considers that in this particular case the market

¹⁰ Amprion operates a transmission network with a length of about 11,000 km in the German states of North Rhine-Westphalia, Lower Saxony, Hesse, Rhineland-Palatinate, Saarland, Baden-Wuerttemberg, and Bavaria.

* Should read: “and”.

¹¹ See e.g. Case M.8687 – Prisko / OKD Nastupnicka, paras. 55 seq; Case M.7850 – EDF / CGN / NNB Group of Companies, para. 54; Case M.8660 – Fortum/Uniper, paras 18 and 26.

¹² See e.g. B4-80/17 – EnBW / MVV, para. 93.

¹³ Balancing power is needed to maintain the appropriate tension level in the grid; on this market TSOs typically purchase electricity in order to cover deviations between production and consumption within their relevant control areas.

¹⁴ COMP/M.6225 Molaris / Commerz Real / RWE / Amprion, of 23 August 2011; COMP/M.5467 RWE / Essent, of 23 June 2009; COMP/M.3268 Sydkraft / Graninge, of 30 October 2003. The

definition can ultimately be left open as no competition concerns would arise even if a separate market for balancing and ancillary services was defined.

4.1.2 Geographic market definition

- (17) The Commission has generally defined the market for the generation and wholesale supply of electricity as national in scope.¹⁵ However, the Commission has also recognised that in some instances the presence of a sufficiently large interconnection capacity between Member States may justify broadening the geographic scope of the market.¹⁶ This could also be the case if two Member States belong to the same bidding area.
- (18) In the case of Germany, Germany belongs to the same bidding area as Luxembourg. As such, these two countries should be defined as belonging to the same geographic market.
- (19) As regards Great Britain, the Commission considers that the relevant geographic market comprises the whole of Great Britain.¹⁷ However, as the Concentration does not result in an affected market in Great Britain for the generation and wholesale of electricity, Great Britain will not be discussed further in this Decision.¹⁸
- (20) For the purpose of this Concentration, it can be left open whether, as a result of interconnection capacity, the geographic market should be defined as wider [...] * the German and Luxembourg bidding area, as the Concentration does not raise any competition concerns under the narrower definition. For practical reasons, related to availability of data, the fact that production in Luxembourg is limited and the fact that E.ON Assets comprise no assets located in Luxembourg, and as such, the increment caused by the Concentration is not affected, the competitive assessment has been carried out based on German production data alone.

Commission has also considered possible narrower segmentations of the balancing market depending on the nature and purpose of the balancing services. For example, the Commission considered the following possible sub-segments of the balancing market (COMP/M.5978 – GDF Suez/International Power): (i) Frequency Reserve, (ii) Standing Reserve, (iii) Fast Reserve and (iv) Contingency Reserve.

¹⁵ See cases COMP/M.5979 – KGHM/TAURON Wytwarzanie/JV, para. 24; COMP/M.5711 – RWE/Ensys, para. 21; COMP/M.4180 – GDF/Suez, para. 726

¹⁶ See e.g. COMP/M.3268 – Sydkraft/Graninge, para. 27; COMP/M.3868 – DONG/Elsam/Energi E2, paras. 258-260.

¹⁷ See COMP/M.5224 - EDF / British Energy. In past decisions related to the UK market, the Commission considered that no distinction should be made on the basis of the source of electricity. There is no indication that this definition is no longer valid.

¹⁸ In Great Britain, RWE currently has a market share of [10-20]% (based on 2017 production) and E.ON Assets account for only [0-1]% of Great Britain production. The combined market share would be [10-20]%. EDF is the largest electricity supplier with a 24% share of generation output. Other significant players include: Centrica (5%), Drax (7%) and SSE (8%). In its recent inquiry into the energy sector the UK Competition and Markets Authority (CMA) analysed the competition in the electricity wholesale market and concluded that no generator has unilateral market power in Great Britain.

* Should read: “than”.

4.2. Transmission of electricity

- (21) In the past the Commission has consistently considered each electricity transmission network as a separate relevant product market whose geographic scope coincides with the area covered by the transmission grid. Each TSO has been accordingly considered as a monopolist on its own network.¹⁹
- (22) In line with its previous case-law, the Commission considers that the network operated by Amprion constitutes a separate relevant product and geographic market.

4.3. Retail supply of electricity

- (23) The Commission has typically identified different product markets for the retail supply of electricity depending on the type of customers, mainly distinguishing between: households, SMEs and large industrial customers. The geographic scope for each customer group has generally been considered to be national, although for some countries, including Germany, the Commission has in the past considered regional or even local markets.²⁰
- (24) For the purpose of this decision, the exact definition of the (product and geographic) market can be left open because the Concentration does not raise competition concerns under any plausible market definition.²¹

5. COMPETITIVE ASSESSMENT

A. Horizontal overlaps

5.1. Generation and wholesale supply of electricity in Germany²²

5.1.1. Market structure

- (25) The German market for generation and wholesale supply of electricity is characterised by a large number of generators and a broad energy mix. In addition to the largest national players (the Parties, Vattenfall, EnBW, Fortum/Uniper and LEAG), there are several smaller companies, often municipal/regional utilities.
- (26) According to the FCO and the German Federal Network Agency (Bundesnetzagentur, "BNetzA"), the level of concentration has been continuously decreasing for the last years. The combined share of conventional supply of the

¹⁹ See e.g. COMP/M.5827 – ELIA/IFM/50Hertz, para 21; COMP/M.5707 - TENNET/ E.ON, paras 6-7.

²⁰ See COMP/M.6225 Molaris / Commerz Real / RWE / Amprion; COMP/M.5827 – ELIA/ IFM/ 50HERTZ, para 24.; COMP/M.5496 - VATTENFALL / NUON ENERGY.

²¹ The markets for the retail supply of electricity are only relevant for the assessment of a vertical link created by the minority shareholding that RWE takes in E.ON. The assessment of the effects of that minority shareholding is not dependent on the exact downstream product market definition.

²² As discussed in the market definition section, the geographic scope of the market is likely to include Luxembourg along with Germany. However, as generation is limited and there are no overlapping activities in Luxembourg, in the remainder of this Decision the assessment is focused on the generation and wholesale supply of electricity in Germany.

largest suppliers in Germany (RWE, LEAG, EnBW, Fortum/Uniper²³ and Vattenfall) has decreased from 72.8% in 2010 to 67.5% in 2017.²⁴

- (27) With a production of [...] TWh in 2017, RWE is the largest supplier of electricity in Germany ([20-30]%), followed by LEAG ([0-10]%)²⁵ and EnBW ([0-10]%).²⁶

Table 1: Production volumes and market shares based on total generation of electricity in Germany from all energy sources

| 2017 | Total production (TWh) | Market share |
|-------------------------|---------------------------|--------------|
| RWE | [...] | [20-30]% |
| E.ON Assets | [...] | [0-1]% |
| Combined | [...] | [20-30]% |
| E.ON | [...] | [0-5]% |
| LEAG | | [0-10]% |
| EnBW | | [0-10]% |
| Vattenfall | | [0-10]% |
| Uniper | | [0-10]% |
| Others | 329.5 | 54.8% |
| Total production | 601.4²⁷ | 100% |

Source: Form CO and the Parties' competitors

- (28) RWE is also the largest supplier of electricity from conventional generation sources ([30-40]%), followed by LEAG ([10-20]%), EnBW ([0-10]%) and Uniper ([0-10]%). E.ON has – prior to this Concentration - a conventional portfolio of essentially only nuclear assets, representing a share of [5-10]%.²⁸

²³ E.ON's electricity generation business (in particular from coal, lignite, gas and water as well as Swedish nuclear power plants) and E.ON's global commodities trading business was spun-off into Uniper SE (Uniper), which was subsequently acquired by Fortum. The Commission has cleared that acquisition by decision of 15 June 2018 (Case COMP/M.8660 – Fortum / Uniper).

²⁴ Bundesnetzagentur/Bundeskartellamt, Monitoringbericht 2018 (Monitoringbericht gemäß § 63 Abs. 3 i. V. m. § 35 EnWG und § 48 Abs. 3 i. V. m. § 53 Abs. 3 GWB), p. 42.

²⁵ The competitors' market shares throughout the decision are ranged for confidentiality reasons (they are based on actual production figures provided by competitors).

²⁶ In terms of total installed capacity, RWE has a share of [20-30]% in 2017. E.ON Assets' capacity amounts approximately to [...] MW (approximately [...] MW is renewable and the remaining capacity is nuclear) which represents approximately [0-1]% of the German installed capacity.

²⁷ This figure also includes railway current and own consumption. Excluding the volume related to these items would not materially change the market shares.

²⁸ In terms of total installed capacity, RWE has a share of [20-30]% in 2017. E.ON Assets' conventional capacity amounts approximately to [...] MW, which represents approximately [0-1]% of the German conventional installed capacity.

Table 2: Production volumes and market shares based on conventional generation of electricity in Germany

| 2017 | Conventional production (TWh) | Market share |
|-------------------------|-------------------------------|--------------|
| RWE | [...] | [30-40]% |
| E.ON Assets | [...] | [0-1]% |
| Combined | [...] | [30-40]% |
| E.ON | [...] | [5-10]% |
| LEAG | | [10-20]% |
| EnBW | | [0-10]% |
| Vattenfall | | [0-10]% |
| Uniper | | [0-10]% |
| Others | 144.1 | 36.3% |
| Total production | 396.6²⁹ | 100% |

Source: Form CO and the Parties' competitors

- (29) The production from renewable sources is fragmented among many suppliers. With [...] TWh in 2017, RWE has a share of less than [0-5]% and E.ON Assets are even smaller ([...] TWh, approximately [0-1]%). The other large conventional suppliers have also a relatively small share of production from renewable sources: Vattenfall ([0-10]%), EnBW ([0-10]%) while LEAG and Uniper do not have any renewable production.^{30 31}

Table 3: Production volumes and market shares based on renewable generation of electricity under the EEG in Germany

| 2017 | RES production (TWh) | Market share |
|-------------------------|----------------------|--------------|
| RWE | [...] | [0-5]% |
| E.ON Assets | [...] | [0-1]% |
| Combined | [...] | [0-5]% |
| E.ON | [...] | [0-5]% |
| EnBW | | [0-10]% |
| Vattenfall | | [0-10]% |
| Others | 185.4 | 90.5% |
| Total production | 204.8 | 100% |

Source: Form CO and the Parties' competitors

²⁹ See Footnote 27.

³⁰ In line with the FCO's market definition, these figures only include subsidised renewable production. The production from renewable sources which is not covered by any subsidy is counted as part of the conventional sources.

³¹ In terms of total installed capacity, RWE has a share of [0-5]% in 2017. E.ON Assets' renewable capacity amounts approximately to [...] MW, which represents approximately [0-1]% of the German renewable installed capacity.

5.1.2. The increment created by the Concentration

- (30) The E.ON Assets generated [...] TWh in 2017,³² of which [...] TWh comes from E.ON's drawing rights in the nuclear plants Gundremmingen C and Emsland. Gundremmingen C must, however, be decommissioned by 31 December 2021 and Emsland must be decommissioned by 31 December 2022. The remainder of the E.ON Assets' consist of eight wind farms (offshore and onshore), one of which is still in construction.³³
- (31) The increment in RWE's share caused by E.ON Assets is limited and amounts to only [0-1]% ([0-1]% nuclear and [0-1]% renewable generation) of the German generation output (if conventional generation and renewable generation under EEG were considered separately, the increment would be [0-1]% for conventional and [0-1]% for renewable).
- (32) In reality, however, upon completion of the asset swap, the actual increment would be even smaller.³⁴
- (33) Whilst RWE would retain most of Innogy's generation assets, some of Innogy's generation assets will be transferred to E.ON on a permanent basis ("Reverse Carve-Out Assets") as part of the asset-swap.³⁵ These assets are held by entities (namely regional entities such as enviaM) within the Innogy Group which are mostly not wholly-owned by Innogy. The Notifying Party submits that retaining these assets was based on "*practical considerations. Given the very tight timeframe of the negotiations for the Transaction and taking into account that these assets do not belong to the core renewables business of E.ON and Innogy, RWE and E.ON decided that the efforts required for carving-out the relevant assets would outweigh the potential benefits.*"
- (34) The Reverse Carve-Out Assets include a large number of units, many of them with a very small generation capacity (less than 1 MW). The volume produced by these assets in 2017 (attributable to Innogy proportionally to its share in these generation assets) amounts to [...] TWh, of which [...] TWh are from conventional sources and [...] TWh from renewables. When production from the Reverse Carve-Out Assets is deducted from the production attributable to RWE post-completion of the asset swap, the net increment drops to [...] TWh, which represents a [0-1]% share of the German generation output (of which [0-1]% is

³² An offshore plant (Arkona) has come online as of early 2019 and therefore its production is not reflected in the 2017 figure. Arkona has a generation capacity of [...] MW and E.ON owns (and would transfer to RWE) a share of 50% in the plant ([...] MW). Assuming that the plant runs approximately 40%-50% of the time in line with the production rate of Amrumbank West (which is one of the other offshore wind farm assets that would be transferred to RWE and is similar in size to Arkona ([...] MW)), Arkona's annual production would amount to approximately [...] TWh.

³³ Delta Nordsee.

³⁴ The agreements covering the transfer of the E.ON Assets to RWE are conditional on the closing of the Innogy acquisition by E.ON, which thereby will either temporarily (see footnote 35) or permanently acquire control over the Reverse Carve-Out Assets (compare para 33).

³⁵ E.ON will temporarily acquire all of Innogy's assets as part of the concentration *M.8870 – E.ON/Innogy*. Most of Innogy's generation assets will then be re-transferred back to RWE in a second step of the asset swap. However, part of Innogy's generation assets will remain with E.ON. According to the Parties, this structure and sequence of transfers is necessary as it is too complicated to carve up Innogy under its current corporate structure.

renewable and [0-1]% is conventional production).³⁶ If non-EEG conventional generation and renewable generation under EEG were to be considered separate markets, the net increment would be [0-1]% for non-EEG conventional and [0-1]% for renewable.

- (35) Moreover, the Commission notes that the aforementioned net increment is approximately of the same amount as the production associated with the minority shares in the nuclear assets transferred to RWE ([...] TWh). This implies that the actual increment caused by the Concentration is only temporary in nature, as it would largely disappear once the nuclear assets are phased out by end of 2022.

5.1.3. *The subsidy scheme for renewable assets*

- (36) The EEG governs the financial support granted to renewable assets. There are two different subsidy schemes for renewable assets:
- (a) direct selling with a market premium: under this scheme, the EEG plant operator sells electricity in the wholesale market via the same channels as electricity produced from conventional sources (on exchanges or bilaterally OTC). In addition to the income from the sale of electricity on the market, the EEG plant operator receives a market premium from the TSO.³⁷
 - (b) feed-in tariff: this scheme is only available to existing plants, or new plants with a capacity of up to 100 kW. Under this scheme, the EEG plant operator passes its power on to the TSO and receives a feed-in tariff set by law. The TSO acts as a wholesaler and sells the electricity in the market.
- (37) Under the 'direct selling' scheme the market premium is determined as the difference between a fixed tariff level ("anlegbarer Wert") and an average wholesale price which is energy-source specific ("monthly reference wholesale price"). Initially, the market premium (EEG 2014) was calculated as the difference between a legally determined tariff level and the average monthly energy-specific wholesale price. However, since 2017 (EEG 2017) the tariff levels for most technologies have been determined through a market-based auction scheme (competitive tenders) conducted by the BNetzA.
- (38) The remuneration structure for direct selling is such that an increase in the wholesale price typically generates two opposing effects on the renewable operators' revenue. On the one hand, it increases the income that the EEG operator gets from the market. On the other hand, it tends to increase the monthly reference wholesale price and therefore reduce the market premium.
- (39) [Most of] E.ON renewable units which are part of E.ON Assets are remunerated under the "direct selling with a market premium" scheme. [Most of] renewable assets in operation were commissioned prior to 1 January 2017 and therefore they are remunerated on the basis of EEG 2014.

³⁶ In terms of installed capacity, the net increment amounts to approximately [...] MW which represents approximately [0-1]% of the German installed capacity.

³⁷ At present, about 78% of the electricity produced under the EEG is sold by direct selling with a market premium.

5.1.4. *The Notifying Party's view*

- (40) The Notifying Party submits that the horizontal overlap resulting from the Concentration will not raise competition concerns in respect of the generation and wholesale of electricity in Germany (the only affected market).
- (41) First, the combined market shares will remain low post-Concentration. Second, the increment is minimal. Third, there are several competitors (both large and small) active in the German electricity generation and wholesale market and as such, post-Concentration, customers will continue to have access to a wide variety of alternative providers. This applies even when the assessment is made on narrower market segmentations (i.e. separately for conventional generation and renewable generation falling under the EEG).
- (42) In support of its arguments that the Concentration will not raise any competition concerns, the Notifying Party submitted a “residual supplier index” (RSI) analysis. The results of this RSI analysis indicate that the Concentration will not increase the extent to which RWE is pivotal to meet demand. The Concentration is therefore unlikely to materially enhance RWE's ability to influence prices in the wholesale German market.

5.1.5. *The Commission's assessment*

- (43) For the reasons set out below, the Commission considers that the Concentration does not raise competition concerns on the market for the generation and wholesale of electricity in Germany and Luxembourg. As explained already in the geographic market definition, for practical reasons related to availability of data, the fact that production in Luxembourg is limited and given that E.ON Assets comprise no assets in Luxembourg (meaning the increment is not affected), the competitive assessment has been carried out based on German production data alone.
- (44) First, as explained in section 5.1.2. above, the net increment created by the Concentration is very limited and it is only temporary in nature as it will disappear once the nuclear generation plants will go off-line (Gundremmingen C by 31 December 2021 and Emsland by 31 December 2022).
- (45) Second, even if renewables under EEG and conventional generation were to be considered separate markets, the merged entity's share and in particular the increment brought about by this Concentration would be low. In renewable generation, the Parties have a very small combined market share of only [0-5]%. In conventional generation, while RWE is the largest supplier in Germany ([30-40]%), the net increment is limited ([0-1]%) and in any event entirely caused by nuclear assets which will have to be decommissioned latest by the end of 2022.
- (46) Third, even if a separate market for balancing power and ancillary services were to be considered, the increment created by this Concentration is very limited and temporary in nature. As explained in paragraph (2) above, the E.ON Assets being acquired consist of renewable and nuclear generation assets. Renewable generation such as wind are normally not used for balancing purposes. Whilst nuclear can be used for balancing purposes, it needs to be pre-qualified for this. Out of the two plants in which RWE acquires E.ON's minority stakes and drawing rights, Emsland is pre-qualified for primary and tertiary reserve but RWE already

holds the majority shares of [...] *% in Emsland as well as 100% of the marketing rights for reserve energy.³⁸ Gundremmingen C is pre-qualified for primary reserve (for a capacity of 37 MW), but has never participated in auctions for primary reserve and the Parties submit that there is no plan to seek additional qualification as the plant will be decommissioned by 2021.³⁹

- (47) The Commission therefore considers that *prima facie* the limited and in any event temporary nature of the increment is unlikely to materially strengthen RWE's market power in the German electricity generation and wholesale supply (whether the market is defined as comprising all generation or segmented between conventional generation and renewables generation covered by the EEG and whether or not a separate market for balancing power is defined).
- (48) However, due to the functioning of the electricity wholesale markets, even companies with a relatively small market share may be able to influence the wholesale price under some circumstances. The Commission has therefore assessed whether, despite the small size of the increment, the Concentration could affect RWE's ability and incentives to influence market prices.

Risk of withholding strategies

- (49) In electricity markets, a relatively common strategy that suppliers can adopt to influence the wholesale price entails withholding part of their production. By withholding (either physically or economically)⁴⁰ electricity generators can shift the merit order curve to the left and this way can trigger a price increase.
- (50) These strategies require the combination of flexible generation (which can be technically withheld) and baseload production (which would remain operational and therefore would benefit from the resulting higher prices). These strategies are ultimately intended to influence the wholesale price that all generation units (with the exception of units under the 'feed-in tariff'⁴¹ regime) receive. When assessing the incentives of withholding capacity, it may, therefore, be informative to look at the entirety of the assets acquired by RWE together, as opposed to consider separately renewable and conventional capacity.
- (51) RWE's generation portfolio in Germany is a mix of baseload (e.g. nuclear, lignite, renewable) and flexible (for example, coal and gas-fired) capacity and may thus be suited for withholding strategies. The Commission, however, considers that the additional capacity acquired by RWE does not materially enhance its ability and/or incentives to withhold capacity.

* Should read: "87.5".

³⁸ This is based on contractual agreements [between RWE and E.ON] [...].

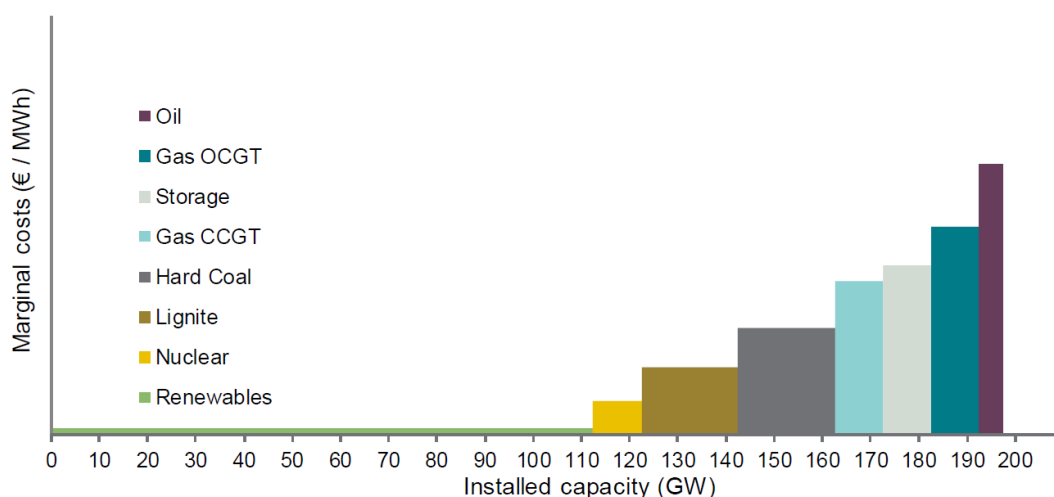
³⁹ The Notifying Party submits that, although RWE has pre-qualified base-load power plants in the past for the provision of electricity reserve [...], today this would not make commercial sense because [...].

⁴⁰ Physical withholding entails a reduction in generation output offered to the market, whereas economic withholding entails an increase in unit prices while keeping output constant. The outcome is essentially the same, namely that less production is available at competitive price level. Thus, in a situation where generators bid supply functions, physical and economic withholding converge. Hence, the remainder of this Decision refers to withholding in general as encompassing both types of strategies.

⁴¹ See paragraph (36). [...].

- (52) Regarding the ability to withhold, the increment brought by the Concentration includes wind-based generation. Although this technology is technically flexible, it is low-cost⁴² and as a consequence tends to position on the left end of the merit order curve (see figure below). These types of units are the most costly to withhold as they are the most profitable to operate.

Figure 1: Illustrative example of the German merit order based of installed capacity



Source: Form CO, figure 1.1

- (53) In response to the market investigation, electricity generators confirmed that renewable plants are typically run at full capacity and that withholding renewables, while technically possible, would only make economic sense in the rare circumstances when the wholesale prices are negative. For example, one competitor noted *"Wind farms can be marketed on the tertiary control market if some technical hurdles are overcome but this is far from being economically beneficial compared to market premium model. So in general, [...] run at full possibly load."* Along the same lines, other suppliers said that *"typically wind farms produce always as much as possible (depending on wind conditions)"*, and that *"a reduction of wind power generation in response to market conditions is only carried out in situations of negative spot prices."*
- (54) The Commission therefore considers that the Concentration does not increase RWE's ability to withhold in any material way.
- (55) Even if the merger is unlikely to increase RWE's ability to withhold, it might in theory create additional incentives to withhold as nuclear are baseload technologies which if run, would benefit from an increase in the wholesale price. For the reason set out below, the Commission considers that the additional incentives, if any, caused by the Concentration are unlikely to be material.

⁴² The subsidy schemes under which most renewable plants are remunerated (including [most of] renewable units of E.ON Assets) *de facto* lower the production costs and increase the incentives to run renewable units at full capacity whenever physically possible.

* Should read: "they".

- (56) First, as explained in paragraphs (34) and (35), the increment is temporary in nature and will disappear by 2021 – 2022 when the nuclear plants will have to be shut down.
- (57) Second, of the temporary net increment ([...] TWh), [...] TWh is renewable wind-based capacity which is remunerated under the 'direct selling' scheme. As explained above, the market premium component of the remuneration significantly reduces the extent to which a EEG plant benefits from a price increase in the wholesale market and therefore tends to lower (although it does not completely remove) the incentives to withhold.⁴³
- (58) Third, even if the conventional part of the temporary increment would fully benefit from a price increase, this is truly minimal in size ([...] TWh), [0-1]% of German generation output in 2017, and unlikely to cause any material change in RWE's incentives to withhold.

5.1.5.1. Analyses submitted by the Notifying Party and third parties

- (59) In the course of its investigation, the Commission has analysed several RSI analyses provided by the Notifying Party and by some third parties. RSI analyses are typically used by energy regulators and competition agencies as a preliminary indication of market power in electricity wholesale markets.⁴⁴
- (60) RSI analysis consists in assessing whether a company is pivotal, i.e. whether it is indispensable to meet demand. Practically, the RSI consists of checking, for all hours in a given year, if the competitors' capacity is sufficient to serve demand were all the capacity of the merged entity to be removed from the market. In its decisional [...]*, the FCO and the German Monopoly Commission have considered that when a supplier is pivotal in more than 5% of the hours this is an indication of market power.⁴⁵
- (61) The Commission considers that while RSI is a useful screening tool to monitor the functioning of the electricity wholesale market and to identify possible problematic areas, it suffers from a number of limitations that should be taken into account when reviewing the impact of mergers. For example, a company may have the ability (by, e.g. withholding capacity) to influence the wholesale price even when it is not pivotal. Likewise, a company may have limited incentives to exercise market power even when pivotal, if the residual demand that cannot be met by competitors is small.
- (62) While not fully investigated, the RSI is sensitive to a number of modelled input-factors which are required to estimate the extent of a supplier's pivotality (e.g. capacity from interconnectors, plants' unavailability, demand projections if

⁴³ Renewable assets would only fully benefit from a price increase if the reference price (computed over all production hours of wind in a given month) were to become greater than the legally pre-set tariff level. This appears to be unrealistic considering the current market conditions.

⁴⁴ See DG COMP energy sector inquiry, http://ec.europa.eu/competition/sectors/energy/2005_inquiry/index_en.html.

* Should read: "practice".

⁴⁵ See e.g. Monopolkommission, Energie 2017: Gezielt vorgehen, Stückwerk vermeiden, Sondergutachten 77, para 105; Bundeskartellamt, Sektoruntersuchung Stromerzeugung/Stromhandel (2011), p. 99.

forward looking, etc.). The various RSI analyses submitted to the Commission show some discrepancy in the estimate of RWE's pivotality in the long-term but they all consistently indicate that (i) RWE's pivotality in the short term (until 2022) would [...] significantly below 10%, (ii) the merger would cause, if any, a very limited increment in RWE's pivotality and (iii) in any event, the increment would essentially disappear post-nuclear phase out (by end of 2022).⁴⁶

- (63) In addition to the RSI, a third party submitted a simulation model which aims at estimating RWE's incentives to withhold to assess whether, and to what extent, the merger would make withholding more profitable for RWE. The model finds that, in general, the effects of the Concentration (in case of withholding conventional assets, such as gas-fired and coal plants) are very limited.
- (64) Only in one of the scenarios considered (based on withholding wind generation) by the third party are the effects relatively larger. This scenario relies on the following assumptions: first, that RWE has perfect foresight on hourly demand and supply conditions and it is able to withhold its renewable production hour by hour. Second, it assumes that RWE, via the minority stake that it would have in E.ON post-merger, would entirely control the conventional production assets that would remain with E.ON post-merger.⁴⁷ In the Commission's view, however, these assumptions are not supported by the facts of the case. First, as explained in paragraphs (52) and (54), renewable assets are not suited for withholding. Second, as argued below (see paragraphs (76) and (77)), the minority stake (16.67%) in E.ON does not confer full control to RWE over the day-to-day management of E.ON's retained assets. Moreover, even assuming control, RWE would only benefit from any additional profits generated by E.ON' assets proportionally to its (limited) participation in E.ON.
- (65) In light of the above, the Commission considers that the various economic analysis submitted (RSIs and simulation) do not modify the Commission's view set out in paragraphs (43) to (58) that the Concentration would not materially change RWE's ability or incentive to distort competition.

5.1.6. Conclusion

- (66) In light of all of the above, in particular given the small and in any event temporary nature of the increment, the Commission considers that no serious doubts arise as to the compatibility of the Concentration with the internal market regardless of whether the market for the generation and wholesale of electricity in Germany and Luxembourg is considered as comprising all generation or segmented between conventional and renewables generation falling under the EEG.

* Should read: "remain".

⁴⁶ Depending on the complainant, the increment in pivotality ranges from 0.4% to 1.1% in 2017 and 0.7 to 1.1% in 2019.

⁴⁷ Also, the model overestimates the conventional (nuclear) capacity that would remain with E.ON post-merger.

5.1.7. *Additional concerns raised by third parties*

- (67) During the investigation, some third parties raised concerns that the Concentration may also have effects in markets other than the generation and wholesale supply of electricity in Germany.
- (68) First, some were concerned that, as a result of the Concentration, RWE would acquire a competitive advantage in the auction for the allocation of subsidy for the development/construction of new renewable assets. In particular, RWE would benefit from larger economies of scale in the procurement of key inputs (such as wind turbines, solar panels, etc.) or services for the construction and maintenance of renewable plants.
- (69) In the Commission's view, the concern, even if in theory plausible, does not appear likely in view of the fact that (i) the generation from renewable sources in Germany is highly fragmented with a large number of players owning generation units; (ii) RWE's share of renewable production is very small ([0-5] %); and (iii) RWE's share of renewable production would be only marginally increased ([0-1] %) by the Concentration.
- (70) Second, one third party questioned whether post-merger, RWE may have the incentive to deliberately mis-forecast (e.g. overstate) the expected production from renewable sources in the day-ahead market on the expectation that this would cause a larger demand for balancing services where RWE would be able to profit by selling larger volumes at higher prices in the balancing markets. While in theory mis-forecasting strategies can be implemented with any technology, renewables are less likely to attract the regulator's attention as they are by nature less predictable.
- (71) In the Commission's view, it is unclear whether this strategy is profitable (the possible additional profits would have to more than compensate the costs for having caused the deviation) and it would entail significant risks as there is no certainty that any deviation in the day-ahead market would necessarily result in higher demand for balancing services (because, e.g. unexpected deviations in the opposite sense would cancel each other out). The majority of competitors responding to the Commission's market investigation consider that suppliers in general have no incentives to mis-forecast the expected production from renewable sources.
- (72) In any case, even assuming that this type of strategy is plausible, the Concentration could only have an effect in so far as RWE's renewable capacity would materially increase following the merger (so that RWE could significantly affect demand for balancing services) and/or RWE's position in the balancing market would be strengthened by the Concentration (so that RWE would be more likely to be called upon to operate in the balancing market). Neither of these conditions applies to the present case. First, the Concentration only marginally increases RWE's renewable capacity ([...] TWh, [0-1] %) and, second, E.ON Assets do not materially add balancing capacity to RWE's generation portfolio.⁴⁸

⁴⁸ See paragraph 46.

- (73) In light of paragraphs (67) to (72), the Commission considers that the concerns described above in relation to renewable auctions or mis-forecasting renewables production are not supported by the specific facts of the case.

B. Minority shareholding

- (74) As part of the overall Transaction, RWE will acquire a share of [...] % in E.ON. This share represents the exchange component of the consideration obtained by RWE for the transfer to E.ON of its distribution and retail business, as well as some generation assets, as currently operated by Innogy. The Commission routinely reviews exchange offers resulting in the corollary acquisition of minority interests, which also entails carrying out an assessment of the competitive interactions between the undertaking in which the minority interest is obtained and the retained activities of the holder of that interest,⁴⁹ i.e., RWE in the present matter. In assessing the competitive effects of any acquisition of control, the Commission must also take into account minority interests held by the acquirer or target in any related companies.
- (75) Hence, within the framework of the merger control assessment of the Concentration, the Commission has considered whether the structural link created by the acquisition of that minority interest could:
- (a) weaken RWE's and E.ON's incentives to compete in the market for generation / wholesale supply in Germany (horizontal effects); and/or
 - (b) give RWE and/or E.ON the ability and incentive to foreclose competitors either (or both) upstream in the generation/wholesale of electricity or downstream in the retail supply of electricity in Germany (vertical effects).

The Notifying Party's view

- (76) RWE submits that its minority stake in E.ON is intended to be purely financial in nature and will not give it any ability to exercise decisive influence over E.ON. According to the Investor Relationship Agreement signed by the Parties, RWE commits to *[act purely as a financial investor. RWE and E.ON have contractually agreed on a mechanism which limits the exercise of RWE's vote to no more than 16.67% in the shareholders' meeting (irrespective of the turnout) and which prevents RWE from undertaking measures that would confer control over E.ON or increase RWE's influence in E.ON above the 16.67% shareholding.]*⁵⁰
- (77) The Notifying Party also submits that although RWE will have the right to nominate one member of the Supervisory Board, its representation in the board is limited (one out of 14 Supervisory Board members, i.e. one out of seven shareholders' representatives) and therefore will not give RWE any ability to influence E.ON's strategic decisions.

* Should read: "16.67".

⁴⁹ See, e.g., Case COMP/M.7276 – GlaxoSmithKline/Novartis Vaccines Business (excl. Influenza)/Novartis Consumer Health Business.

⁵⁰ This provision is specifically designed by the Parties to prevent RWE from having the ability to block any resolutions.

- (78) Overall, the Notifying Party concludes that RWE's minority share in E.ON would result in neither horizontal nor vertical effects, mainly because (i) RWE has no ability to influence E.ON's commercial conduct; (ii) absent this ability, E.ON's strategy is unlikely to change as the minority stake does not alter its incentives; and (iii) RWE's incentives are not materially affected given the limited size of the share that it would hold in E.ON.

The Commission's assessment

Horizontal effects

- (79) E.ON would retain some production assets in Germany post-merger and RWE's and E.ON's activities would therefore overlap in the market for generation and wholesale supply of electricity. The minority stake may in theory lessen RWE's incentives to compete as RWE would not only directly benefit from a price increase but also indirectly through its stake (and therefore the profits) in E.ON.
- (80) The Commission notes, however, that E.ON's generation would be very limited ([...] TWh, representing [0-5]% of the German generation in 2017) and E.ON's generation capacity would be mostly made of nuclear assets, which will have to be decommissioned by 2022.⁵¹ Once the nuclear plants are phased out, E.ON's generation would represent approximately [0-5]% of German production.
- (81) As argued above, the Commission considers it unlikely that the Concentration would materially strengthen RWE's ability and incentives to withhold capacity. In the Commission's view, the minority stake in E.ON would not alter this conclusion. The share in E.ON is unlikely to increase RWE's ability to withhold capacity as RWE would not have any significant influence on the day-to-day operation of E.ON's generation assets given the size of RWE's stake and the provisions set out in the Investor Relationship Agreement (see paragraph (76)). Nor is it likely that [...] would have increased incentives to withhold its own assets as any additional profits that it would receive via its minority share in E.ON would be small due to E.ON's limited generation capacity and the fact that RWE would participate in only 16.67% of E.ON's profits.

Vertical effects

- (82) The Commission has considered whether RWE's acquisition of the minority stake in E.ON can give rise to any input or customer foreclosure.
- (83) Input foreclosure arises if the merged entity has the ability and incentive to foreclose competitors' access to an important input with the aim of lessening the competition that it faces in the downstream market.
- (84) As discussed in the previous section, the acquisition of E.ON Assets would not significantly increase RWE's position upstream (whether overall, based on all generation or separately for either renewable or conventional generation) nor would it materially strengthen RWE's ability and incentive to increase prices in

⁵¹ In fact two of the nuclear plants retained by E.ON, Grohnde and Brokdorf, need to be decommissioned already by end of 2021 and the third one, Isar 2, by end of 2022.

* Should read: "RWE".

the wholesale market (through, e.g., capacity withholding strategies) to the detriment of downstream competitors.

- (85) The incentives to foreclose downstream competitors critically depend on how much additional profits the vertically integrated company expects to gain downstream once the competitors are foreclosed/marginalised. This in turn depends on the company's position downstream and on its ability to attract customers switching away from the foreclosed competitors. In the Commission's view, RWE's position downstream post-merger will be weaker overall than pre-merger. Pre-merger RWE served approximately [...]% of the German electricity demand. Post-merger RWE will not be directly active downstream, and while it would have a stake in a larger downstream company (post-merger E.ON would serve approximately [10-20]% of the demand)⁵², RWE would only benefit from an increase in E.ON's downstream sales in proportion to its limited share in E.ON (16.67%).⁵³ The Concentration therefore is unlikely to lead to input foreclosure.
- (86) Customer foreclosure may occur when the merged entity may foreclose access to a sufficient customer base to its actual or potential rivals in the upstream market and reduce their ability or incentive to compete.
- (87) It should be first noted that E.ON would not immediately benefit from customer foreclosure as this strategy would be, at least initially, meant to weaken competition upstream and, as a result, increase RWE's profits in the wholesale market. Therefore, absent RWE's control or influence, E.ON would not necessarily have incentives to accommodate RWE's attempt to foreclose competitors upstream.
- (88) Even assuming that RWE would be in a position to materially influence E.ON's strategy, E.ON's downstream position does not appear sufficiently strong for customer foreclosure to be of concern. While E.ON would be the largest electricity retail supplier post-Concentration, its share of the total demand of electricity in Germany would be [10-20]%. Even if E.ON were to source its entire electricity requirement from RWE, upstream competitors would still have more than [80-90]% of the demand to serve.
- (89) Some of the respondents to the Commission's questionnaire voiced concerns that if RWE and E.ON were to trade internally to a significant extent, this may have negative repercussions on the liquidity of the electricity wholesale market.
- (90) Currently, RWE and E.ON trade internally to a limited extent. RWE submitted that there is no general netting of RWE's generation and retail position⁵⁴ because

⁵² In theory, input foreclosure may be targeted to some specific segments of the retail supply of electricity where the integrated company has a larger share. However, given the functioning of the wholesale market (with power exchanges where retailers can source electricity at the same conditions as any other retailers), it is unlikely that any vertically integrated company can practically discriminate against one specific (or a sub-group of) downstream competitor. This reduces the incentives to increase the price of the upstream input (wholesale electricity). See Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings, paragraph 43.

⁵³ Roughly speaking, RWE's position downstream post-merger can be approximated by a share of [0-5]% ($= [10-20]\% * 16.67\%$).

⁵⁴ [...].

typically retail and generation portfolios have different hedging requirements and are therefore subject to different hedging strategies.⁵⁵ RWE sells approximately [20-30]% of its electricity generation internally, and E.ON procures approximately [10-20]% of its retail volumes internally.

- (91) The limited extent of internal trades suggests that there may not be significant advantages by systematically trading internally. Any change in RWE's and E.ON's trading strategy post-merger could then only be justified on the expectation that the possible lower liquidity in the market can deteriorate competitors' ability to hedge their position (and therefore compete effectively) in the wholesale market. Whilst RWE and E.ON would be the largest supplier, respectively, upstream and downstream in Germany post-merger, the vast majority of the electricity generation (approx. [80-90]%) and the wholesale demand (approx. [80-90]%) would be accounted for by suppliers other than RWE and E.ON. Therefore, the Commission considers it unlikely that the internalisation of RWE and E.ON trading would significantly affect liquidity on the German electricity wholesale market and lead to some form of competitor foreclosure.⁵⁶
- (92) One final concern raised by some respondents to the Commission's market investigation relates to the risk of RWE having access to information on E.ON's strategies/activities downstream and using it to gain a competitive advantage vis-à-vis vertically non-integrated (or relatively less integrated than E.ON and RWE) companies. For example, some respondents indicated that, as a result of its share in E.ON, RWE could have access to information on E.ON's procurement strategy and this may enable RWE to offer products which are best suited to E.ON's needs. RWE could also have access to E.ON's energy demand projections which can be more accurate than other retailers (as E.ON serves a relatively larger share of the demand) and this may give an advantage to RWE when setting out its long-term investment strategy for new generation capacity.
- (93) According to the Notifying Party, there is no risk that information confidential to E.ON would be accessible to RWE as a result of RWE acquiring the minority interest. This is because RWE representatives appointed to the E.ON Supervisory Board will be subject to confidentiality obligations under German Corporate law. Information provided to an RWE representative as a member of E.ON's Supervisory Board can only be used by such member for said role and cannot be made available to other parts of the RWE group for other purposes. A breach of such duty of confidentiality would be a violation of fiduciary duties and could also result in criminal liability of the RWE representative.⁵⁷ The Notifying Party points to a recent decision by the FCO (EnBW / MVV)⁵⁸ which concluded that the right to nominate a member of the supervisory board does not improve the

⁵⁵ RWE submitted that "[...]"

⁵⁶ In addition, any trade or contract between RWE and E.ON post-merger would no longer be intra-group (Art. 2 (5) and (6) REMIT Implementing Regulation) and it would therefore not benefit from the exemption to automatic reporting to the competent supervisory authorities under Art. 4 (1) a) of the same regulation. Therefore, if RWE were to treat significantly more favourably E.ON than other retailers (to prevent E.ON from procuring electricity from upstream competitors) this may attract the attention and trigger the intervention of the competent supervisory authority.

⁵⁷ Section 404 of the German Stock Corporation Act, section 53 SE-Implementation Act, articles 9, 49 SE-Regulation.

⁵⁸ See FCO, 13.12.2017, B4-80/17.

level of information or strengthen the influence of the nominating shareholder in the company.

- (94) Irrespective of whether or not confidentiality obligations under German Corporate law are sufficient to prevent exchange of sensitive information, the Commission considers that the impact of the Concentration is likely to be limited. In particular, the sensitive information to which RWE might have access post-merger through its minority interest in E.ON would be very similar in nature to the type(s) of information it already has access to in the pre-merger situation as the holder of a 77% controlling interest in Innogy represented in Innogy's Supervisory Board. On the basis of the outcome of the market investigation, it is unclear whether, and if so, to what extent, any additional information resulting from E.ON's larger position downstream post-merger, compared to Innogy's pre-merger position, could give a material competitive advantage to RWE. For example, it is at least dubious that the accuracy of E.ON's energy demand projections would materially improve post-merger considering that, even if larger, E.ON would still serve a minority of the German demand ([10-20]%).
- (95) In light of the above, the Commission is of the view that the minority interest that RWE would hold in E.ON post-merger is unlikely to give rise to any vertical foreclosure effects.

C. Vertical link with Amprion

- (96) RWE jointly (together with Commerz Real AG) controls Amprion, one of the four German electricity TSOs.⁵⁹ RWE's transmission activities are vertically linked to its generation and wholesale supply business. While the link is pre-existent and transmission activities are subject to regulation, theoretically, were the Concentration to strengthen RWE's position in the generation and wholesale supply of electricity, this might increase its incentives to foreclose access to Amprion's transmission grid.
- (97) However, for the reasons set out below, the Commission considers it unlikely that vertical foreclosure effects would arise as a result of the Concentration.
- (98) First, RWE's control over Amprion is shared with Commerz Real AG. Any foreclosure strategy would require the support of Commerz Real AG which may have little, if anything, to gain from marginalising RWE's upstream competitors as, unlike RWE, it is not active in the upstream market.
- (99) Second, the incentive to foreclose upstream rivals depends on the extent to which the downstream division of the integrated company can be expected to benefit from higher prices downstream once the upstream rivals have been foreclosed. Typically the greater the market share of the merged entity downstream, the greater the base of sales on which to enjoy increased margins. The market for the wholesale supply of electricity is downstream to the market for electricity transmission⁶⁰ and, as discussed in section 5.1.5, the Concentration enhances RWE's position in the downstream market only marginally (regardless of whether

⁵⁹ See COMP/M.6225 - MOLARIS/ COMMERZ REAL/ RWE/AMPRION.

⁶⁰ In the sense that access to the transmission network is a necessary input to supply electricity at wholesale level.

the market is considered as comprising all generation or segmented between conventional and renewables generation falling under the EEG) and only temporarily.

- (100) Finally, TSOs are regulated under national law and EU regulation and subject to the obligation to grant non-discriminatory access to the grid to any supplier.⁶¹ This would further reduce the scope of any foreclosure strategy.

6. CONCLUSION

- (101) For the above reasons, the European Commission has decided not to oppose the notified operation and to declare it compatible with the internal market and with the EEA Agreement. This decision is adopted in application of Article 6(1)(b) of the Merger Regulation and Article 57 of the EEA Agreement.

For the Commission

(Signed)
Margrethe VESTAGER
Member of the Commission

⁶¹ See Form CO para 153.