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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 Where possible the information omitted has been replaced by ranges of figures or a general description.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 parties

Subject: **Case M.9587 - ENGIE/EDP Renováveis/EDPR Offshore España 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 23 January 2020, the European Commission received notification of a concentration pursuant to Article 4 of the Merger Regulation which would result from a proposed transaction by which ENGIE S.A. (“ENGIE”, France) and EDP Renováveis S.A. (“EDPR”, Spain), belonging to the EDP group (Energias de Portugal, S.A., “EDP”, Portugal), intend to acquire joint control, within the meaning of Articles 3(1)(b) and 3(4) of the Merger Regulation, of EDPR Offshore España S.L.U. (“EDPR Offshore España” or the “JV”, Spain).³ ENGIE and EDPR are designated hereinafter as the “Parties” or the “Notifying Parties”.

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

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

³ Publication in the Official Journal of the European Union No C 031, 30.1.2020, p. 7.

1. THE PARTIES

- (2) ENGIE, headquartered in France, is a global energy group active in the fields of gas, electricity and energy services.
- (3) EDPR, headquartered in Spain, is a subsidiary of EDP active in the generation of renewable energy by developing, building and operating wind farms and solar plants worldwide. EDP is active globally in the generation, distribution and supply of electricity.
- (4) EDPR Offshore España, headquartered in Spain, is a subsidiary of EDPR active in offshore windfarm activities worldwide. Post-transaction, the JV would be mainly active in the development, construction and operation of wind farms and the generation and wholesale supply of electricity.

2. THE OPERATION

- (5) The proposed transactions consists in the acquisition of joint control by ENGIE and EDPR over EDPR Offshore España.
- (6) Pursuant to a Memorandum of Understanding, signed on 21 May 2019, which sets out the Parties' shared intention to form a JV, the concentration is to be implemented by conclusion of a shareholder agreement and an investment agreement between ENGIE and EDPR. In addition, for each asset to be contributed to the JV, the Parties will enter into a Share Purchase Agreement.
- (7) The Parties intend to combine their offshore wind activities in the JV, which upon implementation of the proposed transaction would be the exclusive vehicle for all their offshore windfarm activities globally. Within the territory covering the EEA and the United Kingdom, the JV would be active in the generation and wholesale supply of electricity in Belgium, France, Poland, Portugal and the United Kingdom. The JV would also (to a lesser extent) be active in the development, construction and operation of offshore wind farms for its own use.
- (8) The JV has sufficient own staff and dedicated management (a senior management team dedicated to its day-to-day operations and an estimated [...] employees by the end of 2020), as well as financial resources for its operation and for the management of its portfolio and business interests. Furthermore, the JV would have a market presence, is not expected to have significant sale or purchase relationships with its parents and is intended to operate on a lasting basis. Therefore, the JV would be full functional.
- (9) ENGIE and EDPR will each hold 50% of the JV's shares, and they will be entitled to appoint an equal number of board directors ([...]). The board will be responsible for approving a broad catalogue of reserved matters⁴ and, given the required quorum and

⁴ Reserved Matters include approving any investment in excess of EUR [...] if such investment has been approved in the budget and EUR [...] if such investment has not been approved in the budget, approving any business plan and annual budgets, appointing and/or dismissal of any member of the management committee, and of the CEO and Chief Operating Officer, appointing directors of the boards, committee members, officers and executives. (Form CO, paragraph 35).

majority⁵ to pass board resolutions, both ENGIE and EDPR will have veto rights over the strategic decisions of the JV.

- (10) It follows that the proposed transaction would result in a concentration within the meaning of Articles 3(1)(b) and 3(4) of the Merger Regulation.

3. UNION DIMENSION

- (11) The Parties have a combined aggregate worldwide turnover of more than EUR 5 000 million.⁶ Each of them has a Union-wide turnover in excess of EUR 250 million, but they do not achieve more than two-thirds of their aggregate EU-wide turnover within one and the same Member State. The concentration has therefore a Union dimension within the meaning of Article 1(3) of the Merger Regulation.

4. RELEVANT MARKETS AND COMPETITIVE ASSESSMENT

4.1. Market Definition

- (12) Although the JV would be active in the development, construction and operation of offshore wind farms, it would only do so for its own use, and the market is therefore not affected. The only markets affected by the proposed transaction are (i) the markets for the generation and the wholesale supply of electricity in Belgium and Portugal⁷ and (ii) the market for the retail supply of electricity.

4.1.1. Generation and wholesale supply of electricity

4.1.1.1. Product market definition

(A) The Commission's past practice

- (13) In *EON/INNOGY*, the Commission defined the generation and wholesale supply of electricity as a separate product market. In that decision the Commission did not further segment the market for electricity generation and wholesale supply of electricity based on the generation sources and trading channels.⁸

⁵ Reserved Matter require the approval of at least one of the directors appointed by each shareholder. The quorum at a Board meeting will consist of four directors including two directors appointed by each of the shareholders (Form CO, paragraph 35).

⁶ Turnover calculated in accordance with Article 5 of the Merger Regulation.

⁷ The Commission received a comment related to ENGIE's strong position in the market for green certificates ("GECs") in the Flemish region. However, as the JV will not be active in this market and there are therefore no overlaps, this Decision will not discuss this market. In any case, the proposed transaction will not change ENGIE's position with regard to GECs, since it already holds shares in the Belgian project that it will contribute to the JV, and EDP only has [...] MW under construction, which will not be contributed to the JV. EDP is also not present in the market for Flemish GEC (reply to RFI of 18 February 2020).

⁸ See e.g. Case COMP/M.8870 – *EON/INNOGY*.

(B) The Notifying Parties' view

(14) The Parties do not contest the market definition in *EON/INNOGY*.⁹

(C) The Commission's assessment

(15) The market investigation in the present case confirms the market definition in Commission's previous decisions. None of the market respondents indicated that a narrower market for generation and wholesale supply of electricity through renewable offshore sources should be considered.¹⁰

(16) In light of the above considerations, in this Decision the market for generation and wholesale supply of electricity is considered to be a single market.

4.1.1.2. Geographic market definition

(A) The Commission's past practice

(17) In previous decisions, the Commission considered the market for electricity generation and wholesale supply of electricity to be national, but ultimately left open whether it could be broader in certain cases.¹¹

(B) The Notifying Parties' view

(18) The Parties do not contest this geographic delineation for Belgium but regarding Portugal, they argue that the geographic market for the generation and wholesale supply of electricity should be broader than national and also include Spain, for the following reasons: (i) Portugal and Spain have been integrating their wholesale electricity markets into a single Iberian electricity market (MIBEL); (ii) they share a common spot market operator, OMIE (since 2007) and (iii) a forward market operator, OMIP (since 2006); (iv) prices are usually similar and (v) the regulatory framework is increasingly harmonised.¹²

(C) The Commission's assessment

(19) As regards Portugal, a majority of competitors who participated in the market investigation indicated that "the wholesale electricity market to consider is the Iberian market (MIBEL)".¹³ As regards Belgium, the market investigation was inconclusive, with some market participants buying from and selling to other Member States (e.g. Germany and the Netherlands) and others exclusively active in Belgium.¹⁴

(20) In any case, for the purpose of this Decision, the geographic market definition can be left open between national and supra national, as the proposed transaction does not

⁹ Form CO, paragraph 139.

¹⁰ Replies to question 12 of Questionnaires to wholesale customers Belgium and Portugal. Replies to question 10 of Questionnaires to wholesale competitors Belgium and Portugal.

¹¹ Case COMP/M.5979 *KGHM / Tauron Wytwarzanie / JV*, para. 24; Case COMP/M.4180 – *GDF/Suez*, para. 726.

¹² Form CO, paragraph 142.

¹³ Replies to question 7 of Questionnaire to wholesale competitors in Portugal.

¹⁴ Replies to question 7 of Questionnaire to wholesale customers in Belgium.

give rise to serious doubts as to its compatibility with the internal market under any of these two alternative markets.¹⁵

4.1.2. *Retail supply of electricity*

4.1.2.1. Product market definition

(A) The Commission's past practice

- (21) In previous decisions, the Commission segmented the market for retail supply of electricity based on three categories of final customers: (i) large industrial and commercial customers, (ii) smaller industrial and commercial customers; and (iii) households.¹⁶

(B) The Notifying Parties' view

- (22) The Parties do not contest the previous definition and argue that the product market definition can be left open.¹⁷

(C) The Commission's assessment

- (23) The market investigation confirms the Commission's market definition. None of the market respondents indicated that a further segmentation for the retail supply of electricity would be appropriate.¹⁸
- (24) In light of the above considerations and of the results of the market investigation, in this Decision, the retail market for the supply of electricity will only be segmented based on different final customer groups.

4.1.2.2. Geographic market definition

(A) The Commission's past practice

- (25) In previous decisions, the Commission considered the market for retail supply of electricity to be national. For the segments of retail supply of electricity to small industrial and commercial customers and to households, the Commission left open

¹⁵ In case the geographic market was defined as Iberian, no affected market would arise. Therefore, this Decision will only discuss the potential impacts of the proposed transaction on the Portuguese market. If the market was broader than Belgium to cover also the Netherlands and Luxembourg, the market would be affected, but the combined market shares of the Parties would be significantly lower than in the case for the Belgian national market (ENGIE: [30-40]% generation and [30-40]% installed capacity and EDP: [0-5]% generation and [0-5]% installed capacity in Benelux. For comparison, the Parties' combined market shares in a Belgian national market are [70-80]% in installed capacity and [60-70]% in generation). If the market was broader than Belgium and included France and Germany, no affected market would arise (Reply to RFI from 18 February 2020).

¹⁶ In relation to Belgium see Case COMP/M.5549 *EDF/Segebel*, para. 132, Case COMP/M.8855; *Otary/Eneco/Electrabel/JV*, paras. 27-28.

¹⁷ Form CO, paragraphs 144-146.

¹⁸ Replies to question 12 of Questionnaires to wholesale customers Belgium and Portugal. Replies to question 10 of Questionnaires to wholesale competitors Belgium and Portugal.

whether the market for retail supply of electricity could be regional (sub-national) in certain Member States, including Belgium but not Portugal.¹⁹

(B) The Notifying Parties' view

(26) The Parties do not contest the previous definition by the Commission.

(C) The Commission's assessment

(27) With regard to large industrial and commercial customers, the market appears to be national in both Belgium and Portugal. The market investigation examined whether the market could be segmented between regions (Wallonia, Flanders and Brussels in the case of Belgium) for the retail supply of electricity to small industrial and commercial customers and households. The replies to the market investigation suggested that such a segmentation of the market was not warranted.²⁰

(28) For the purpose of this Decision, the Commission will leave the market definition open while focusing its analysis on the national level, as any difference in the market shares between national and regional level do not affect the competitive analysis.²¹

4.2. Competitive Assessment

(29) Under Article 2(2) and (3) of the Merger Regulation, the Commission must assess whether a proposed concentration would significantly impede effective competition in the internal market or in a substantial part of it, in particular through the creation or strengthening of a dominant position.

(30) In this respect, a merger may entail horizontal and/or vertical effects.

(31) The proposed transaction gives rise to two horizontally affected markets:

- The market for electricity generation and wholesale supply of electricity in Belgium in which ENGIE, EDP and the JV would be active.
- The market for electricity generation and wholesale supply of electricity in Portugal in which EDP, ENGIE and the JV would be active.

(32) The proposed transaction also gives rise to six potential vertical relationships:

- In Belgium, the market upstream for electricity generation and wholesale supply of electricity in which ENGIE, EDP and the JV would be active and, downstream, the markets for retail supply of electricity to (i) large industrial and commercial customers, (ii) small industrial and commercial customers and (iii) households in which ENGIE is active.

¹⁹ See Case COMP/M.6984 – *EPH/Stredoslovenska Energetika*, para. 18; Case COMP/M.5827 – *Elia/IFM/50 Hertz*, para. 24; Case COMP/M.5496 – *Vattenfall/ Nuon Energy*, para. 15; and Case COMP/M.5467 – *RWE/Essent*, paras. 283-284. In relation to Belgium, see Case COMP/M.4180 – *Gaz de France/Suez*, paras. 738-743; and Case COMP/M.5549 – *EDF/Segebel*, para. 138.

²⁰ Replies to question 8 of Questionnaire to retail competitors in Portugal. Replies to question 8 of Questionnaire to retail competitors in Belgium.

²¹ In 2018, ENGIE had a market share of [60-70]% in the Brussels region, [40-50]% in Flanders and [40-50]% in Wallonia.

- In Portugal, the market upstream for electricity generation and wholesale supply of electricity in which EDP, ENGIE and the JV would be active and, downstream, the markets for retail supply of electricity to (i) large industrial and commercial customers, (ii) small industrial and commercial customers and (iii) households in which EDP, parent company of EDPR, is active.
- (33) Other than the affected markets identified in Belgium and Portugal, in other Member States where the JV is to be active (France and Poland),²² no affected markets arise.²³

4.2.1. *Horizontal Overlaps*

4.2.1.1. The market for electricity generation and wholesale supply of electricity in Belgium

(A) The Notifying Parties' view

- (34) First, the Notifying Parties submit that the proposed transaction would not materially alter the current market structure and the Parties' competitive incentives. The JV's only asset in Belgium would be a minority shareholding in the offshore site Seamade, which has an electricity generation capacity of 487.2 MW, representing less than 4% of the total Belgian capacity.²⁴ ENGIE currently holds 17.5% of Seamade, a minority interest that would be contributed to the JV.²⁵ In addition, EDP would own just [...] MW of additional generation capacity in Belgium (not offshore and still under construction), which would not be contributed to the JV.²⁶
- (35) Second, despite the Parties' combined market share ([70-80]% in installed capacity and [60-70]% in generation), given the small increment ([0-5]% and [0-5]%) brought by the proposed transaction, the Notifying Parties argue that the proposed transaction would not raise serious doubts as to its compatibility with the internal market. There are also a number of credible competitors on this market, e.g. EDF Luminus ([10-20]% market share for installed capacity and [10-20]% for generation).²⁷
- (36) Third, the Parties argue that ENGIE's position in the Belgian electricity generation and wholesale market, where it is present through its subsidiary Electrabel, will continue to decrease in the future. The position of incumbent Electrabel has been declining due to new entrants following liberalisation of the electricity market. In addition, Electrabel faces competition from suppliers of alternative energy and its market share is expected to further decline after the closure of a number of nuclear power plants in the next ten years.²⁸

²² In addition to the United Kingdom.

²³ Form CO, paragraph 207.

²⁴ Form CO, paragraph 195.

²⁵ Form CO, table 3.

²⁶ Form CO, paragraph 180.

²⁷ Form CO, Tables 14 and 15.

²⁸ Form CO, paragraph 189.

- (37) Finally, the Parties submit that imports of electricity, particularly from France and Germany, pose additional competitive constraints.²⁹

(B) The Commission's assessment

- (38) The market investigation confirmed that the proposed transaction would not raise serious doubts as to its compatibility with the internal market and there were no substantiated complaints. A clear majority of participants in the market investigation expect the impact of the proposed transaction to be neutral,³⁰ with prices likely to remain the same.³¹ One wholesale customer also confirmed in the market investigation that they receive electricity from outside³² Belgium.
- (39) Given the negligible position of the JV (with a minority stake in a single wind farm reflecting less than 5% of the capacity on the market), the very small increment in market shares (of [0-5]% reflecting the [...] MW capacity of the EDP generation in Belgium), the other market players and the competitive constraint coming from imports, the Commission concludes that the proposed transaction does not raise serious doubts as to its compatibility with the internal market.

4.2.1.2. The market for electricity generation and wholesale supply of electricity in Portugal

(A) The Notifying Parties' view

- (40) Despite the high combined market share ([60-70]% in installed capacity and [50-60]% in generation), given the increment ([5-10]% and [5-10]% respectively), the Notifying Parties argue that the proposed transaction would not raise serious doubts as to its compatibility with the internal market.
- (41) Similar to the Belgian market, the incumbent EDP has continuously lost market share to competitors both in the generation and in the wholesale supply of electricity.³³ Competitors on this market include Trustenergy ([5-10]% market share for installed capacity and [5-10]% for generation), Endesa ([0-5]% market share for installed capacity and [0-5]% for generation), Finenergy ([0-5]% market share for installed capacity) and Iberwind ([0-5]% market share for installed capacity).³⁴
- (42) Moreover, the electricity generation capacity of the JV in Portugal is [...] MW, which represents less than 1% of the total Portuguese capacity. This impact would be

²⁹ Form CO, paragraph 192.

³⁰ Replies to question 9 of Questionnaire to retail customers in Belgium.
Replies to question 10 of Questionnaire to retail competitors in Belgium.
Replies to question 11 of Questionnaire to wholesale customers in Belgium.
Replies to question 9 of Questionnaire to wholesale competitors in Belgium.

³¹ Replies to question 8 of Questionnaire to retail customers in Belgium, question 8.
Replies to question 9 of Questionnaire to wholesale customers in Belgium.
Replies to question 10 of Questionnaire to wholesale customers in Belgium.
Replies to question 8 of Questionnaire to wholesale competitors in Belgium.

³² Reply to question 7 of Questionnaire to wholesale customers in Belgium.

³³ Form CO, paragraph 196.

³⁴ Form CO, Tables 16 and 17.

even smaller in the future, in view of the increasing number of wind park projects under development in Portugal.³⁵

- (43) Finally, ENGIE and EDP already jointly own the Portuguese offshore site that they will contribute, WFA (54.4% by EDPR and 25% by ENGIE).³⁶
- (44) On that basis, the Notifying Parties submit that the proposed transaction would therefore not materially alter the current market structure and the Parties' competitive incentives in the market for electricity generation and wholesale supply of electricity in Portugal.

(B) The Commission's assessment

- (45) The market investigation confirmed that the proposed transaction would not raise serious doubts as to its compatibility with the internal market and there were no substantiated complaints. A clear majority of participants in the market investigation expect the impact of the proposed transaction to be neutral,³⁷ with prices likely to remain the same.³⁸ A number of replies also indicated that the Parties face competitive pressure from imports from Spain.³⁹ A competitor described the wholesale electricity market in Portugal (and Spain) as "a transparent market with a high level of competition".⁴⁰
- (46) In the light of the results of the market investigation, the Commission concludes that the proposed transaction does not raise serious doubts as to its compatibility with the internal market for the following reasons: (i) the negligible position of the JV in the market (with a stake in a single wind farm reflecting less than 1% of the capacity on the market), (ii) the very small increment in market shares (of [5-10]% reflecting the position of ENGIE in generation in Portugal), (iii) the presence of other market players and the competitive constraint coming from imports from Spain.

³⁵ Form CO, paragraph 201.

³⁶ Form CO, paragraph 199.

³⁷ Replies to question 9 of Questionnaire to retail customers in Portugal.
Replies to question 10 of Questionnaire to retail competitors in Portugal.
Replies to question 11 of Questionnaire to wholesale customers in Portugal.
Replies to question 9 of Questionnaire to wholesale competitors in Portugal.

³⁸ Replies to question 8 of Questionnaire to retail customers in Portugal.
Replies to question 9 of Questionnaire to wholesale customers in Portugal.
Replies to question 9 of Questionnaire to retail competitors in Portugal.
Replies to question 8 of Questionnaire to wholesale competitors in Portugal.

³⁹ Replies to question 7 of Questionnaire to retail customers in Portugal.
Replies to question 8 and 9 of Questionnaire to wholesale competitors in Portugal.

⁴⁰ Reply to question 8 and 9 of Questionnaire to wholesale competitors in Portugal.

4.2.2. *Vertical relationships*

4.2.2.1. The generation and wholesale (upstream) and retail (downstream) sale of electricity in Belgium

- (47) In Belgium, three vertically affected markets arise because of the activities of ENGIE, EDP and the JV upstream in the market for electricity generation and wholesale supply of electricity, and ENGIE's presence downstream in:
- (a) The market for the retail supply of electricity to large industrial and commercial customers,
 - (b) The market for the retail supply of electricity to small industrial and commercial customers, and
 - (c) The market for the retail supply of electricity to households.
- (48) As outlined in paragraphs (34) to (35) above, at the upstream level on the market for electricity generation and wholesale supply of electricity in Belgium, in 2018 ENGIE had a market share of [60-70]% (in terms of generation) and of [60-70]% (in terms of installed capacity), while EDP had a market share of [0-5]% (in terms of generation) and of [0-5]% (in terms of installed capacity). The JV would have a minority share in a wind farm with a market share of [0-5]% (in terms of generation) and of [0-5]% (in terms of installed capacity). The combined market share at the upstream level was therefore relatively high at [60-70]% (in terms of generation) and [70-80]% (in terms of installed capacity), but with the JV representing less than 5% ([0-5]% in terms of installed capacity and [0-5]% in terms of generation).
- (49) At the downstream level, i.e. on the market for retail supply of electricity in Belgium, only ENGIE is active, with a market share of approx. [40-50]% for large industrial and commercial customers,⁴¹ [40-50]% for small industrial and commercial customers,⁴² and [40-50]% for households in 2018.⁴³
- (A) No input foreclosure
- (50) The Parties submit that these markets are affected only technically, since the vertical link is purely potential: they confirmed that they do not foresee that the JV will sell to electricity retailers at all (the JV will sell either to wholesalers or to industrial and commercial final customers).⁴⁴ In any event, basing the competitive analysis of vertical relationships for the affected markets on the assumption that the JV could sell its output to electricity retailers, the Parties submit that the proposed transaction does not lead to an input foreclosure risk in the Belgian market.
- (51) The Commission considers that the proposed transaction would not lead to an input foreclosure risk, since the Parties will neither have the ability nor the incentive to foreclose rival electricity retailers in Belgium.

⁴¹ Form CO, Table 19.

⁴² Form CO, Table 20.

⁴³ Form CO, Table 21. See also footnote 21 above for ENGIE's market shares on a regional level within Belgium.

⁴⁴ Form CO, paragraphs 205-206.

- (52) First, the proposed transaction would not fundamentally alter the current market structure and the Parties' competitive position and incentives. ENGIE already holds a minority interest in the offshore site Seamade in Belgium that it will contribute to the JV.⁴⁵ The vertical link with respect to ENGIE downstream is therefore pre-existing, and is not affected by the proposed transaction.
- (53) Second, with regard to EDP (which is the new element in the vertical link), its market share in Belgium at the upstream level (i.e. in the national markets for generation and wholesale supply of electricity) is negligible, and will remain low after the proposed transaction.
- (54) Third, at the downstream level, i.e. on national markets for the retail supply of electricity, only ENGIE is currently active. EDP is not active downstream and therefore, regardless of its competitive position upstream, it will have no incentive to allow the JV to foreclose electricity retailers from the JV's output, since that would imply a pure profit loss (not compensated by benefits from a hypothetical expansion at the downstream level, which would only benefit ENGIE). The creation of the JV would if anything reduce their incentives to foreclose rival retailers from electricity sourcing.
- (55) Fourth, the JV would hold a minority share in less than 4% of installed capacity in Belgium (the JV's offshore wind farm is under construction, and therefore has no electricity output yet).⁴⁶ The proposed transaction would not enable the Parties to foreclose rivals. Even if the Parties decided not to sell any of the JV's output to third parties, electricity purchasers would have access to other supply sources since the JV accounts only for a very minor part of the electricity generated in Belgium.
- (56) Finally, the predominant view among the respondents of the market investigation suggests that the proposed transaction will not have any impact,⁴⁷ and the Commission did not receive any substantiated complaint. The majority of customers also mentioned possible alternative retail electricity suppliers, such as EDF Luminus, Lampiris, RWE and Axpo.⁴⁸
- (57) The Commission therefore considers that the proposed transaction does not raise serious doubts about its compatibility with the internal market as the Parties will have neither the ability nor the incentive to foreclose rival electricity retailers in Belgium.

(B) No customer foreclosure

- (58) The Parties submit that post-transaction they would neither have the ability nor the incentive to foreclose customers as a result of the proposed transaction. They stress in particular that there would remain sufficient alternative players in the market for the retail supply of electricity for the JV's competitors to sell their electricity output. In addition, they point out that the Parties' market shares in the retail supply of electricity have been decreasing at a steady rate in the last few years in view of new

⁴⁵ Form CO, Table 3.

⁴⁶ Form CO, paragraph 190. The Parties also expect that their market shares will decrease in the next few years.

⁴⁷ See footnotes 30 and 31.

⁴⁸ Replies to question 7 of Questionnaire to retail customers in Belgium.

entrants on these markets. ENGIE's market share declined from [40-50]% in 2016 to [40-50]% in 2017.⁴⁹

- (59) Moreover, the JV would have, in terms of installed capacity, market shares of less than 4% in Belgium. Even if ENGIE bought all the electricity produced by the JV, it would still need to buy significant volumes from other sources, given its downstream market share (hence the volume of input that it requires).
- (60) The predominant view among the respondents of the market investigation suggests that the proposed transaction would not have any impact on the market,⁵⁰ and the Commission did not receive any substantiated complaint.
- (61) The Commission's position is therefore that the proposed transaction would not lead to customer foreclosure risks, since the Parties would neither have the ability nor the incentive to foreclose rival electricity generators and wholesalers in Belgium.

4.2.2.2. The generation and wholesale (upstream) and retail (downstream) sale of electricity in Portugal

- (62) In Portugal, three vertically affected markets arise because of the activities of EDP, ENGIE and the JV upstream in the market for electricity generation and wholesale supply of electricity, and EDP's presence downstream in:
 - (a) The market for the retail supply of electricity to large industrial and commercial customers,
 - (b) The market for the retail supply of electricity to small industrial and commercial customers, and
 - (c) The market for the retail supply of electricity to households.
- (63) At the upstream level, i.e. on the market for electricity generation and wholesale supply of electricity in Portugal, in 2018 EDP had a market share of [40-50]% (in terms of generation) and of [50-60]% (in terms of installed capacity), while ENGIE had a market share of [5-10]% (in terms of generation) and of [5-10]% (in terms of installed capacity). The JV had a market share of [0-5]% (in terms of generation) and of [0-5]% (in terms of installed capacity). The combined market share at the upstream level was therefore relatively high at [50-60]% (in terms of generation) and [60-70]% (in terms of installed capacity), but with the JV representing less than [0-5]% (in terms of installed capacity) and [0-5]% (in terms of generation).⁵¹
- (64) At the downstream level, i.e. on the market for retail supply of electricity in Portugal, only EDP is active, with a market share of approx. [20-30]% for large industrial and commercial customers, [40-50]% for small industrial and commercial customers, and [80-90]% for households in 2018.⁵²

⁴⁹ Form CO, paragraph 226.

⁵⁰ See footnotes 30 and 31.

⁵¹ Form CO, Table 16 (installed capacity) and Table 17 (generation).

⁵² Form CO, Table 26.

(A) No input foreclosure

- (65) The Parties submit that these markets are affected only technically, since the vertical link is purely potential: they confirmed that they do not foresee that the JV would sell to electricity retailers at all (the JV would sell either to wholesalers or to industrial and commercial final customers).⁵³ In any event, basing the competitive analysis of vertical relationships for the affected markets on the assumption that the JV could sell its output to electricity retailers, the Parties submit that the proposed transaction would not lead to an input foreclosure risk in the Portuguese market.
- (66) The Commission considers that the proposed transaction will not lead to an input foreclosure risk, since the Parties would neither have the ability nor the incentive to foreclose rival electricity retailers in Portugal.
- (67) First, the proposed transaction would not fundamentally alter the current market structure and the Parties' competitive position and incentives. The Portuguese offshore site that ENGIE and EDP will contribute to the JV, WFA, is already partially jointly owned by EDPR (54.4% shareholding) and ENGIE (25% shareholding).⁵⁴ The vertical link with respect to EDP downstream is therefore pre-existing, and is not affected by the proposed transaction.
- (68) Second, ENGIE's Portuguese market shares upstream are small, and will remain low after the proposed transaction.⁵⁵
- (69) Third, ENGIE is not active downstream and therefore, regardless of its competitive position upstream, it will have no incentive to allow the JV to foreclose electricity retailers from the JV's output, since that would imply a pure profit loss (not compensated by benefits from a hypothetical expansion at the downstream level, which would only benefit ENGIE). The creation of the JV would if anything reduce their incentives to foreclose rival retailers from electricity sourcing.
- (70) Fourth, the JV would hold shares representing less than 1% of the installed capacity in Portugal.⁵⁶ The proposed transaction will not enable the Parties to foreclose rivals. Even if the Parties decided not to sell any of the JV's output to third parties, electricity purchasers would have access to other supply sources since the JV accounts only for a very minor part of the electricity generated in Portugal.
- (71) Finally, the predominant view among the respondents of the market investigation suggests that the proposed transaction would not have any impact,⁵⁷ and the Commission did not receive any substantiated complaint.
- (72) The Commission therefore considers that the proposed transaction does not raise serious doubts about its compatibility with the internal market as the Parties will have neither the ability nor the incentive to foreclose rival electricity retailers in Portugal.

⁵³ Form CO, paragraphs 205-206.

⁵⁴ Form CO, Table 3.

⁵⁵ Form CO, paragraph 186.

⁵⁶ Form CO, paragraph 176.

⁵⁷ See footnotes 37 and 38.

(B) No customer foreclosure

- (73) The Parties submit that they would neither have the ability nor the incentive to foreclose customers as a result of the proposed transaction. They stress in particular that there will remain sufficient alternative players in the market for the retail supply of electricity for the JV's competitors to sell their electricity output. In addition, they point out that the parents' market shares in the retail supply of electricity have been decreasing at a steady rate in the last few years in view of new entrants on these markets. EDP's market share in the downstream market in Portugal dropped from [40-50]% in 2016 to [40-50]% in 2018.⁵⁸
- (74) Moreover, the JV would have, in terms of installed capacity, market shares of less than 1% in Portugal. Even if EDP bought all the electricity produced by the JV, they would still need to buy significant volumes from other sources, given its downstream market shares (hence the volume of input that EDP requires).
- (75) The predominant view among the respondents of the market investigation suggests that the proposed transaction would not have any impact,⁵⁹ and the Commission did not receive any substantiated complaint.
- (76) The Commission's position is therefore that the proposed transaction will not lead to customer foreclosure risks, since the Parties would neither have the ability nor the incentive to foreclose rival electricity generators and wholesalers in Portugal.

5. CONCLUSION

- (77) 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
Executive Vice-President

⁵⁸ Form CO, paragraph 226.

⁵⁹ See footnotes 37 and 38.