EUROPEAN COMMISSION

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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 Where possible the information omitted has been replaced by ranges of figures or a general description.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.9929 — EDP/Viesgo**
Commission decision pursuant to Article 6(1)(b) of Council Regulation No 139/2004[1] and Article 57 of the Agreement on the European Economic Area[2]

Dear Sir or Madam,

(1) On 23 September 2020**,** the European Commission received notification of a proposed concentration pursuant to Article 4 of the Merger Regulation by which Energias de Portugal S.A. ("EDP", Portugal), acquires within the meaning of Article 3(1)(b) of the Merger Regulation indirect sole control of the whole of Viesgo Infraestructuras Energéticas, S.L. ("Viesgo", Spain) (the "Transaction"). The concentration is accomplished by way of purchase of shares.[3] EDP and Viesgo are designated hereinafter as the "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 321, 29.09.2020, p. 45.

Commission européenne, DG COMP MERGER REGISTRY, 1049 Bruxelles, BELGIQUE
Europese Commissie, DG COMP MERGER REGISTRY, 1049 Brussel, BELGIË

Tel: +32 229-91111. Fax: +32 229-64301. E-mail: COMP-MERGER-REGISTRY@ec.europa.eu.

1. THE PARTIES

(2) EDP is a vertically integrated utility company and the largest generator, distributor and supplier of electricity in Portugal, with significant operations in the electricity sector in Spain. In total EDP is present in 19 countries in 4 continents and is present throughout the electricity value chain and in the gas markets.

(3) Viesgo's main activities are the production and supply of electricity from renewable sources in Spain and Portugal and the distribution of electricity in Spain. Viesgo is currently ultimately controlled by Macquarie Infrastructure and Real Assets Europe Ltd. ("MIRAEL", United Kingdom).

2. THE CONCENTRATION

2.1. Multiple steps

(4) The Transaction is accomplished by way of purchase of shares of Viesgo accompanied by the transfer of various assets of EDP's distribution businesses owned by E-Redes (ultimately controlled by EDP) into Viesgo. On 15 July 2020, EDP, Viesgo and MIRAEL signed the Amended and Restated Framework Agreement ("Framework Agreement"), governing the steps necessary for the execution of a number of operations, as well as the conclusion of the concerned Sale and Purchase Agreements ("SPAs"), by which EDP acquires control of Viesgo leading to the acquisition of both its distribution and generation businesses ("Viesgo Distribution Business" and "Viesgo Generation Business").

2.2. Sole control

(5) The Transaction will change the situation of sole control of Viesgo by MIRAEL to sole control by EDP, with MIRAEL retaining an indirect non-controlling minority shareholding in Viesgo's distribution business.

(6) EDP will exert sole control over Viesgo's distribution business. Resolutions of the general meeting of shareholders shall require the favourable vote of the simple majority of the share capital of Viesgo. Furthermore, for Board decisions, MIRAEL will have a maximum of 1/3 of the Board members,[4] while decisions of the Board of directors will have to be taken with the favourable vote of more than 50% of the directors. Its minority shareholding confers on MIRAEL minority protection rights for specific decisions requiring its approval. However, these decisions do not relate to strategic decisions determining the commercial policy of Viesgo such as the business plan, the budget, any major investment or the appointment of senior management.

2.3. Single concentration

(7) The Framework Agreement regulates the conditions, procedure and steps necessary for the execution of all the different parts of the Transaction, which constitute one

[4] The Board of directors will be composed of a number of members [Details of the Shareholders' Agreement]directors. [Details of the Shareholders' Agreement] directors will be appointed by EDP and [Details of the Shareholders' Agreement] directors will be appointed by MIRAEL. [Details of the Shareholders' Agreement].

single concentration for merger control purposes for the following reasons. First, the Framework Agreement and the SPAs were signed simultaneously on 15 July 2020. Second, the SPAs of the respective parts of the Transaction are closely connected in that they formed part of the Framework Agreement entered into between EDP and Viesgo (amongst other parties). Third, the undertakings participating in EDP's acquisition of control over the Viesgo Distribution Business and the Viesgo Generation Business are the same (EDP and Viesgo). The fact that MIRAEL retains a minority non-controlling stake in the distribution business does not impact this conclusion, in line with paragraphs 41 to 44 of the Commission Consolidated Jurisdictional Notice ("CJN")[5]. Fourth, the fact that there is only a single concentration comprising different agreements is also reflected in EDP's press release,[6] which states that the acquisition is unitary in nature.[7]

3. EU DIMENSION

(8) The undertakings concerned have a combined aggregate worldwide turnover of more than EUR 5 billion (EDP: [10,000-15,000] EUR million; Viesgo: EUR [200-400] million). The aggregate Community-wide turnover of each of them exceeds EUR 250 million (EDP: [10,000-15,000] EUR million; Viesgo: [200-400] EUR million), and the undertakings concerned do not achieve more than two-thirds of their Community-wide turnover in one and the same Member State. The notified operation therefore has an EU dimension within Article 1(2) of the Merger Regulation.

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5 Official Journal C 95, 16.04.2008, p. 1.

6 According to the press release: "*Under the terms of the agreement, EDP's Spanish electricity distribution subsidiary, ERedes, and Viesgo's electricity distribution units, Viesgo Distribución and Begasa, with a total RAB of €1.8 billion (post-Lesividad) and EBITDA of €320 million as of 31 December 2019, will be owned 75.1% by EDP and 24.9% by MIRA. Also, as part of the transaction, EDP will, through its 82.6%-owned subsidiary EDP Renováveis, S.A. ("EDPR"), acquire 100% of the renewables business of Viesgo, which comprises 24 wind farms and two mini hydro power plants located throughout Spain and Portugal representing a total of over 500 MW of installed net capacity, for an Enterprise value of €565 million. EDP will also acquire Viesgo's two thermal generation plants in the south of Spain, which carry potential interconnection rights under the European Union's "Green Deal Investment Plan and Just Transition Mechanism" following completion of their decommissioning.*"

7 According to the press release: "*The Viesgo transaction coupled with the right issue represents a unique investment opportunity for EDP and is fully aligned with EDP's equity story focused on growth in renewables and networks, in particular:*

- *Enhances EDP's exposure to electricity networks and renewables, critical enablers of the energy transition with strong long-term growth prospects.*
- *More than doubles EDP's presence in electricity distribution in Spain with perpetual licenses and regulatory visibility until 2025.*
- *Further reinforces EDP's position as leading global renewables player with a portfolio of high-quality assets with strong resource and extension/repowering potential, reinforcing EDP's commitment with investments in Portugal and the remaining portfolio.*
- *Strengthens EDP's business risk profile by increasing EDP's exposure to regulated networks.*
- *Maintains EDP's solid balance sheet and credit metrics.*
- *Creates long-term value for shareholders by being accretive from both an earnings per share and cash flow perspective."*

4. ANALYSIS

(9) The Parties are both active in the following markets (i) the markets for generation and wholesale supply of electricity in Spain and Portugal, and (ii) the grid-wide markets for the distribution of electricity in Spain.

(10) Against this background, the Transaction results in one horizontally affected market, namely the Portuguese market for generation and wholesale supply of electricity.[8]

(11) The activities of the Parties result in the following vertically affected markets: (i) the markets for the grid-wide distribution of electricity in Portugal (upstream)[9] and the market for generation and wholesale supply of electricity in Portugal (downstream) and (ii) the markets for the grid-wide distribution of electricity in Spain (upstream) and the market for generation and wholesale supply of electricity in Spain (downstream).

4.1. Product and geographic market definition

4.1.1. Generation and wholesale supply of electricity

(12) The Commission has consistently defined the market for the generation and wholesale supply of electricity as encompassing the domestic generation of electricity in power stations within a certain geographic market, traded on the wholesale market, as well as electricity physically imported into that geographic market via interconnectors, and irrespective of the different sources of electric energy[10] within the wholesale electricity market.[11]

(13) In previous decisions, the Commission has taken the view[12] that generation and wholesale supply of electricity are a single relevant product market because the generation of electricity is not an autonomous market activity from its wholesale supply.[13]

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8 In the Spanish market for generation and wholesale supply of electricity, the Parties' combined market share in 2019 was [5-10]% in terms of capacity and [5-10]% in terms of production. The distribution markets are grid-wide in scope and one distribution grid is separate and not substitutable with distribution through another (see Section 4.1.2), therefore there can be no overlap between the distribution activities of the Parties in Spain.

9 Distribution networks are a necessary input for generators to be able to supply electricity, and generators pay network charges to the grid operator to which they are connected. Therefore, distribution grids are upstream to the generation and wholesale supply market.

10 Gas fired, coal fired, nuclear, hydroelectric power stations, wind farms or others.

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

12 COMP/M.6984 – EPH/Stredoslovenska Energetika; COMP/M.6540 – Dong Energy Borkumriffgrund I Holdco/Boston Holding/Borkum Riffgrund I Offshore Windpark; COMP/M.6225 – Molaris/Commerz Real/RWE/Amprion; COMP/M.5979 – KGHM/Tauron Wytwarzanie/JV.

13 The Commission has also considered a distinction between wholesale supply on the one hand and balancing and ancillary services on the other hand, and has taken the view that the market for the provision of balancing and ancillary services is national in scope (COMP/M.7927 – EPH/ENEL/SE). However, the Transaction does not give rise to any affected market in the provision of ancillary and balancing services in Spain or Portugal.

(14) The Commission has generally defined the geographic market for the generation and wholesale supply of electricity as national in scope.[14]The Parties do not contest the Commission's practice.

(15) In view of the Commission's practice, and in the absence of evidence to the contrary, for the purposes of this decision, the Commission retains the market definition identified above, that is the market for the generation and wholesale supply of electricity, which is national in scope.

4.1.2. Distribution of electricity

(16) In previous decisions,[15] the Commission has identified two separate markets for the transportation of electricity: transmission and distribution.[16] For the competitive assessment of the Transaction the distribution market is the only relevant, because the transmission is not an affected market.

(17) In relation to distribution of electricity, in previous decisions, the Commission has identified a separate market for the distribution of electricity, namely the operation and management of the lower voltage grids.[17]

(18) For the distribution of electricity, the Commission has previously considered that the relevant geographic market is the territory covered by a relevant distribution network forming a connected grid. Similarly to other customer distribution channels one distribution grid is separate and not substitutable with distribution through another grid.[18]

(19) The Parties agree with the Commission's practice.

(20) In view of the Commission's practice, and in the absence of evidence to the contrary, for the purposes of this decision, the Commission will retain the market definition identified above for the distribution of electricity, namely the operation and management of the lower voltage grids, which is grid-wide in scope.

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

15 COMP/M.7927 – EPH/ENEL/SE, para. 21; COMP/M.5467 – RWE/EssentEssent, para. 179; COMP/M.4238 – E.ON/Prazskà plynárenská, para. 18.

16 According to Articles 2(3) and 2(5) of Directive 2009/72/EC of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC (OJ L 211, 14.8.2009, p. 55–93), "transmission" means the transport of electricity on the extra high-voltage and high-voltage interconnected system with a view to its delivery to final customers or to distributors, but does not include supply, while "distribution" means the transport of electricity on high-voltage, medium-voltage and low-voltage distribution systems with a view to its delivery to customers, but does not include supply.

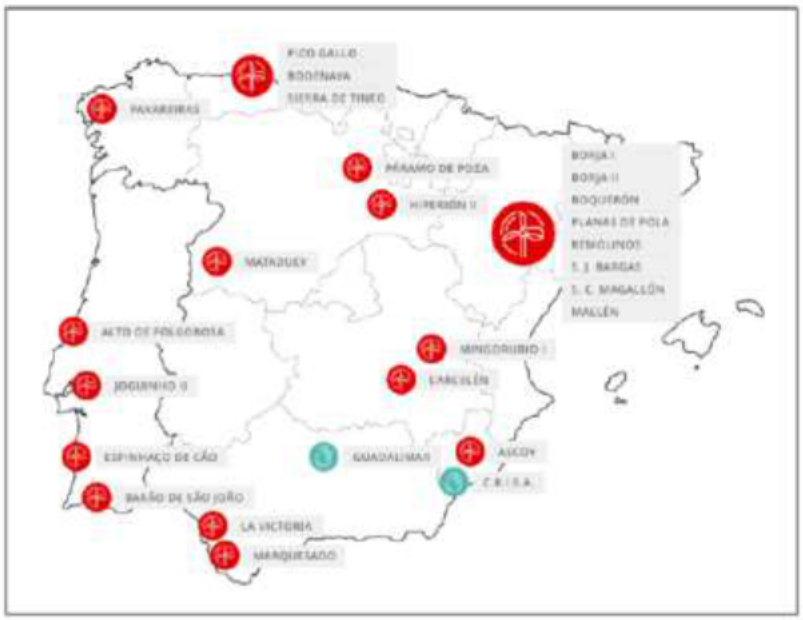
17 COMP/M.5827 – Elia/IFM/50Hertz, para. 18; COMP/M.5467 – RWE/Essent, para. 179, 440.

18 COMP/M.5827 – Elia/IFM/50Hertz, para. 23; COMP/M. 5467 -RWE / ESSENT para 21; COMP/M.4238 – E.ON/Prazskà plynárenská, para. 19; COMP/M.3440 – ENID/EDP/GDP, para. 75.

4.2. Competitive assessment

4.2.1. Horizontal overlaps

(21) The map below shows the location of Viesgo's generation assets in Spain and Portugal (in red wind farms, in blue hydraulic plants).[19]



(22) The Portuguese market for the generation and wholesale supply of electricity is horizontally affected due to the existing leading position of EDP in this market, resulting in a combined market share for the Parties of [50-60]% in terms of capacity and [40-50]% in terms of production, however with a market share increment [0-5]% both in terms of capacity and production.

Table 1: Portuguese market for generation and wholesale supply of electricity (2019, volume)

	Capacity		Production	
	Volume (MW)	%	Volume (GWh)	%
EDP	[...]	[50-60]	[...]	[40-50]
Viesgo	[...]	[0-5]	[...]	[0-5]
Combined	[...]	[50-60]	[...]	[40-50]
TrustEnergy	[...]	[10-20]	[...]	[10-20]
Finerge	[...]	[5-10]	[...]	[0-5]
Endesa	[...]	[0-5]	[...]	[5-10]
Iberwind	[...]	[0-5]	[...]	[0-5]
Other	[...]	[20-30]	[...]	[20-30]
Market size	[...]	100	[...]	100

Source: Form CO, paragraph 195

(23) Considering that little increment, the Transaction will not result in a significant change in the structure of the market, on which Viesgo does not exercise any significant competitive pressure.

[19] As part of Viesgo's strategy to focus in renewables energy, Viesgo will be closing of the two coal-fired power plants: Puente Nuevo already ceased operations and Los Barrios in Cadiz will stop producing in 2021.

(24) The above conclusion would not change even if one would take into account only the segment of the generation and wholesale supply of electricity through renewable sources. This is so, even though it should be noted that the above-mentioned market segment has never been retained in the Commission's practice as a separate market. Under such an analysis, the Transaction would result in a combined market share for the Parties of [50-60]% in terms of renewable capacity and [40-50]% in terms of renewable production, with Viesgo's market share also being [0-5]% both in terms of renewable capacity and production.

Table 2: Portuguese market for the generation and wholesale supply of electricity (2019, volume)

	Renewable capacity		Conventional capacity		Renewable production		Conventional production	
	Volume (MW)	Market share (%)	Volume (MW)	Market share (%)	Volume (GWh)	Market share (%)	Volume (GWh)	Market share (%)
EDP	[...]	[50-60]	[...]	[50-60]	[...]	[40-50]	[...]	[40-50]
Viesgo	[...]	[0-5]	[...]	[0-5]	[...]	[0-5]	[...]	[0-5]
Combined	[...]	[50-60]	[...]	[50-60]	[...]	[40-50]	[...]	[40-50]
TrustEnergy	[...]	[0-5]	[...]	[20-30]	[...]	[0-5]	[...]	[20-30]
Finergie	[...]	[5-10]	[...]	[0-5]	[...]	[5-10]	[...]	[0-5]
Endesa	[...]	[0-5]	[...]	[10-20]	[...]	[0-5]	[...]	[10-20]
Iberwind	[...]	[5-10]	[...]	[0-5]	[...]	[5-10]	[...]	[0-5]
Other	[...]	[20-30]	[...]	[10-20]	[...]	[30-40]	[...]	[10-20]
Market size	[...]	100	[...]	100	[...]	100	[...]	100

Source: Form CO, paragraph 204

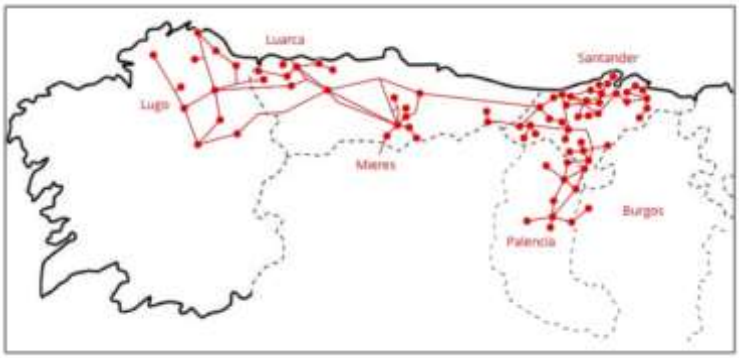
(25) The majority of the respondents to the Commission's market investigation also supported the conclusion that the Transaction will not have a significant impact on the Portuguese market for the generation and wholesale supply of electricity, given that the increase in market share is very low.[20]

(26) In view of the above, the Commission considers that the Transaction does not give rise to serious doubts as to its compatibility with the internal market in relation to the Portuguese market for generation and wholesale supply of electricity.

4.2.2. Vertical relationships

(27) Viesgo currently controls electricity distribution networks in Spain consisting of grids totalling 31,411 km, which are situated mainly in Cantabria, and some of in Asturias, Galicia and Castilla y León. The map below shows the location of Viesgo's distribution networks in Spain.

[20] Replies to Commission's emails of 24 September 2020.



(28) Viesgo is not active in the Portuguese market for the distribution of electricity.

(29) Due to EDP's (both in Spain and Portugal) and Viesgo's (only in Spain) monopolistic position in those distribution grids that they own, the Transaction gives rise to the following vertically affected markets:

(a) In Portugal: the market for distribution of electricity on which EDP is active (upstream) and the market for generation and wholesale supply of electricity on which both Parties are active (downstream);

(b) In Spain: the market for distribution of electricity on which both Parties are active (upstream) and the market for generation and wholesale supply of electricity on which both Parties are active (downstream).

(30) Because of EDP's and Viesgo's monopolistic position with regard to those distribution networks they operate, the relevant theory of harm would be foreclosure of third-party suppliers' access to their grids. For the reasons below, such a foreclosure would seem not to be a serious concern.

(31) First, the Parties claim that no vertical choice of distribution of electricity would technically be possible for generators in Portugal and Spain given that, under the current national regulatory frameworks, an electricity generator is never given the opportunity to choose to which grid to connect. This is because an electricity generator will be connected to the operating grid where the power plant is located. The grid operator, provided there is available capacity and that it is technically possible (both conditions strictly applied under the supervision of the Portuguese and Spanish energy regulators), is under the obligation to grant access to its distribution network under the conditions approved by the respective regulator. In view of the existing regulatory framework in Portugal and Spain and the responses to the Commission's market investigation, the Commission considers that post-Transaction EDP would have limited if any ability to foreclose third-party access to its distribution network, in spite of its monopolistic position in the distribution networks it operates.

(32) Second, the actual vertical relationships between EDP and Viesgo are limited in number in Spain, where [Details of Viesgo's distribution network] of EDP's electricity generating assets [Details of Viesgo's distribution network] connected to Viesgo's distribution network, and [Details of EDP's distribution network] of Viesgo's electricity generating assets [Details of EDP's distribution network] connected to EDP's distribution network.

(33) Third, Viesgo's market share in the Portuguese and the Spanish market for the generation and wholesale of electricity is very limited, [0-5]% in Portugal and [0-5]% in Spain, both in terms of capacity and production.

(34) In view of the existing regulatory framework, the limited number of actual vertical relationships between Viesgo and EDP, and Viesgo's limited presence in the market for the generation and wholesale supply of electricity in Spain and in Portugal, it is unlikely that EDP will have an incentive to undermine third-party access to its distribution network post-Transaction.

(35) In conclusion, the Transaction is unlikely to result in the foreclosure of third-party electricity generators and wholesalers in Spain and Portugal. The results of the Commission's market investigation confirmed that other market players believe that EDP will not have the ability or incentive to foreclose access to its distribution network to third-party suppliers in Spain or Portugal.[21]

(36) In view of the above, the Commission considers that the Transaction does not raise serious doubts as to its compatibility with the internal market as a result of non-horizontal effects either in the markets for generation and wholesale supply of electricity or in the markets for distribution of electricity, both in Spain or Portugal.

5. CONCLUSION

(37) 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

[21] Replies to Commission's email of 24 September 2020.