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STATEMENT

Merger Control Procedure M.8870/8871 – E.ON/RWE/Innogy

Introduction

In the course of the European Commission's examination of the exchange transaction of assets and shares of the energy groups E.ON SE, RWE AG and Innogy SE, NATURSTROM AG comments on the proceedings **"Merger Control Procedure M.8870/8871 - E.ON/RWE/Innogy"**. NATURSTROM welcomes the European Commission's in-depth merger control procedure and expresses serious concerns about the apportionment of Innogy between E.ON and RWE as well as the scheduled exchange of the business units end customer supply, mains operation and energy production between E.ON and RWE. If the apportionment and the exchange transaction materialise, they will have negative impacts on the energy market. Our concerns are directed against the expected market dominance of the two remaining energy companies E.ON and RWE following the integration of Innogy. This overpowering dominant position would be accompanied by reduced competition in various submarkets, particularly in the energy supply to end customers, the operation of charging infrastructure for electric vehicles, the collection and utilisation of energy data, the concession of energy networks and in power generation. In particular, NATURSTROM suspects that other market participants, especially medium-sized and civic enterprises as well as public-law participants as energy producers, operators of networks and metering points as well as energy suppliers, will be displaced by the prospective monopoly position of the two groups. Hereafter, a diminution of competition leads to rising electricity prices for households, companies and institutions.

NATURSTROM AG was founded in Düsseldorf in 1998 and supplies more than 250,000 households, companies and institutions with **naturstrom**, **naturstrom biogas** and sustainable heat, establishing NATURSTROM as one of Germany's leading green electricity providers. Furthermore, the company focuses on the permanent expansion of decentralised renewable energies by developing and operating energy projects in collaboration with citizens and municipalities on a long-term basis. NATURSTROM also implements consumption-related, cross-sectoral supply solutions: from ecological local heat supply in rural communities to electricity supply solutions for tenants in apartment buildings and integrated electricity, heat and e-mobility services for medium-sized companies or entire neighbourhoods. NATURSTROM increased steadily ever since the liberalisation of the common energy market in 1998. Today, more than 500 employees at 17 locations in Germany work on the implementation of the energy transition.

For the first time in 1998 new energy providers were offered the opportunity to compete with business rivals former organised as monopolists in order to offer new solutions to end customers. In the case of NATURSTROM, consumers were offered the possibility to be supplied with 100 % renewable energies. As one of only four independent suppliers, the company asserted itself as a pioneer for renewable energies during the difficult early years of the liberalized market. In 2006, the operation of electricity networks was subject to state regulation, because the provisions of the EU Internal Market Package 2003 were transposed into German law. Since then, a considerable diversity and intensity of competition has developed in various market segments, mainly in the area of end-customer supply of electricity and gas, but also in energy generation. This diversity of suppliers is now threatened by the deal between the energy companies E.ON, RWE and Innogy.

The deal between E. ON and RWE leads to a fundamental change within the competitive situation within the energy supply in favour of a monopoly-like position of two then specialized suppliers. Through the transfer of costumers and networks of Innogy and RWE to E. ON the last-mentioned gains a dominant position in the energy supply sector and furthermore loses its competitor RWE within this particular market segment. Furthermore, RWE is likely to dominate the energy production market by maintaining its Renewable Energies Sector and other conventional power plants - again without competition from its previous business rival E.ON. Therefore, there will not be two extremely large market participants anymore being larger than the nearest competitor by a factor of one to two at most in terms of relevant key figures. The new constellation with the division of business areas and markets between E.ON and RWE leads to competitive positions which have factors of more than 10 to the next competitor and of more than 100 to a competitor of an average size,

such as a municipal utility for a medium-sized city or an independent green electricity supplier such as NATURSTROM. Especially smaller energy companies are threatened by the deal between E.ON and RWE, resulting in a massive decline of competition within the next years.

Within the ongoing examination of the deal concerning the merger control procedure, NATURSTROM AG requests to take the following points of concern and suggestions into consideration.

I. Market definition in customer business: local instead of national

Through the exchange deal with RWE, the new E.ON unites a total of 16 million electricity customers - including all direct and indirect shareholdings. According to an analysis¹ initialized by green electricity provider Lichtblick SE and consulting firm LBD, E.ON will achieve a market share of 31 percent of the entire national end-customer market.

However, the consideration of the German retail electricity market at national level is not appropriate for the purposes of market definition, because competition for electricity customers is largely conducted in local markets. Energy suppliers mainly offer postcode-specific tariffs, the calculation of which is not only based on the different local network charges and concession fees, but also includes different margins depending on the area and distribution channel. This results in significant price differences in different local areas with the same tariffs. Therefore, a consumer might pay significantly more for his electricity than his neighbour purchasing the same tariff only living in a different postal code area in the same city. It is incidental: For consumers, only the local market is relevant, because they can only choose from those tariffs being offered for their postal code area - a nationwide uniform tariff is only offered by very few providers such as NATURSTROM. NATURSTROM therefore demands for a cartel law assessment based on local market conditions and not on a national or even Europe-wide perspective that does not do justice to the reality of competition.

A local analysis shows the dominant position that E.ON would hold after the acquisition of Innogy's end-customer business. The differentiated analysis of Lichtblick and LBD has shown that the new E.ON would supply more than 70 percent of the customers on approximately two thirds of the German market.

¹ <https://www.lichtblick.de/presse/news/2019/02/01/deutschland-sieht-rot-eon-wird-zum-neuen-strom-monopolisten/>

Eon: Der neue Strom-Monopolist

Eon will Kunden und Netze der RWE-Tochter Innogy übernehmen.
Damit dominiert der Energieriese künftig zwei Drittel des deutschen Marktes*.



Source: Lichtblick SE / LBD

Of several thousand different electricity tariffs in Germany, the merged major group E.ON would offer 840 electricity tariffs with 160 different brands. The consumer would thus be led to believe in a variety of suppliers that do not exist at all. Because with many tariffs, electricity customers can hardly see at first glance that E.ON SE hides ultimately behind the brand. The strong position of commercial comparison portals reinforces this lack of transparency: Currently, 60 percent of German electricity customers compare tariffs on the online portals Verivox or Check24 from the pool of locally available electricity products. The new E.ON would not only have a dominant market position in many postcode areas - in real terms and in the hit list of the comparison portals - but would also have the financial means to secure expensive advertising space at the top of these important comparison portals.

A similar picture can be seen in gas sales: The new E.ON supplies more than 70 percent of customers in about 50 percent of the area. Similarly the range of products offered by E.ON, including the group shareholdings, extends to 156 gas brands and 567 gas tariffs, which are hard for the consumer to distinguish. Although in-depth research enables consumers to identify the company behind a brand, this should not be the established procedure, instead customers should immediately be aware of their real provider. In addition, the simultaneous financing of advertising space on the comparison portals of such a large number of tariffs and brands automatically squeezes out other competitors. Thus the new E.ON can take a dominant position also in the gas end customer market.

Because of these structural advantages, NATURSTROM assumes that the new E.ON would have a considerable influence on market dynamics and pricing policy. It is to be expected that E.ON will use its market power to gradually increase its market share in individual markets through correspondingly favourable offers and to displace competitors. They would not be able to take adequate countermeasures

because they do not have as high financial resources as E.ON and are more dependent on the respective local market. The more a supplier has concentrated itself on a few regional markets, the faster it will drift off into inefficiency in the event of an attack by an overpowering market participant, further worsening its competitive and market recovery opportunities. This means that municipal utilities, regional suppliers, but also medium-sized companies are primarily affected. Although competition initially functions superficially in this way and price reductions can also be expected for individual consumer groups, the opposite will happen after the expected market shakeout with price increases due to the extremely large market power. The intensity of competition in the end consumer markets for electricity and gas, which has been developing very slowly since the opening of the markets, would be enormously weakened, and in the medium term prices for customers would rise as a result.

We demand a differentiated examination of local market structures and a realistic assessment of the new E.ON's monopoly-like position on the end customer market. As one of only four independent electricity suppliers in Germany that have been able to compete in the market since the market liberalisation in 1998, we are opposed to the discrimination of small and medium-sized electricity and also gas suppliers in local markets resulting from the market power of a single company.

II. Market dominance as a basic supplier and as a network operator

Basic providers do play an important role for the German electricity market. They are obliged to supply consumers within their area with electricity. On average, the basic suppliers provide almost 70 percent of consumers in their area with electricity and gas. The new E.ON will receive a vastly expanded basic services area, and with the deal it could become the primary provider for 67 percent of the customers in the electricity market. So far, it has been taking on this role for 42 percent of customers – which is already a dominant position – but does not yet constitute a monopoly-like position.

A further advantage results from the extended network area. Although the revenues from network operation and energy distribution are legally separated by the principle of “unbundling”, the profits and losses of both divisions are ultimately offset against each other in the consolidated balance sheet. Network operation is a very profitable business for the new E.ON with high government guaranteed returns ensuring a lavish and secure annual net income. At the distribution network level, the new E.ON would have access to some 16 million measuring points, including minority shareholdings even more than 20 million. This would correspond to a market share of 41 percent. Measured by the line length, even 50 percent of the distribution networks would be in the hands of E.ON and its holdings. NATURSTROM points out that the new E.ON can use the revenues from network operations indirectly to offer tariffs below the average market price or exceptionally high bonuses to the end customer and to compensate potential losses of the end customer business with the network operations. Thus, the deal enables the energy company to make enormous price dumping and enables it to outperform competitors in a price battle and to drive them out of the local market.

In addition, NATURSTROM raises concerns over regarding the regulation of network operations by the Federal Network Agency: With a share of 40 percent measured by the number of measuring points, the new E.ON could better enforce its standards and demands towards the authority than the other providers. Regarding the regulation of the gas network operation, E.ON's representation of interests has already removed a parameter in the efficiency comparison that puts rural network operators at a disadvantage compared to urban ones, as criticized by the chief technology officer of the company EWE, Urban Kreussen². NATURSTROM shares these concerns and calls for an independent regulation that is not guided by the interests of a single network operator. Despite the goodwill on the part of the authority, this would menace if a single supplier receives such a dominant position.

² Source: <https://www.energiate-messenger.de/news/189265/eon-innogy-deal-belastet-regulierungs-balance>

It should further be taken into account that E.ON will not only set technical standards due to its acquired large market share in energy networks, but will also have such high market power in the purchase of operating material, that a fair competition in relation to other network operators can no longer be assumed. No supplier could escape the wishes of E.ON, no matter in which direction they would go and how explicitly they would be expressed. Technical development, delivery conditions for other network operators and all above prices for purchased operating material and services would be dictated by E.ON. Such an exceptional market position might be used at the future allocation of network concessions. It would be easy for E.ON to gradually adopt the network concessions in Germany, which are classified as interesting– and to justify this with particularly high technical competence, the availability of employees in the vicinity and particularly attractive economic conditions for the communities. Other network operators would only rarely have a chance and only if they were of a relevant local size, new network operators would not be able to establish themselves. Instead of increasing competition, a decreasing competition would come up in the medium term with the opportunity for E.ON to use its overpowering competitive position almost at will. It is highly questionable whether a regulatory authority would still have effective means to oppose such market power.

In conjunction with the market power in network operation is the market power in distribution. Both favour each other in a dominant group: Each gain of market power in one area also increases market power in the other area. Due to the temporarily lower prices and attractive switching offers in the electricity and gas supply, it can therefore be assumed that E.ON will not only take over Innogy's power and gas customers, but will also gradually take over electricity and gas customers of other competitors. Now that E.ON has expanded this position and consolidated its dominant position, it can set electricity and gas prices on the market according to its own pricing policy. In the long-run, therefore, an increase in prices for private consumers as well as for commercial customers or institutions can be expected.

III. Data dominating by smart measurement technology

With the roll-out of Smart Meter measurement technology from 2019 on, the new E.ON is going to have a new business area. In the upcoming years, smart meter technology will be installed not only at bulk consumers, but also at average end consumers and smaller customers: The aim is to equip all end consumers with an annual electricity consumption of more than 6,000 kilowatt hours and all power generation plants with an installed capacity of more than 7 kilowatts with intelligent measuring systems in accordance with § 29 (1) of the German Metering Point Operating Act (Messstellenbetriebsgesetz) and all other end consumers with lower consumption in accordance with § 29 Para. 3 of the German Metering Point Operating Act (Messstellenbetriebsgesetz) with modern measuring equipment up to the year 2032. This obligation applies to the metering point operators who are responsible for the basic conditions, whereby this function is assumed almost exclusively by the local distribution network operator.

According to the plans of the EU Commission, the roll-out of smart meter measuring technology was originally meant to be governed by free competition. However, for the introduction of the technology, the network operators will act as the basic responsible metering point operators, for which reason independent providers for intelligent metering systems are legally possible, but will not be able to assert themselves against the superiority of the local distribution network operators. It is questionable whether they will be able to compete at all and establish themselves over time. How is it possible to establish free and fair competition if E.ON penetrates the new business field from the outset by means of its primary responsibility as the basic metering point operator setting prices and technological standards?

There is the danger that new suppliers will be undercut in advance, as the expansion of the smart meter can be cross-subsidized in analogy to other business areas with the high revenues from network operation. The above arguments on market power towards suppliers also apply here.

With the acquisition of RWE's networks, E.ON now has 20 million metering points. Including the large number of participations in almost 100 grid companies, the new E.ON would thus have a market share of 40 percent of the metering points, as already mentioned above - all of them could be equipped with smart meters. The next largest competitor, "Netze BW", has a market share of just 11 percent. This strong and secure position, as well as the decisive role of fixed costs in the gateway administration of smart meters, results in economies of scale and cost advantages for the development of the new business in intelligent measurement systems. The new E.ON could use the additional profits resulting from increased profitability in smart metering to further expand its position in the end customer market.

If it collects the consumption data of almost half of Germany's citizens via intelligent meters, the new E.ON threatens to become a big data company in the energy industry. This holds great potential for E.ON, because consumer usage data will be a valuable factor in the future in downstream markets such as consumption control (particularly relevant for charging infrastructure for electric vehicles) or smart home solutions. In the first place, Big Data offers a valuable advantage in knowledge that can be used in energy supply. Secondly, E.ON could also develop its own businesses around the data and use them to generate additional contributions to operating income. Thus, the built-up of economic strength and power can in turn be used to hinder and displace competitors in the core business areas. Currently, it is already obvious that problems can arise from lacking data protection in case of low-regulated big data companies as Google or Facebook. NATURSTROM therefore demands a precise examination of the future consequences for consumers in case of a market-dominating situation on the part of E.ON. The data of consumers as well as that of companies and institutions are particularly worth protecting and must not be misused on the free market and bundled in one organisation. NATURSTROM welcomes any initiative by the European Commission which favours free competition so that new suppliers can establish themselves.

IV. Infrastructure for charging stations of electric cars

The acquisition of Innogy, currently the largest supplier of charging stations for electric cars, gives the new E.ON a nationwide market share of nearly 20 percent. The market share of the largest competitor is only 6 percent. E.ON and Innogy are strongly represented as charging infrastructure operators especially in their grid areas in western and northern Germany as well as in parts of the federal states of Brandenburg, Saxony and Bavaria. In many counties, the new E.ON would dominate the market with market shares in excess of 50 percent.

NATURSTROM criticises the fact that the new E.ON can set its own prices at public charging points, specifically in areas where a low competitive pressure designates the market. In addition, as the largest distribution network operator, the new E.ON can also secure access to public areas for the future construction of charging infrastructure as part of the concession process. The competition for future charging locations is already in full swing - and a new E.ON would have a clear advantage here. In addition, synergy effects can arise between electricity used in households and the purchase of electricity for electric cars, which E.ON could use to consolidate its dominant market position. Coupled tariffs, for example, which combine household electricity with charging electricity, can only be offered meaningfully by those who have sufficient coverage with charging infrastructure in locally defined markets.

An optimization of the charging power supply will be based in particular on the availability of the corresponding data and their targeted processing - we have commented on E.ON's market power in this regard in the previous chapter.

V. Demand: A monopoly in the supply of end customers must not be created

Based on the above arguments and antitrust doubts, NATURSTROM takes a clear position on the exchange of assets and shares in the process "**Merger Control Procedure M.8870/8871 - E.ON/RWE/Innogy**". NATURSTROM requests that the acquisition by E.ON of the end customer business for the supply of electricity and gas customers as well as the distribution network operation of Innogy SE will be prohibited. The acquisition threatens free competition by placing E.ON in a dominant position in a number of local defined electricity and gas supply markets. This will enable E.ON to outbid other competitors in a targeted manner and to drive them out of the market. Based on long-term considerations a decreasing intensity of competition would undoubtedly lead to rising electricity and gas prices for consumers. In the in-depth examination of the deal between E.ON and RWE, consumer interests therefore deserve special attention.

We would also like to point out that E.ON's dominant position in many local electricity and gas customer supply markets, combined with its strong position in distribution, smart metering and charging infrastructure, can generate advantages that prevent functioning competition in developing market segments from the outset. As an independent eco-energy supplier, we demand free and fair competition in the energy market and ask the EU Commission to pay close attention to future business areas in the review process.

In case that the EU Commission authorizes the "Merger Control Procedure M.8870/8871 - E.ON/RWE/Innogy", there have to be at least far-reaching constraints to decrease the power of these two company groups. One unconditional and definite point is the disposition of all participations E.ON has on all regional grid companies.