

Brussels, 4.5.2010
C(2010) 2863 final

COMMISSION DECISION

of 4.5.2010

**relating to a proceeding under Article 102 of the Treaty on the Functioning of the
European Union and Article 54 of the EEA Agreement**

(Case COMP/39.317 – E.ON Gas)

(Only the German text is authentic)

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty¹, in particular Article 9(1) thereof,

Having regard to the Commission decision of 22 December 2009 to initiate proceedings in this case,

Having expressed concerns in the Preliminary Assessment of 22 December 2009,

Having given interested third parties the opportunity to submit their observations pursuant to Article 27(4) of Regulation (EC) No 1/2003 on the commitments offered to meet those concerns,

After consulting the Advisory Committee on Restrictive Practices and Dominant Positions,

Having regard to the final report of the Hearing Officer,

WHEREAS:

1. SUBJECT MATTER

- (1) This Decision concerns the behaviour of E.ON AG, Düsseldorf and the companies which it controls, including E.ON Ruhrgas AG, Essen ("E.ON Ruhrgas") as well as E.ON Gastransport GmbH, Essen ("EGT") (collectively "E.ON" or the "E.ON Group"), on the German gas supply and transmission markets. It is addressed to E.ON AG, E.ON Ruhrgas and EGT.
- (2) In its Preliminary Assessment of 22 December 2009, the Commission came to the provisional conclusion that E.ON may have abused its dominant position on the markets for the supply of end customers in the form of a refusal to supply by way of long-term bookings on E.ON's gas transmission system, thereby violating Article 102 of the Treaty on the Functioning of the European Union ("TFEU"). E.ON has for many years in advance booked large parts of the available firm and freely allocable entry capacities on its gas transmission grid, which may lead, according to the Preliminary Assessment, to a foreclosure of competitors trying to transport and sell gas to customers connected to the E.ON grid and therefore may restrict competition on the downstream gas supply markets.

¹ OJ L 1, 04/01/2003, p.1. With effect from 1 December 2009, Articles 81 and 82 of the EC Treaty have become Articles 101 and, respectively 102 of the TFEU. The two sets of provisions are in substance identical. For the purposes of this Decision references to Articles 101 and 102 of the TFEU should be understood as references to Articles 81 and 82 of the EC Treaty when appropriate. The TFEU also introduced certain changes in terminology, 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. THE ADDRESSEES

- (3) E.ON is a German undertaking active in the production, transportation, distribution² and supply of energy (mainly electricity and gas) in Germany, other EU Member States and world-wide. In 2009, E.ON had a turnover of EUR 81.82 billion³. E.ON AG is active in the German gas business predominantly via its wholly-owned subsidiary E.ON Ruhrgas. It is the largest supplier of natural gas in Germany and one of the leading players in Europe. It serves regional and local distributors, industrial customers and electricity generation plants. EGT, a wholly owned subsidiary of E.ON Ruhrgas, owns⁴ and operates E.ON's gas transmission system in Germany. In 2007, E.ON Ruhrgas achieved a turnover of EUR 22.75 billion⁵ worldwide. E.ON AG, EGT and E.ON Ruhrgas are regarded as one undertaking within the meaning of Article 102 TFEU.

3. PROCEDURAL STEPS UNDER REGULATION NO 1/2003

- (4) On 22 December 2009 the Commission opened proceedings with a view to adopting a decision under Chapter III of Regulation (EC) No 1/2003. On the same day, it adopted a Preliminary Assessment as referred to in Article 9(1) of Regulation (EC) No 1/2003 which set out the Commission's competition concerns; these related to E.ON's behaviour on the German gas supply and transmission markets. The Preliminary Assessment was notified to E.ON AG, EGT and E.ON Ruhrgas by letters of 22 December 2009.
- (5) On 7 January 2010, E.ON submitted commitments ("the Commitments") to the Commission in response to the Preliminary Assessment. On 29 January 2010, E.ON replied to the Preliminary Assessment rejecting the concerns raised by the Commission, nevertheless upholding the proposed commitments.
- (6) On 22 January 2010 a notice was published in the Official Journal of the European Union pursuant to Article 27(4) of Regulation (EC) No 1/2003, summarising the case and the Commitments and inviting interested third parties to present their observations on the Commitments within one month following publication.
- (7) On 8 March 2010 the Commission informed E.ON of the observations received from interested third parties following the publication of the notice. On 26 March 2010 E.ON submitted an amended proposal for commitments.

² http://www.eon.com/en/downloads/EON_Company_Report_2009_.pdf

³ E.ON Annual Report 2009, page 19, Retrieved 11. March 2010 http://www.eon.com/en/downloads/E.ON_Finanzbericht_2009_EN.pdf

⁴ The ownership of the domestic transport infrastructure was formally transferred from E.ON Ruhrgas AG to E.ON Gastransport GmbH on 31 August 2008.

⁵ E.ON Ruhrgas Annual Report 2007, page 3, Retrieved 11. March 2010 http://www.eon-ruhrgas.com/cps/rde/xbcr/SID-23505FF7-C20F654B/er-corporate/EON_07_Jahresbericht_D.pdf

- (8) On 15 April 2010 the Advisory Committee on Restrictive Practices and Dominant Positions was consulted. On 16 April 2010 the Hearing Officer issued his final report.

4. THE GERMAN GAS SECTOR

- (9) The legal framework for the supply of natural gas in Germany was historically characterised by a system of local/regional supply monopolies. In 1998 first steps of liberalisation were introduced with a system of negotiated third party access. Since 2007 the application of an "Entry/Exit" (or "Two-Contract") access model is mandatory, according to which transport customers can book entry capacities into the grid (from the entry point to a notional "virtual trading point"⁶ common to the entire grid) and exit capacities from the notional virtual trading point to a specific exit point, independent from the individual transport path and the number of sub-grids that have to be passed through⁷. Network operators therefore have to offer capacities which can be flexibly allocated ("*freely allocable capacities*" or "*frei zuordenbare Kapazitäten*") and which allow a shipper with a booking at an entry point to choose any exit point within the operator's network⁸.
- (10) However, even in the new access model, there are still capacities which cannot be flexibly allocated. According to the Gasnetzzugangsverordnung ("GasNZV"⁹), the network operators may, exceptionally, declare some capacities as "*restricted allocable capacities*" ("*beschränkt zuordenbare Kapazitäten*") if this increases the total amount of available firm capacity in the grid due to the specificities of the network¹⁰.
- (11) Together with the introduction of the Entry/Exit model, so-called "market areas" were created¹¹. Market areas were set up by defining grid areas in which no internal bottlenecks exist, thereby enabling shippers within one area to choose

⁶ The virtual trading point is not allocated to a physical entry or exit point. At the virtual trading point gas quantities may be traded after entry and before exit within a market area. The virtual trading point enables the purchase or sale of gas quantities without booked capacities.

⁷ See BNetzA, Decision of 17.11.2006, case BK7-06/074. The obligation to provide the option of entry/exit booking existed as of 2005.

⁸ Provided that capacity at the exit point is available.

⁹ §6 (3) sentence 2 of the GasNZV.

¹⁰ *Restricted allocable capacity* is subject to allocation restrictions and allows only the transport from an entry point to a single, predetermined exit point, within the market area (often an exit point to a bordering network). Access to the virtual trading point is also not possible with restricted allocable capacities. The fact that freely allocable capacity allows shippers to reach every exit point within E.ON's network is key to compete effectively with E.ON in its market area. By contrast, restricted allocable capacity offers by definition only very limited options to deliver gas to customers. See in this context also BNetzA, Monitoringbericht - Entwicklung des Strom- und Gasmärktes 2008, page 138.

¹¹ Vereinbarung über die Kooperation gemäß § 20 Abs. 1 b) EnWG zwischen den Betreibern von in Deutschland gelegenen Gasversorgungsnetzen, of 19.7.2006.

freely between all exit points¹² and to transport gas to downstream grids without separate bookings. There are separate market areas for high-calorific gas ("H-gas") and low-calorific gas ("L-gas").

- (12) Since 2006, the number of market areas has decreased from 28 to now 6 (3 in H-Gas and 3 in L-Gas) due to co-operation between the different network operators. E.ON has entered into a joint market area (NetConnect Germany ("NCG")) together with the TSO bayernets GmbH ("bayernets") with effect of October 2008. As of 1 October 2009, three additional network operators joined NCG, combining their respective market areas to one: GVS Netz GmbH ("GVS"), the Eni subsidiary Eni Gas Transport Deutschland S.p.a. ("Eni Gas Transport") and the GDF subsidiary GRTgaz Deutschland GmbH ("GRTgaz").

5. PRELIMINARY ASSESSMENT

5.1. Relevant markets

5.1.1. Relevant product markets

- (13) The Commission has in previous decisions defined a separate market for gas transport¹³, which is distinct from the markets for the sale or supply of gas.
- (14) Regarding the market for *gas transport*, a distinction needs to be made with regard to whether transport capacity is contracted as *firm* or *interruptible* capacity¹⁴. While shippers sometimes resort to interruptible capacity due to the lack of firm capacity, the market investigation has shown that they nevertheless consider firm and interruptible capacity as not substitutable¹⁵.
- (15) A further distinction needs to be made between the transport of H-gas and L-gas. H-gas is high-calorific gas whereas L-gas is low-calorific which represents a

¹² See footnote 8.

¹³ See e.g. Case IV/493 – *Tractebel/Distrigas II* (paragraphs 27 et seq.); COMP/M.3410 - *Total/Gas de France*, paragraphs 15-16; COMP/M.3696 – *E.ON/MOL*, paragraph 97. It may be noted that the Commission has in previous cases also defined other infrastructure-related markets, such as a market for storage, possibly including other flexibility services, see e.g. Case No IV/M.1383 – *Exxon/Mobil* (paragraph 69) or case COMP/M.3868 - *Dong/Elsam/Energi E2*, paragraphs 50-70.

¹⁴ Capacities can be booked on a *firm* or on an *interruptible* basis. While the TSO guarantees, in principle, the transport of firm capacities under normal circumstances, the TSO is entitled to refuse the transport of booked *interruptible capacities*, if such a transport is not possible for the TSO (e.g. because of network congestion). In such a case, the TSO will usually refund the payments for the denied transport, but will not be subject to further liabilities (as in the case of firm capacities), see also § 5 and 44, Annex 3 to the "Kooperationsvereinbarung" of 29.7.2008.

¹⁵ This is also confirmed by the BNetzA in its decision of 5 May 2006 where it states that there are significant differences between firm capacities and interruptible capacities for the shippers. The BNetzA moreover considers in this decision that the refusal of the TSO to sell firm capacities and to offer interruptible capacities instead has to be considered as a refusal to supply according to §20 (2) EnWG. See Decision of the Bundesnetzagentur of 5 May 2006, BK7-06-008, page 6: "...ein Aliud im Verhältnis zu den begehrten festen Kapazitäten..."

difference in quality. The transport of the two different types of gas takes place in different pipelines and a separate network.

- (16) Within the *gas supply* market¹⁶, different markets for gas sales to wholesalers and to end customers (retail level) can be distinguished according to the Commission's case practice. As concerns wholesale activities, the Commission¹⁷ and the Bundeskartellamt¹⁸ have traditionally defined two separate wholesale markets in Germany. On the first wholesale level, supra-regional gas companies which purchase (import) gas from the producers (mostly abroad) supply, *inter alia*, regional wholesalers which have no own access to gas production. On the second wholesale level, these regional wholesalers sell gas to small local and regional distributors, i.e. mostly "Stadtwerke"¹⁹. In addition, supra-regional gas companies also sell gas directly to the Stadtwerke²⁰.
- (17) As concerns the level of supply to end customers, the Commission and the Bundeskartellamt have consistently defined separate markets for the supply of gas to large industrial customers and the supply of gas to small customers (i.e. household and small commercial customers)²¹. The group of industrial customers have comparably larger possibilities and incentives to switch suppliers than the small households.

5.1.2. Relevant geographic market

- (18) Gas *transport* networks have been considered by the Commission as *natural monopolies*. Indeed, the supply of gas to customers depends on the possibility to use existing pipeline infrastructure. In most cases the construction of competing parallel gas networks is not economically viable²². Shippers wanting to supply

¹⁶ Also referred to as gas "sales" markets.

¹⁷ See e.g. IV/M.1383 – *Exxon/Mobil* (paragraph 111); COMP/M. 1673 - *Veba/Viag*; paragraph 184; COMP/M.2822 - *EnBW/ENI/GVS*, paragraphs 14-15; COMP/M.4890 *Arcelor/Ferngas*, paragraph 11; COMP/M.4110 *E.ON / Endesa*, paragraphs 13, 14; COMP/M.5467 - *RWE/Essent*, paragraph 100.

¹⁸ See e.g. Bundeskartellamt, decision of 12.3.2007 in the merger case RWE - *Saar Ferngas*, AG (B 8 – 40000 – U 62/06), S. 12 f.

¹⁹ In the following, the term "Stadtwerke" is used for both local and regional distributors, i.e. also for distributors which cover more than just one town as the Stadtwerke do.

²⁰ Both supra-regional and regional gas companies also sell some gas quantities directly to end users (mainly large industrial customers).

²¹ See e.g. COMP/M.5467 - *RWE/Essent*, paragraph 100; BKartA, decision of 6 July 2009, B8-96/08 *EnBW/EWE*, paragraph 33; BKartA, decision of 5 March 2009, B8-163/08 *Saar Ferngas/ESW (Stadtwerke Landau)*.

²² See e.g. case COMP/M.3696 – *E.ON/MOL*, paragraph 97: "natural monopoly"; see also MEMO/06/481 on infringement procedures because of insufficient unbundling. See also Monopolkommission, Sondergutachten, Strom und Gas 2007, paragraph 434; Hauptgutachten XIV (2000/2001), paragraph 842. This "natural monopoly" character of gas infrastructure is ultimately the basis for the Gas Directives, which are intended to open up the European gas markets to competition. Contrary to what is provided for the (potentially) competitive gas supply markets, gas infrastructure is

customers connected to EGT's grid therefore need access to EGT's grid via its entry points.

- (19) As concerns E.ON's *L-gas network*, it can thus be concluded that there are no effective competitive constraints from existing neighbouring gas networks or from the prospect of new pipeline connections. EGT's L-gas network, which is not part of any market area cooperation, therefore has to be considered as a relevant geographic market.
- (20) As concerns E.ON's *H-gas network*, the same considerations apply at least until October 2008. Until that date, E.ON's H-gas market area was defined by the boundaries of its H-gas grid since only EGT entry points allowed for a supply of customers connected to the EGT grid. After the creation of the NCG market area in October 2008 (and its extension in October 2009), customers connected to E.ON's grid can, to a certain extent, be reached through other entry points within the same market area (NCG). Shippers wanting to supply customers connected to the EGT grid may therefore now also use, for example, a bayernets or a GVS entry point without further booking requirements. For the purpose of this Decision, all entry points which give access into the EGT grid could, therefore, be considered as belonging to the same relevant market.
- (21) The Commission has in previous decisions defined the downstream *supply markets* in Germany as regional (grid-wide) in scope²³. Although German gas markets were *de jure* liberalised already in 1998, the factual possibilities for competitors to exert competitive pressure from outside the grid on E.ON through alternative offers for customers connected to E.ON's grid remained extremely limited. An important barrier is the lack of available firm transport capacities on EGT's gas grid. It therefore appears appropriate to define the supply markets to local and small regional distributors ("short-distance" wholesale supply) and to end customers (large industrial customers, small household/commercial customers) as not wider than *grid wide*.
- (22) The situation has not changed with the creation of the NCG market area co-operation. While this co-operation may theoretically give increased possibilities to bayerngas, Eni, GVS and GDF to become active also in the supply of customers connected to the E.ON grid, no such effect of the market area co-operation has yet become visible. This view is in line with the position of the BKartA which has pointed out that there is no indication that E.ON's and Bayerngas' market position in the supply of gas has substantially changed since February 2008 when they started the NCG co-operation²⁴. The recent changes with respect to the creation of the NCG market area can therefore not be regarded as sufficiently strong to lead

subject to permanent regulation as regards, in particular, third party access and unbundling requirements.

²³ See e.g. Case IV/M.713 – *RWE/Thyssengas*, paragraphs 15-19; Case COMP/M.2822 – *EnBW/ENI/GVS*.

* Parts of this text have been edited to ensure that confidential information is not disclosed; those parts are enclosed in square brackets and marked with an asterisk.

²⁴ See in this context also the recent decision of the Bundeskartellamt of 5 March 2009 in the merger case *SFG - ESW*, (B 8 – 163/08), S. 9 f.

to a market definition for the gas supply markets which is different than the traditional market definition.

5.2. E.ON's market position

- (23) According to the Commission's preliminary analysis E.ON has a dominant position on the market for the transport of H- and L-gas as well as on the markets for the wholesale supply of gas to distributors and the retail supply to industrial customers in the relevant geographic markets.
- (24) E.ON is, via its subsidiary EGT, the holder of a natural monopoly in its transmission grid. Until October 2008, E.ON controlled 100% of the marketing of entry and exit capacity of EGT's grid and of transport of H- and L-gas into its network. While the market shares are unchanged at 100% for EGT's L-gas grid, the creation of NCG has brought some changes to the situation for H-gas. Of the total firm freely allocable capacity into NCG, EGT contributes approximately [75-85*] % whereas the other NCG partners offer only [15-25*] %. During October 2008 and October 2009 when the only members of NCG were E.ON and bayernets, E.ON on this basis even had a share of approximately [90-100*] % of all firm freely allocable capacity into NCG and thereby also into the EGT grid.
- (25) Thus, even after the creation of the NCG market area, EGT remains the by far the largest provider of entry capacity into the EGT H-gas grid and to the customers located in this area which justifies the preliminary assessment that it holds a dominant position. For entry capacity into the EGT L-gas grid, EGT's dominance has remained unchanged – EGT provides 100% of this entry capacity.
- (26) As concerns the supply markets, according to the Commission's preliminary assessment E.ON has a dominant position on the wholesale market for the supply of gas to regional and local distributors. E.ON remains the leading supplier in its grid area with very high market shares. For H-gas, there is evidence that E.ON²⁵ has a market share of at least around [55-65*] % in its grid area in the wholesale supply of regional and local distributors. Other suppliers in this market are far behind E.ON: Enovos/Saar Ferngas reaches, according to recent calculations²⁶, [10-20*]²⁷ %, Gas-Union [5-10*]%, RWE [5-10*] % and Wingas [0-5*] %. Moreover, Enovos/Saar Ferngas is unlikely to act as a full-fledged competitor to E.ON. As a regional wholesaler ("regionales Ferngasunternehmen") in the grid area of E.ON it is supplied to a large extent by, and therefore highly dependent on, E.ON.

²⁵ Including E.ON's subsidiaries Ferngas Nordbayern (E.ON shareholding of 70%), E.ON Avacon (E.ON shareholding 67.8%, E-ON Avacon own shares: 1.9%) and Erdgasversorgung Thüringen-Sachsen mbH (EVG) (E.ON shareholding 50%) (see Konzernverzeichnis of E.ON as of 31 December 2008 http://www.eon.com/de/downloads/081231_Konzernverzeichnis_de.pdf). Out of these three companies, EVG has with a maximum of [0-5*] % the smallest market share in the EGT market area.

²⁶ Calculations based inter alia on figures published in the recent report on the BKartA's sector inquiry into the German gas markets (see BkartA, Sektoruntersuchung - Kapazitätssituation in den deutschen Gasfernleitungsnetzen, report published on 17.12.2009).

²⁷ In this section, values were replaced by ranges in brackets for confidentiality reasons.

- (27) E.ON is even stronger in the L-gas market where it reaches a market share of [75-85*] % in the supply of regional and local distributors. Among the remaining suppliers, only RWE takes a more significant position of [10-20]% - all other companies have only marginal shares.
- (28) According to the Commission's preliminary assessment, E.ON is also dominant on the market for retail supplies to industrial customers within its grid area with a very high market share of around [75-85*] % for H-gas and [80-90*] % for L-gas²⁸. Even though industrial customers can generally switch suppliers more easily than households, the market share figures demonstrate that so far such switching has not occurred to any significant extent. In order to supply industrial customers with gas, E.ON's competitors need transport capacity on the EGT grid. As the analysis of this case shows, it is exactly the lack of accessibility for competitors to the EGT grid which can be considered as the main obstacle for competition. On this basis, it can be concluded that E.ON is dominant on the market for the supply of industrial customers in the relevant geographic market.

5.3. Substantial part of the internal market

- (29) According to the Commission's preliminary assessment, the area covered by EGT's transmission network constitutes a substantial part of the internal market as required by Article 102 TFEU²⁹.
- (30) E.ON is by far the largest German network operator. The affected geographic markets cover the largest part of Germany³⁰. The total gas consumption in Germany amounted to approximately 991 TWh in the year 2007. The gas consumption in the area covered by the EGT grid could be estimated on the basis of all gas exiting the EGT grid. According to figures provided by E.ON, exit volumes for L-gas were [...*] TWh and for H-gas [...*] in 2007 in the EGT grids, not counting transit volumes ([...*] TWh) which were transported through the EGT grids. This estimated consumption roughly corresponds to the total gas consumption of France with around [...*] TWh³¹.

5.4. Practices raising competition concerns

- (31) The Preliminary Assessment expressed the concern that E.ON may have abused its dominant position according to Article 102 TFEU in the form of a refusal to

²⁸ Calculations based *inter alia* on figures published in the recent report on the BKartA's sector inquiry into the German gas markets (see BKartA "Sektoruntersuchung - Kapazitätssituation in den deutschen Gasfernleitungsnetzen", report published on 17.12.2009).

²⁹ See in this context also decision of 18 March 2009, COMP/39.402 - *RWE Gas Foreclosure*.

³⁰ In Case C-475/99 *Ambulanz Glöckner* [1999] ECR I-8089, paragraph 38, it was held that the Land of Rheinland-Pfalz (one of the German Länder) may constitute a substantial part of the internal market as "it covers a territory of almost 20 000 km² and has a high number of inhabitants, around four million, which is higher than the population of some Member States".

³¹ See Report of the Commission de Régulation de l'Energie: "Le marché de détail du gaz, 3^{ième} trimestre 2009", page 29 (<http://www.cre.fr/fr/content/download/9189/159413/file/2009Observatoire3emeTrim.pdf>)

supply by way of long-term bookings on E.ON's gas transmission system. The long-term bookings may have led, according to the Preliminary Assessment, to a foreclosure of competitors trying to transport and sell gas to customers connected to the E.ON grid, thereby restricting competition on the downstream gas supply markets.

Essential facility character of E.ON's gas grid

- (32) The Preliminary Assessment took the view that E.ON's gas transmission network can be considered an *essential facility*, since access to it was objectively necessary to carry out business in the gas supply markets within E.ON's grid areas.
- (33) Transport capacity on a transmission grid is a necessary input³² for gas suppliers to transport gas to their (potential) customers. Competing gas suppliers wanting to supply customers in EGT's grid had no alternative than using EGT's entry points to reach their customers. Reproducing E.ON's transport infrastructure was no realistic alternative for gas suppliers, *inter alia* because of the high investment costs, the planning risk and the duration of the construction of a high-pressure pipeline³³.
- (34) The Preliminary Assessment came to the conclusion that access to EGT's entry points still appears to be indispensable after the creation of the *NCG market area cooperation*³⁴. Indeed, only a very limited number of additional entry points were added by the NCG-cooperation, and EGT still contributes approximately [75-85]* % of the overall volume of firm freely allocable entry capacities into this area. Moreover, the NCG market area co-operation also has not changed control over the participating grids: EGT remains the owner of its transmission grid, solely responsible for the capacity allocation at the entry and exit points within its grid³⁵. Other NCG partners could with the new market area co-operation theoretically enter into competition with E.ON for customers connected to the EGT-grid. However, so far this remains a merely theoretical possibility as in reality no significant changes in the competitive situation of the market could be observed.
- (35) It is therefore the Commission's preliminary finding that access to transport capacities on E.ON's network are an *indispensable input* for suppliers wanting to compete for customers currently served downstream by E.ON.

E.ON booked almost the entire capacity on its own grid

³² See in this respect also judgement of the Court of 26 November 1998 in case C-7/97 *Oscar Bronner* [1998] ECR I-7791, paragraphs 44-46.

³³ See in this context also e.g. Commission decision of 18.3.2009, COMP/39.402 - *RWE Gas Foreclosure*, paragraph 15; Commission decision of 4.12.2009, COMP/39.316 - *GdF Suez*, paragraph 27; BNetzA, decision of 5 December 2008 - BK4-07-106 (fehlender Leitungswettbewerb im E.ON Fernleitungsnetz).

³⁴ See above, paragraph (12).

³⁵ It may be noted that the virtual trading point within the NCG area has not yet been perceived by transport customers as an alternative due to the very limited liquidity at the virtual trading point.

- (36) In its Preliminary Assessment, the Commission found that E.ON³⁶ has booked, on a long-term basis, most of the *firm*³⁷ and *freely allocable*³⁸ capacities at the entry points³⁹ giving access to EGT's grid⁴⁰. As a consequence, only little or no free capacity⁴¹ has been available to competitors wanting to transport gas into EGT's network. The tight capacity situation has not been the result of competition on the transmission network, but due to the almost exclusive reservation of the network through E.ON⁴².
- (37) The Commission has evidence that the capacity situation is not likely to improve in the next years and therefore competitors will not be able to compete freely and effectively. Indeed, already from today's bookings it is clear that the capacity problem will be perpetuated at least until 2019. In the gas year 2009/2010, E.ON's H-gas bookings accounted for [75-85*] % of the available firm freely allocable capacities. According to the data submitted by E.ON, it will still account for at least [65-75*] % of all available capacities until 2019. E.ON's booking share may even further increase until that date taking into account possible further bookings in the meantime. For L-gas, E.ON has booked up to [90-100*] % (in gas year 2010/2011) of the available capacities, leaving virtually no capacity to competitors. Already today, E.ON's bookings until 2019 account for not less than [90-100*] % of all available firm freely allocable capacities.
- (38) Competitors wanting to sell gas to customers connected to E.ON's transmission network therefore face a permanent capacity bottleneck, severely limiting them to transport gas to their actual or potential customers.
- (39) The tight capacity situation contrasted with steady and significant *demand* by transport customers for firm and freely allocable transmission capacities which could not be satisfied by E.ON, as evidenced by numerous rejections of

³⁶ Through its subsidiary *E.ON Ruhrgas*.

³⁷ See above, paragraph (14).

³⁸ See on the point above, paragraph (11).

³⁹ Bookings at *exit points* were considered not relevant for the purpose of the Commission's analysis, because by booking entry capacity shippers are guaranteed to receive exit capacity, too. This means that lacking exit capacity should normally not be an obstacle for competitors to enter into competition with E.ON. Likewise, internal *storage* entry points were not taken into account for the calculation of the technically available capacity, because even if a competitor would get access to one of E.ON's storage sites³⁹, this competitor would normally first need to bring gas into the EGT grid in order to fill the storage. Hence, the utilisation of storages requires the booking of non-storage entry capacity on the EGT grid. The relevant entry point for supplying customers connected to the grid would therefore not be the one allowing for entry into a storage site but the one allowing for entry into the EGT grid beforehand.

⁴⁰ After October 2008: the NCG-grid.

⁴¹ The investigation showed free capacities of around [0-5*] % for H-gas and [0-5*] % for L-gas.

⁴² Third party bookings have accounted for only [10-25*] % for H-gas and [0-5*] % for L-gas between 2006 and 2010.

transmission requests in the investigation period. It is likely that the "formal" requests significantly understate the actual demand⁴³.

- (40) According to the Commission's case practice, long-term capacity bookings can be regarded as *refusal to supply* under Article 102 TFEU⁴⁴. This has been recently confirmed with respect to gas transmission in the Commission's *GdF Suez* case⁴⁵. In this context it is noteworthy that the mere fact that the current capacities may have been actually used by the essential facility holder for its supply business is not sufficient to exclude an abuse under Article 102 TFEU according to established decision practice⁴⁶.
- (41) For the above reasons the Commission preliminarily concludes that E.ON's long-term reservations of a large proportion of the entry capacities into its network amount to a refusal to supply an essential input and may constitute an abuse of dominant position in breach of Article 102 TFEU, hampering competitors' access to the downstream gas supply markets, to the detriment of consumers⁴⁷.

5.5. Effect on trade between Member States

- (42) According to the Commission's preliminary assessment, the behaviour by E.ON described in the previous section affects trade between the Member States within the meaning of Article 102 of the TFEU. Under the case law of the Court of Justice and the Commission's decision-making practice, a direct or indirect, actual or potential influence on the pattern of trade between Member States is sufficient to meet the criterion of affecting trade between Member States, as long as the effect is appreciable⁴⁸. According to the Commission's Preliminary Assessment, E.ON's behaviour is capable of affecting trade between Member States, notably by

⁴³ See also Commission decision of 18.3.2009, COMP/39.402 RWE Gas Foreclosure, at paragraph 24.

⁴⁴ See in this context e.g. Commission decision of 19.4.1977, JO L 117, 1/9; *Sea-Link*, 21.12.1993, JO L 15/18; decision of 21 December 1993 – *Port of Rødby*, OJ L 55, 26.02.1994, page 52; *Frankfurt Airport*, 14.1.1998, L 72/30). Commission decision 94/19/CE of 21 December 1993, concerning proceedings pursuant to Article 86 EC (IV/34689 - *Sea Containers/Stena Sealink* - Interim measures), OJ L 15 of 18.01.1994, page 8, para. 66).

⁴⁵ Case COMP/39.316 of 4.12.2009 - *GdF Suez*.

⁴⁶ See e.g. Case 39.402 of 18 March 2009 - *RWE Gas foreclosure*, footnote 25; Case COMP/39.316 of 4.12.2009 - *GdF Suez*. In such a situation, a dominant essential facility holder is under the obligation to take all possible measures to remove the constraints imposed by the lack of capacity (e.g. by limiting the duration and volume of its own bookings or by expanding its capacities). The Commission also notes in this context that E.ON has erected its gas transmission networks before the liberalisation of the gas transmission markets, i.e. largely protected from competition; see also with respect to refusal to supply and margin squeeze the Communication from the Commission on *Guidance on the Commission's Enforcement Priorities in Applying Article 82 EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings* of 09.02.2009, OJ C 45 of 24.9.2009, S. 7, paragraph 82, 3rd sentence.

⁴⁷ See in this context also Commission's Guidance Paper on Article 82, paragraph 19.

⁴⁸ See Commission Notice, Guidelines on the effect on trade concept contained in Arts 81 and 82 of the Treaty, (2004) OJ C101/07, paragraphs 23 *et seq.* and 44 *et seq.*

affecting import and export flows or hindering foreign competitors from competing with E.ON on the downstream markets within its grid area.

6. COMMITMENT PROPOSAL

- (43) E.ON does not agree with the Commission's Preliminary Assessment. Despite its objections, which did not change the Commission's competition concerns, it has nevertheless offered commitments pursuant to Article 9 of Regulation (EC) 1/2003 to meet the Commission's competition concerns ("Commitment Proposal"). The key elements of the Commitment Proposal are the following:
- (44) In a first step, E.ON proposed to release firm freely allocable entry capacities into its gas transmission grid by October 2010 ("Immediate Capacity Release"). The intention of the Immediate Capacity Release is to bring significant capacities to the market on short notice. It concerns a total capacity volume of 17.8 GWh/h, 10 GWh/h of which are offered for H-gas capacities, 7.8 GWh/h for L-gas capacities.
- (45) The relevant entry points for H-gas are (released capacity volumes according to the Commitment Proposal in brackets): Waidhaus (3,469 MWh/h), Emden NPT (1,250 MWh/h), Dornum (500 MWh/h), Emden EPT (250 MWh/h), Eynatten / Raeren (2,250 MWh/h), Oude Statenzijl (500 MWh/h), Achim (171 MWh/h), Bocholtz (44 MWh/h), Oberkappel (364 MWh/h) and Lampertheim (1,200 MWh/h).
- (46) For L-gas, E.ON's Commitment Proposal covered the entry points Emsbüren (2,193 MWh/h), Drohne (1,413 MWh/h), Steinbrink (187 MWh/h), Vreden (1,400 MWh/h) and Elten (2,565 MWh/h).
- (47) In a second step, E.ON proposed to further reduce its overall share in the bookings of firm freely allocable entry capacity ("Long-Term Reduction") in the NCG (H-gas) market area to 50% by October 2015. For the L-gas network, E.ON proposed a further overall reduction of its booking share to 64% by October 2015. E.ON may reach these thresholds by returning capacities to the TSO or by measures increasing the entry capacity into the grid (through investments or by entering into market area co-operation). E.ON committed not to exceed these thresholds until 2025⁴⁹.
- (48) E.ON will retain certain possibilities to book capacities. E.ON is, for instance, not prevented from booking *interruption-free capacities* and it may, in the first two years of the Immediate Release, book *short-term capacities* (bookings with duration of up to one year) that are not booked by third parties one month before the beginning of the gas year for which the capacities are released⁵⁰. Moreover, E.ON

⁴⁹ After 1 October 2025, E.ON may book such capacities without limitation except if the bookings are made very early in advance: Between 1 October 2015 and 1 October 2020, E.ON undertook, with respect to the period from 1 October 2025 to 1 October 2030, to exceed the mentioned thresholds only by at maximum 5%. Between 1 October 2020 and 1 October 2025, E.ON committed, with respect to the same period (from 1 October 2025 to 1 October 2030), to exceed the mentioned thresholds only by at maximum 10%.

⁵⁰ See paragraphs 5, 6 and 10 of the Final Commitments. The described limitations for the booking of short-term capacity apply only to the first two years of the Immediate Release.

may, as of October 2011, book *long-term capacities* under the condition that E.ON's overall booking share *decreases* over time until reaching the thresholds of 50% for H-gas and 64% for L-gas by October 2015.

- (49) An independent trustee will be asked to supervise the fulfilment of these commitments by E.ON.

7. COMMISSION NOTICE PURSUANT TO ARTICLE 27(4) OF REGULATION (EC) 1/2003

- (50) In response to the publication on 22 January 2010 of a notice pursuant to Article 27(4) of Regulation (EC) No 1/2003 ("Market Test Notice"), the Commission received 20 responses from interested third parties. The respondents generally welcomed the Commitment Proposal and confirmed that the offered capacity release can, in principle, address the concerns expressed by the Commission in the Preliminary Assessment. The observations received did not lead the Commission to identify new competition concerns related to the Commitment Proposal and contained no points such as to make the Commission reconsider the concerns it expressed in the Preliminary Assessment. However, a number of respondents proposed certain modifications to the Commitment Proposal in order to make the gas release more effective. These comments related notably to four issues:

Selection of entry points for the Immediate Release

- (51) A large number of respondents criticised that the allocation of capacities offered by E.ON does not fully correspond to the actual demand. In particular as regards the entry points *Oude Statenzijk, Bocholtz, Vreden* and *Oberkappel*, the volume of the released capacity was perceived as being too small. In addition the necessity of providing capacity at the entry point *Bunder Tief*, which was not included in the Commitment Proposal, was mentioned.
- (52) Third parties also criticised that the capacity offered for the Immediate Release at certain points was higher than the expected demand. According to the comments received, the capacities released at the entry points *Eynatten, Lampertheim, Emsbüren* and *Drohne* could be reduced. For *Achim*, the market test clearly indicated that this entry point is of limited or no use to third parties due to its specific situation. It would therefore not be meaningful to include it into the Immediate Release.
- (53) The Commission considers the comments concerning the allocation of the capacities in the Immediate Release as pertinent.

Allocation procedure for the Immediate Release

- (54) Many respondents to the market test criticised the current capacity allocation mechanism according to which the released capacities would have to be allocated. The criticism concerned in particular the "First Come, First Served"-mechanism and the fact that there is currently no limit to the maximum duration of the bookings. Such a system was not perceived as well suited for a fair and efficient allocation of the released capacities. Therefore, third parties asked either to modify the allocation procedure or to *limit the possible booking duration* of the

Immediate Release, in order to reduce the risk that the perceived disadvantages of the current capacity allocation system could be "perpetuated" through long-term bookings of the released capacities⁵¹. While the Commission is of the opinion that the allocation procedure for the Immediate Release needs to be consistent with the existing legal and regulatory framework in Germany, it shares the view of many respondents that, in a first step (during the first two years of the Immediate Release) capacities should only be marketed for a duration of up to two years. Such a procedure is likely to increase the effectiveness of the commitments.

Release of adjacent exit capacities

- (55) A number of respondents criticised that E.ON would not also release *exit capacities* adjacent to the relevant entry points currently held by E.ON. They pointed out that in order to enter into E.ON's grid some competitors may⁵² not only need *entry* capacity at this point, but also the *exit* capacity at the adjacent point which allows them to leave the "upstream" network. In particular, competitors who are not supplied with gas at the border but intend to receive it at the virtual trading point of the adjacent grid could be prevented from entering E.ON's network despite the capacity release at such an entry point. According to the Commission's investigation, E.ON holds adjacent exit capacities only at one of the entry points concerned by the Immediate Release (Oude Stanzijl) and only in a small proportion compared to the capacity it holds at the adjacent entry point. For Oude Stanzijl, the Commission considers the requirement to release an adequate proportion of adjacent exit capacities as pertinent.

Grid fees

- (56) The market test has indicated that there is a certain risk that not all capacities will be taken-up already in the first two years of the Immediate Release, because of the short time available between the adoption of the decision and the beginning of the gas year 2010/2011 and the consequences of the current economic downturn⁵³. Third parties complained that a right for E.ON Ruhrgas to hand back capacities and to transfer the cost risk to the TSO might increase the overall network tariffs, thereby penalising all grid users and allowing E.ON to gain an advantage over other shippers by saving capacity costs⁵⁴. Third parties, therefore, proposed that E.ON should only be relieved from its obligation to pay the network fees for

⁵¹ It may be noted that the German Bundeswirtschaftsministerium and the Bundesnetzagentur are currently working on a reform of the present capacity allocation procedure which is expected to enter into force in the course of the next two years, see "Einleitungsverfügung zum Festlegungsverfahren zum Kapazitätsmanagement" of 9.2.2010, BK7-10-001, available under: <http://www.bundesnetzagentur.de/media/archive/18208.pdf>.

⁵² Sometimes, however, gas is delivered to the shippers directly at an entry point by other suppliers. In this case, no exit capacity is needed by the shippers to enter E.ON's grid since the upstream supplier books the relevant exit capacity in the adjacent grid.

⁵³ See in this context question a) in paragraph 12 of the Market Test Notice.

⁵⁴ Normally transport customers have no right to sell back superfluous transport capacities to the TSO. The commitments will, however, oblige EGT to take back capacities which are intended for the release.

capacities handed back to the TSO if these capacities are actually taken up by competitors. The Commission shares the view that there is a certain risk that not all capacities can be taken up in the first two years of the Immediate Release and that steps need to be taken to avoid negative effects on competitors. It considers that the solution proposed by third parties for this period would constitute an adequate remedy to this problem⁵⁵.

Other comments

- (57) Other comments have not been taken into account, since they concerned issues outside the scope of the procedure or could not be considered as valid arguments against the effectiveness of the Commitment Proposal. Among others, respondents complained in a general manner about the German regulatory framework or asked for remedies which would have no direct link to the alleged infringement in the present case, such as granting access to storage and blending facilities or to release exit capacities into other market areas. Some third parties preferred that the release of the entire capacities would take place earlier than in 2015 and others asked for higher amounts of capacities to be offered in the Commitment Proposal. However, this would in the Commission's view be disproportionate.
- (58) The Commission informed E.ON on 8 March 2010 of the comments received in the context of the Market Test. In response to these comments, E.ON submitted a revised proposal for commitments ("Final Commitments") on 26 March 2010, which took account of these comments.
- (59) The Final Commitments *re-adjust the capacities* offered at the different entry points as part of the Immediate Release, in line with the results of the market test. They also introduce a two-step procedure for the Immediate Release, according to which the capacities are initially handed back and released *for a duration of two years*. In a second step (as of October 2012) the capacities will be released for the full duration of the corresponding bookings. The "Long-Term Release" (paragraphs 6 et seq. of the commitment text) remains unaffected by this modification. E.ON also offers *exit capacities* adjacent to one entry point covered by the release to companies which purchase the released entry capacities insofar as E.ON holds firm bookings of those exit capacities (up to the amount of the entry capacity released). These capacities will be offered to interested third parties via the secondary capacity market⁵⁶. Finally, E.ON also added a commitment according to which it will during the first two years continue *to pay* the network fee for the immediately released capacities unless these are actually taken up by competitors.

⁵⁵ It may be noted that a similar rule is provided in the current proposal for a reform of the capacity allocation procedure in Germany which is likely to enter into force within the next two years. See in this context the BNetzA's "*Einleitungsverfügung zum Festlegungsverfahren zum Kapazitätsmanagement*" of 9.2.2010, BK7-10-001, Section B, I., 3.).

⁵⁶ Because of the obligation to sell available capacities primarily to holders of interruptible capacity (Art. 9(3) GasNZV), a sale via the primary market would not have been an appropriate option.

- (60) In view of the results of the consultation, the Commission considers that the Final Commitments are sufficient to effectively remove the competition concerns expressed in the Preliminary Assessment.

8. PROPORTIONALITY OF THE FINAL COMMITMENTS

- (61) According to settled case law, the principle of proportionality requires that the measures adopted by Community institutions must be suitable and not exceed what is appropriate and necessary for attaining the objective pursued⁵⁷. Where there is a choice between several appropriate measures, recourse must be had to the least onerous one, and the disadvantages caused must not be disproportionate to the aims pursued⁵⁸.
- (62) For the assessment of the proportionality of commitments submitted within the framework of Article 9 of Regulation 1/2003, the Commission takes into account that the commitments are not imposed by the Commission for an established infringement under Article 7 (1) of Regulation 1/2003, but voluntarily proposed by the undertaking seeking to bring the procedure to an end without a formal decision on the existence of an infringement.
- (63) The Final Commitments proposed by E.ON are *suitable* to remove the competition concerns identified by the Commission in its Preliminary Assessment, since they effectively remove the bottlenecks at the entry points into E.ON's network resulting from E.ON's large long-term capacity bookings, thereby allowing competitors to compete with E.ON on the downstream gas supply markets. The conditions and the scope of the release are also *necessary* to remove the identified concerns, as the result achieved by the Final Commitments could not have been reached by means of other, less far-reaching measures. The Final Commitments can also be regarded as adequate and *proportionate* to the identified competition concerns. On the one hand, the release does not constitute a disproportionate burden for E.ON, while, on the other hand, the potential foreclosure through Germany's largest gas operator potentially affected a very large number of transport and gas customers connected to E.ON's gas transmission network, possibly leading to considerable consumer harm.
- (64) In addition, the public consultation pursuant to Article 27 (4) of Regulation (EC) No. 1/2003 confirmed the Commission's assessment that the offered commitments, as modified by the Final Commitments, are proportionate to the identified competition concerns on the German gas markets.

⁵⁷ Judgement of the Court of First Instance of 19/07/1997 in case T-260/94, *Air Inter v Commission* [1997] ECR II-997, paragraph 144, and Case T-65/98, *Van den Bergh Foods v Commission* [2003] ECR II – 4653, paragraph 201. Specifically in the context of Article 9 decision, see judgement of the Court of First Instance of 11/07/2007 in case T-170/06 *Alrosa Company Ltd v Commission*, paragraph 94.

⁵⁸ Judgement of the Court of 11/07/1989 in case 265/87, *Schröder* [1989] ECR 2237, paragraph 21, and judgement of the Court of 9/03/2006 in case C-174/05, *Zuid-Hollandse Milieufederatie and Natuur en Milieu* [2006] ECR I – 2243, paragraph 28.

Proportionality of the Immediate Release

- (65) As concerns the Immediate Release, i.e. E.ON's obligation to release around 18 GWh/h entry capacities by October 2010 (10 GWh/h for H-gas, 7.8 GWh/h for L-gas), the *scope* of the release and the distribution to the various entry points offered can be regarded as proportionate. The Immediate Release will make around 15% of the current firm and freely allocable transport capacity into the relevant H- and L-gas market areas immediately available. The Immediate release will enable third-party shippers to rapidly reinforce their foothold on the relevant downstream supply markets and to increase the competitive pressure on E.ON in the short term. From E.ON's perspective, the offer to release 17.8 GWh/h on short notice equals [15-25*] % of the capacities currently held by E.ON Ruhrgas. The scope of the Immediate Release offered by E.ON will therefore be sufficient to significantly stimulate competition without imposing a disproportionate burden on E.ON.
- (66) As far as the *distribution* of the capacities to the different entry points is concerned, E.ON's offer, as modified in the Final Commitments⁵⁹, appears appropriate, taking into account the results of the Market Test and the expected demand, as, for instance, reflected by the results of the "Open Season" procedure carried out by E.ON in 2008 or the booking situation at the affected entry points⁶⁰. The offered capacities also keep a certain regional balance between the different sources of gas in that they cover entry points for gas coming from the most important sources (e.g. from Norway, the Netherlands and Russia).
- (67) The modified *allocation procedure* for the Immediate Release, according to which EGT commits to market capacities only for a duration of two years in a first step⁶¹, will increase the likelihood that all capacities affected by the Immediate Release will come to the market as competitively as possible in accordance with the German legal framework.

Proportionality of the Long-Term Release

- (68) The Long-Term Release, i.e. E.ON's obligation to ultimately reduce its booking share in the available capacities into the NCG- and the L-gas grid to 50% and 64% respectively by October 2015 can also be considered as proportionate. As regards the scope of the reduction, E.ON's voluntary proposal to further reduce its *H-gas* booking share to 50% by 2015 can be considered as sufficient to fully remedy the identified competition concerns in the H-gas market. The release will make significant transport capacities available to competitors, allowing them for the first time to effectively compete with E.ON in its "traditional" home area. It is also important to note that the Long-Term Release is of a structural nature, because the capacities will be handed back on a lasting basis, which guarantees that the effect of the commitment will not be dependent on E.ON's future behaviour. Given the

⁵⁹ See above, paragraphs (51) et seq. and (59).

⁶⁰ See: <http://www.eon-gastransport.com/cps/rde/xchg/SID-B29B38D8-A12624A6/eon-gastransport/hs.xsl/3140.htm?rdeLocaleAttr=en>.

⁶¹ See above, paragraph (59).

different means by which E.ON can achieve the reduction of its booking share (e.g. market area cooperation or investments⁶²) and the sufficiently long duration to achieve the ultimate reduction target (October 2015), the reduction of E.ON's booking share to 50% cannot be regarded as disproportionate⁶³. The reduction of E.ON's booking share to 50% will allow alternative suppliers to effectively compete with E.ON on the relevant gas supply markets. By removing the capacity bottleneck it provides a clear-cut remedy that allows the Commission to safely conclude that in the future any foreclosure of competitors will be ruled out⁶⁴.

- (69) Given the specific features of the German *L-gas market*, E.ON's voluntary offer to reduce its *L-gas* bookings to 64% appears to be sufficient to remedy the current competition concerns. *L-gas* is imported to Germany from a limited number of mainly Dutch sources. The market is much smaller than the market for *H-gas*, both as concerns the geographic scope and the transported gas volumes. Also the demand for *L-gas* capacities and the number of actual or potential competitors in this market is significantly lower than in the *H-gas* market. The offered release is therefore sufficient to enable these potential competitors to enter into competition with E.ON and expand their market position. At the same time, the commitment for *L-gas* provides for a clear-cut remedy that allows the Commission to safely conclude that in the future any foreclosure of competitors will be ruled out.
- (70) E.ON commits to comply with the reduction targets until the gas year 2025/2026. The duration of the commitment is necessary to allow sustainable entry of downstream competitors and to establish competitive conditions in the gas transport and supply markets, in particular with a view to the long contract duration in these markets and the time necessary to attract new customers and gain market share in the gas supply markets.
- (71) As concerns the necessity to appoint an independent trustee, it is the Commission's view that a particularly careful monitoring is indispensable, given the complexity and the relatively long duration of the capacity release process. The requirement of a trustee is also in line with the Commission's case practice in the application of Articles 101 and 102 TFEU⁶⁵ and the Merger Regulation⁶⁶.

⁶² See in detail Final Commitments, paragraph 8.

⁶³ See for the scope of the reduction target also the comparable case COMP/39.316 of 4.12.2009 - *GdF Suez*.

⁶⁴ Cf. AG Kokott, conclusions of 17/09/2009 in case C-441/07 P, *Commission v Alrosa Company Ltd.*, paragraphs 53 et seq.

⁶⁵ See *inter alia* the Commission Decisions in cases COMP/38.348 of 12 April 2006- *Repsol CPP SA*, COMP/39.388 of 26 November 2008 - *German electricity wholesale market* and 39.389 of 26 November 2008 *German electricity balancing market*, 39.402 of 18 March 2009 - *RWE Gas foreclosure*; COMP/39.316 of 4.12.2009 - *GdF Suez*.

⁶⁶ See the Commission notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004, OJ C 267, 22.10.2008, p.1.

Conclusion

- (72) The Commission considers that both the Immediate Release and the Long-Term Release of transport capacity by E.ON constitute an effective and proportionate means to remove the competition concerns identified in its Preliminary Assessment.

9. CONCLUSION

- (73) By adopting a decision pursuant to Article 9(1) of Regulation (EC) No 1/2003, the Commission makes commitments, offered by the undertakings concerned to meet the Commission's concerns expressed in its Preliminary Assessment, binding upon them. Recital 13 of the Preamble to the Regulation (EC) No 1/2003 states that such a decision should not conclude whether or not there has been or still is an infringement.
- (74) In the light of the Final Commitments offered, the Commission considers that there are no longer grounds for action on its part and, without prejudice to Article 9(2) of Regulation (EC) No 1/2003, the proceedings in this case should therefore be brought to an end.
- (75) The Commission retains full discretion to investigate and open proceedings under Article 102 of the Treaty and Article 54 of the EEA Agreement as regards practices that are not the subject matter of this Decision.

HAS ADOPTED THIS DECISION:

Article 1

The attached commitments (which were submitted by E.ON AG for the entire E.ON group) are rendered binding on E.ON, its subsidiaries, in particular EGT and E.ON Ruhrgas, and all companies under their control.

Article 2

The proceedings in the present case shall be brought to an end.

Article 3

This Decision is addressed to:

E.ON AG, E.ON – Platz 1, 40479 Düsseldorf, Germany,

E.ON Ruhrgas AG, Huttropstr. 60, 45138 Essen, Germany and

E.ON Gastransport GmbH, Kallenbergstr. 5, 45141 Essen, Germany

Done at Brussels, 4.5.2010

For the Commission

Joaquín Almunia

Member of the Commission

ANNEX

THE COMMITMENTS (Only available in German Language)