

COMMISSION DECISION

of 14.4.2010

**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 39351 – Swedish Interconnectors)

(Only the English 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 EC Treaty¹, in particular Article 9(1) thereof,

Having regard to the Commission decision of 1 April 2009 to initiate proceedings in this case,

Having expressed concerns in the preliminary assessment of 25 June 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 concerns²,

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

Having regard to the final report of the Hearing Officer in this case³,

WHEREAS:

1. SUBJECT MATTER

- (1) This Decision is addressed to Svenska Kraftnät (hereinafter "SvK"), the Swedish Transmission System Operator (hereinafter "TSO") and concerns the curtailment of cross-border transmission capacity for electricity by SvK to address internal congestion since at least 2002.
- (2) In its Preliminary Assessment of 25 June 2009, the Commission came to the provisional conclusion that the curtailment of cross-border transmission capacity for electricity by SvK raised concerns as to its compatibility with Article 102 of the TFEU and Article 54 of the EEA Agreement⁴.

¹ OJ L 1, 4.1.2003, p.1. With effect from 1 December 2009, Articles 81 and 82 of the EC Treaty have become Articles 101 and 102, respectively, of the Treaty on the Functioning of the European Union ("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, respectively, of the EC Treaty where appropriate.

² OJ C 239 of 6.10.2009, p. 9-10.

³ Hearing Officer final report of 25.03.2010

⁴ For the purposes of this Decision, references to Article 102 TFEU shall mean a reference to both Article 102 of the TFEU and Article 54 of the EEA Agreement.

2. THE PARTIES

Svenska Kraftnät

- (3) SvK is a state-owned central administrative authority in Sweden commissioned to maintain, operate and develop the national transmission grid for electric power, which includes all the state-owned interconnectors with neighbouring countries.⁵ SvK is the TSO designated by Sweden for its national electricity system pursuant to Article 8 of Directive 2003/54/EC⁶.
- (4) As part of the Swedish State Administration, SvK does not belong to any group of undertakings and does not have a legal personality.⁷ It is supervised by a Board appointed by the Swedish government. The head of the authority, the "Director General", is appointed by the Swedish government for a period of six years, whereas the remaining personnel are appointed by SvK. Furthermore, according to the Swedish Authority Ordinance (*Myndighetsförordning 2007:515*) SvK can independently represent the Swedish state in a court of law where the matter falls within its area of responsibility. According to Swedish constitutional law, the Swedish government is not allowed to control the activities of its subsidiary authorities. It cannot decide how SvK shall conclude on a concrete single issue which concerns the performing of its duties towards individuals or local authorities. The Swedish state can, however, issue general regulations or guidelines as regards the activities of SvK which are binding..

Dansk Energi

- (5) Dansk Energi (hereinafter "DaE") is a commercial and professional organisation of Danish energy companies operating in Denmark.
- (6) DaE submitted a complaint to the Commission on 20 July 2006 about SvK's behaviour as regards the regulation of transmission capacity on the electrical connection between southern Sweden and eastern Denmark, the Öresund interconnection ("*Öresundsförbindelsen*").
- (7) In particular, DaE submitted that SvK has a policy of limiting transmission capacity through the Öresund interconnector not for reasons of securing supply of electricity but for reasons of lowering costs connected to counter-trade and also in

⁵ The grid consists of approximately 15,000 kilometres of 200kV and 400 kV lines plus installations, interconnectors to neighbouring countries and IT systems. The State-owned interconnectors are: Sweden-Finland, Sweden – South Norway, Sweden – Mid Norway, Sweden –North Norway, Sweden – West Denmark, Sweden – East Denmark, Sweden – Poland. There is one further interconnector on Swedish borders, the Baltic Cable, linking Sweden and Germany which is not owned by the Swedish State but by the undertakings Statkraft (2/3) and E.ON (1/3). See Figure 1 for a presentation of the interconnectors.

⁶ Directive 2003/54/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity and repealing Directive 96/92/EC, OJ L 176 of 15.7.2003, p. 37.

⁷ See reply to Q 1b from SvK to RFI of 30.4.2008 in which SvK states that it is not a legal person according to Swedish law.

order to lower the spot market price in Sweden. Further, DaE alleged that the limitation of the interconnector capacity has a damaging effect on competition and trade within the internal electricity market and especially to the detriment of consumers in eastern Denmark.

- (8) As an association of energy companies in Denmark, DaE is directly concerned by such a policy because limiting export to Denmark inflates the prices in eastern Denmark, restricting effective competition and finally harming consumers in the area. Accordingly, DaE requested that the Commission initiate proceedings against SvK under Regulation (EC) No 1/2003 and Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty⁸ for an abuse of dominant position.

3. PROCEDURAL STEPS UNDER REGULATION (EC) NO 1/2003

- (9) The present investigation was triggered by a complaint⁹ submitted by DaE on 20 July 2006 as regards the interconnectors between southern Sweden and eastern Denmark. The Commission subsequently enlarged the scope to include the interconnectors and the behaviour of SvK on all borders of Sweden.
- (10) A number of requests for information pursuant to Article 18 of Regulation (EC) No 1/2003 were sent to SvK. Further, requests for information were addressed to a number of third parties such as other TSOs, energy companies as well as the trading platform Nord Pool Spot AS (hereinafter "Nord Pool").
- (11) On 1 April 2009, the Commission opened proceedings pursuant to Article 11(6) of Regulation (EC) 1/2003 with a view to adopting a decision under Chapter III of that Regulation. On 28 April 2009, SvK informed the Commission that it accepts that any formal document, preliminary assessment or Decision is adopted in the English language. On 25 June 2009, the Commission 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 the curtailment of cross-border transmission capacity for electricity by SvK.
- (12) On 4 September 2009, SvK submitted commitments ("the Commitments") to the Commission in response to the preliminary assessment.
- (13) On 6 October 2009, 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 give their observations on the commitments within one month following publication.¹⁰

⁸ OJ L 123, 27.4.2004, p. 18.

⁹ On 5 February 2010, DaE withdrew that complaint.

¹⁰ Cf. footnote 2.

- (14) On 13 November 2009, the Commission informed SvK of the observations received from interested third parties following the publication of the notice. On 26 January 2010, SvK submitted an amended proposal for commitments.
- (15) On 15 March 2010 the Advisory Committee on Restrictive Practices and Dominant Positions was consulted. On 25 March 2010 the Hearing Officer issued his final report .

4. PRELIMINARY ASSESSMENT

4.1. Relevant markets

1.1.1. Product market

- (16) According to the preliminary assessment, the product market is considered to be the electricity transmission market including the transmission grid at the voltage level of 220-400 kV and the interconnectors connected to this voltage level.
- (17) This is in line with the previous Commission Decisions in which the relevant product market was considered to be the operation and management of the high voltage grid ("electricity transmission market")¹¹, that is, the transmission of electricity between points on the high voltage grid.

1.1.2. Geographic market

- (18) According to the preliminary assessment of the Commission, the relevant geographic market is considered to be the territory of Sweden, including its borders where interconnectors are located.
- (19) This is in line with the previous Commission Decisions in which the geographic scope of the electricity transmission market was considered to be each transmission operator's network¹².
- (20) In previous cases¹³, the Commission also considered the existence of a separate market relating only to the transmission of electricity involving a "cross-border flow" within the meaning of Article 2(1) of Regulation (EC) No 1228/2003 of the

¹¹ (a) Commission Decision of 14 August 2008 in case COMP/M.5154 – *CASC JV*, OJ C 270, 25.10.2008, p. 15, paragraph 18 et seq., (b) Commission Decision of 22 August 2008 in case COMP/M.4922 – *EMCC*, OJ C 288, 11.11.2008 p. 1, paragraph 12 et seq., (c) Commission Decision 2006/622/EC of 21 December 2005 in case COMP/M.3696 – *E.ON/MOL*, OJ L 253, 16.9.2006 p. 20, paragraph 212 and (d) Commission Decision 2005/801/EC of 9 December 2004 in case COMP/M.3440 – *EDP/ENI/GDP*, OJ L 302, 19.11.2005 p. 69, paragraph 34.

¹² (a) Commission Decision 2005/801/EC of 9 December 2004 in case COMP/M.3440 – *EDP/ENI/GDP*, OJ L 302, 19.11.2005, p. 69, paragraph 75 and (b) Commission Decision 2006/622/EC of 21 December 2005 in case COMP/M.3696 – *E.ON/MOL*, OJ L 253, 16.9.2006, p. 20, paragraph 253 where the grid was operated on a national level.

¹³ (a) Commission Decision of 14 August 2008 in case COMP/M.5154 – *CASC JV*, OJ C 270, 25.10.2008, p. 15, paragraph 21 et seq. and (b) Commission Decision of 22 August 2008 in case COMP/M.4922 – *EMCC*, OJ C 288, 11.11.2008, p. 1, paragraph 14 et seq.

European Parliament and of the Council of 26 June 2003 on conditions for access to the network for cross-border exchanges in electricity¹⁴. The geographic scope of such an activity was deemed to be limited to the transport of electricity on one specific interconnector line.

- (21) With regard to SvK, the preliminary assessment highlighted the fact that the competitive analysis which concerns the transmission of electricity within Sweden and for exports to other Member States and Contracting Parties to the EEA Agreement does not depend on whether only one specific interconnector line or the national transmission grid is considered to be the relevant geographic market. Even when the interconnector is not owned or co-owned by the Swedish state or SvK, SvK can, in any event, control and thereby reduce the available capacity for this interconnector as the owner of the transmission grid in Sweden.

4.2. Undertaking

- (22) According to the Commission's preliminary assessment, SvK is considered to be an undertaking within the meaning of Article 102 TFEU.
- (23) According to the case-law of the Court of Justice, an entity engaged in economic activities is considered to be an undertaking within the meaning of Articles 101 and 102 TFEU regardless of its legal status and of the way in which it is financed¹⁵. SvK is an entity engaged in economic activities, insofar as it provides its services on the electricity transmission market, and is therefore considered to be an undertaking within the meaning of Article 102 TFEU. The Commission's preliminary assessment stated that the fact that SvK does not have a separate legal personality from that of the Swedish state does not affect the conclusion that it is considered an undertaking within the meaning of Articles 101 and 102 TFEU. Moreover, it is noted that although the State has a single legal personality, SvK has the capacity to be an independent party to legal proceedings where a matter falls within its area of responsibility. For the purpose of its activity, SvK can make use of specific assets and enjoys considerable autonomy.

4.3. Position of the parties on the relevant market / Dominant position

- (24) In its preliminary assessment, the Commission took the view that SvK has a dominant position" within the meaning of Article 102 TFEU on the Swedish electricity transmission market.
- (25) SvK has been granted an exclusive concession to operate the Swedish electricity transmission network under Swedish legislation. SvK therefore has a monopoly on the Swedish electricity transmission market. It has the ability to reduce and thereby control the available export capacity to neighbouring countries.

¹⁴ OJ L 176, 15.7.2003, p. 1.

¹⁵ Case C-41/90 *Höfner and Elser* [1991] ECR I-1979, paragraph 21, Case C-280/06 *ETI and Others* [2007] ECR I-10893, paragraph 38, Judgment of 5 March 2009 in Case C-350/07 *Kattner Stahlbau* nyr, paragraph 34.

4.4. Substantial part of the internal market

- (26) According to the Commission's preliminary assessment, the Swedish electricity transmission market is considered a substantial part of the internal market as required by Article 102 TFEU¹⁶. The Swedish electricity transmission market covers the whole territory of a Member State. Furthermore, all electricity exported from Sweden to other Member States and to other Contracting Parties to the EEA Agreement is exported via the transmission network and the interconnectors controlled by SvK. There are no alternative means or routes to import or export electricity from Sweden to other Member States or to other Contracting Parties to the EEA Agreement.

4.5. Practices raising concerns

- (27) In the preliminary assessment, the Commission raised concerns that SvK may have abused its dominant position on the Swedish electricity transmission market according to Article 102 TFEU by curtailing capacity on the Swedish interconnectors when it anticipated internal congestion within the Swedish transmission system, thereby discriminating between different network users. By treating requests for transmission for the purpose of consumption within Sweden differently from requests for transmission for the purpose of export, SvK may have artificially segmented the market and prevented industrial and other users located outside Sweden from reaping the benefits of the internal market. It has been confirmed by the Court of Justice in *Tetra Pak*¹⁷ that behaviour committed on one market (the interconnector capacity curtailment in this case) having an effect on another market (the wholesale and retail electricity markets in neighbouring countries in this case) can be considered an abuse under Article 102 TFEU.

4.5.1. Market conditions

- (28) Electricity is traded in Sweden as in the other Nordic countries through various forums (Over The Counter /exchange) and using different products (day-ahead/forward). The most important forum for physical trading is Nord Pool, where approximately 70 % of the total electricity consumption in the Nordic region is traded¹⁸. The Nord Pool day-ahead price is determined by a matching process of hourly¹⁹ supply and demand offers²⁰ from market participants. Those offers are made by participants according to where their production or consumption physically takes place in predefined bidding zones. Those

¹⁶ Commission Decision 2001/519/EC of 13 June 2000 in case COMP/M.1673 – *VEBA/VIAG*, OJ L 188, 10.7.2001, p. 1, where the German national market for the supply of electricity at the interconnected level was regarded as a substantial part of the common market according to Article 2 of Council Regulation (EEC) No 4064/89 (Merger Regulation).

¹⁷ Case C-333/94 P *Tetra Pak International SA v Commission*, ECR 1996 Page I-05951.

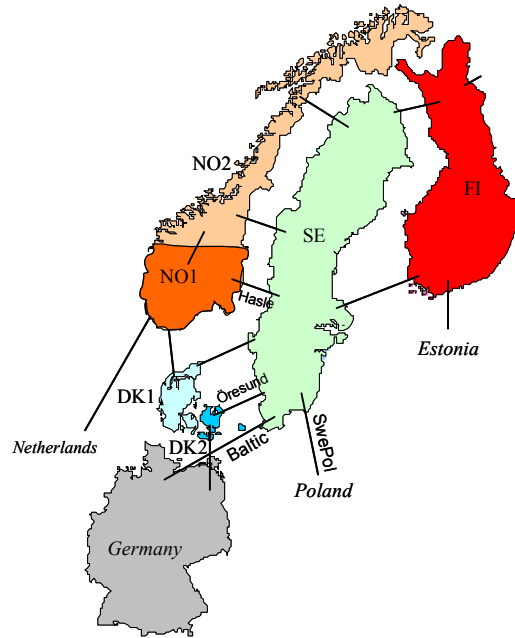
¹⁸ See: <http://www.nordpoolspot.com/about/>.

¹⁹ Electricity markets are organised on an hourly basis because electricity cannot be stored and demand is continuous and fluctuating significantly across hours.

²⁰ There are three types of bids available in Elspot: Hourly Bid, Block Bid and Flexible Hourly Bid.

geographical zones, and the electricity links ("interconnectors") between these zones, are depicted in Figure 1.

Figure 1: Schematic overview of the Nordic bidding zones and interconnectors on 17 November 2008



Note: The solid lines in the figure indicate interconnectors. The bidding zones were as of 17 November 2008 North Norway (NO2), South Norway (NO1), Denmark West (DK1), Denmark East (DK2), Sweden (SE) and Finland (FI). Poland and the Netherlands are not part of the Nord Pool system, whereas since 5 October 2005 the Vattenfall network area in Germany has become a bidding zone in Nord Pool. This zone is called Kontek.²¹ Moreover the system of bidding zones has evolved during the period of investigation: while Norway included 2 bidding zones on 17 November 2008, the number and scope of Norwegian zones have changed several times and it currently includes 4 bidding zones. In practice, Statnett decides the scope and number of zones based on where congestions are expected in the grid.²² From 11 June 2001 until 15 December 2002 Norway was made of 2 areas. From 16 December 2002 until 1 June 2003 there were 4 areas. From 2 June 2003 until 14 December 2003 there were 2 areas. From 15 December 2003 until 30 May 2004 there were 3 areas, from 31 May 2004 until 19 November 2006 there were 2 areas and from 20 November 2006 to 16 November 2008 there were 3 areas²³. From 17 November 2008 to 12 April 2009 there were 2 areas, while from 13/04/2009 to 10 January 2010 there were 3 areas. From 11 January 2010 to 14 March 2010 there were four bidding zones in Norway.²⁴ On 15 March 2010 there were five bidding zones in Norway.²⁵

- (29) The Swedish electric system which has currently one bidding zone is characterised by the existence of bottlenecks in the network. SvK identifies four bottleneck

²¹ See: <http://www.nordpoolspot.com/Documents/Product%20Sheets/KONTEK.pdf>.

²² See: <http://www.lovdataba.no/cgi-wift/ldles?doc=/sf/sf/sf-20020507-0448.html>. In this regulation it is stated that Statnett shall use bidding zones as a tool to handle large and long-lasting bottlenecks in the grid. Bidding zones should also be used in cases where Statnett expects energy shortage within a limited geographical area.

²³ Letter from SvK dated 8 December 2008.

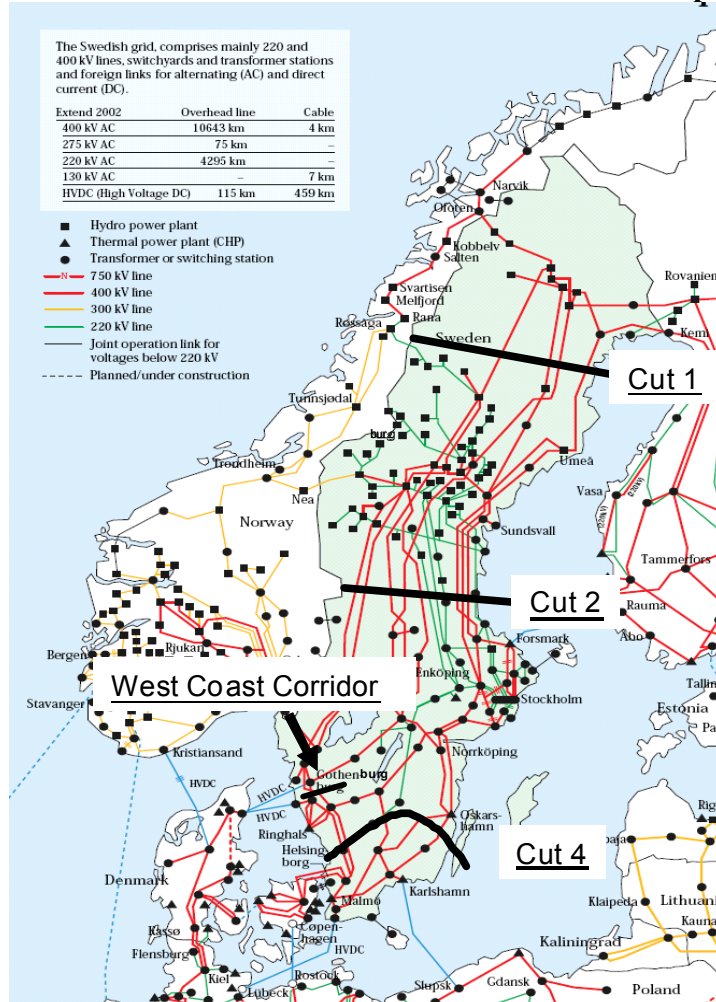
²⁴ http://www.nordpoolspot.com/upload/reports/areaPrice_daily_2008.xls

http://www.nordpoolspot.com/upload/reports/areaPrice_daily_2009.xls

²⁵ <http://www.nordpoolspot.com/reports/areaprice/Post.aspx>.

sections (called "cuts") in its network as presented in Figure 2: these are called Cut1, Cut2, Cut4 and the West Coast Corridor.

Figure 2: Network in Sweden with bottlenecks as of 22 April 2006



Source: SvK. Further, the location of the bottlenecks (cuts) in Sweden is also mentioned in a Nordel document with the title "Principles for determining the transfer capacity in the Nordic power market" of 23 January 2008.

- (30) The electricity flow through Cut 1 is the total flow through four power lines²⁶. The electricity flow through Cut 2 is the total flow through eleven power lines²⁷. The

²⁶ Porjus-Grundfors 400 kV; Ligga-Vargfors 400 kV; Letsi-Betåsen 400 kV; Svartbyn-Stornorrfors 400 kV.

²⁷ Rätan-Borgvik 400 kV; Midskog-Borgvik 400 kV; Storfinnsforsen-Lindbacka 400 kV; Betåsen-Bäsna 400 kV; Midskog-Morgårdshammar 400 kV; Hjalta-Hamra 400 kV; Nysäter-Stackbo 400 kV; Moliden-Stackbo 400 kV; Laforsen-Hofors 220 kV; (Krångede-Horndal 220 kV until April 2006); Dönje-Ockelbo 220 kV; Söderala-Valbo 220 kV.

“West-Coast-Corridor” is the total flow through two 400 kV lines.²⁸ The flow through Cut 4 is the total flow through six power lines²⁹.

- (31) The bottlenecks in the Swedish electricity network are first due to the localisation of electricity demand and supply (generation) within Sweden.
- (32) Swedish electricity demand (residential and industrial customers) is mostly located in the south of Sweden. This is due to the fact that a majority of the population and industry is situated in the south where large cities are located such as Göteborg, Stockholm and Malmö.³⁰
- (33) Generation facilities in the country are not distributed in the same way as consumption. The area between Cut 2 and Cut 4 (area 3) has the overall largest share of both electricity consumption and production. The two areas north of Cut 2 (area 2) and Cut 1 (area 1) represent more than 40% of total production capacity whereas they represent around 20% of consumption. The southernmost area south of Cut 4 (area 4) represents only 6% of total production capacity but close to 20% of total consumption. There is thus in Sweden an excess of generation in the north and an excess of consumption in the south requiring the network to transport electricity from the North to the South.

Table 1: Electricity consumption and production by network area in Sweden - 2007

Areas in Sweden	Demand (based on GWh)	Production (based on GW)
Area 1	6%	15%
Area 2	15%	28%
Area 3	61%	52%
Area 4	18%	6%
Total	100%	100%

Source: SvK.

- (34) In Sweden, the technologies with the largest installed capacity are hydropower plants (49%) and nuclear plants (27%). These are technologies with lower marginal costs than thermal technologies (such as gas or oil-fired power plants)³¹. Hydropower and nuclear power plants represent together 25.3 GW of installed capacity. They can thus jointly supply in many hours virtually all³² of the electricity needed to meet demand in Sweden since the level of demand in Sweden varies between approximately 13.6 GW³³ at off-peak (that is in the middle of the night)

²⁸ Strömme-Stenkullen and Horred-Kilanda.

²⁹ Horred-Breared 400 kV; Horred-Söderåsen 400 kV; Tenhult-Alvesta 400 kV; Simpevarp-Alvesta 400 kV; Simpevarp-Nybro 400 kV; Nässjö-Värnamo 220 kV.

³⁰ See Statistics Sweden (2008) for the population density in Sweden: http://www.h.scb.se/scb/bor/scbboju/cgi-bin/bj_mapp.exe. See also Statistics Sweden (2008) for distribution of industry in Sweden: http://www.scb.se/Pages/ListWide_261362.aspx.

³¹ See Energy SI report paragraph 368.

³² In practice, there may still be other plants producing electricity (such as wind power or CHP plants) in that area because of technical constraints.

³³ This represents the average load in Sweden at 4am in 2008.

and 28.9 GW at peak (that is the demand at noon). In those many hours when hydropower and nuclear power can serve all of demand in Sweden, the price in Sweden is influenced by the cost of those technologies. Consequently the prices in Sweden are lower than those of other zones, such as eastern and western Denmark, where demand can rarely (if at all) be met only by such imported cheaper technologies and requires the use of more expensive thermal power plants which is the main generation technology used in that country.³⁴

- (35) This result shows the other constraint on the Swedish network. The bottlenecks in the Swedish electricity network are not only linked to the situation within Sweden but also linked to the situation of Sweden within the Nordic area. The imbalance between supply and demand within Sweden is exacerbated by the fact that, in the south, Sweden exports electricity to the continent to satisfy demand there while, in the north, Sweden imports electricity from Norway where there is cheap hydro power often in excess of demand in Norway.
- (36) During moments of peak demand, the lines in one or more of the four sections, but particularly in sections 2 and 4, cannot accommodate north-south flows of electricity in or into Sweden. SvK needs to manage this congestion.
- (37) Whereas in the long term investments to expand or reinforce capacity in the network can primarily remedy this congestion³⁵, SvK can adopt essentially three types of measures to relieve internal network congestion in the shorter term. First, it can create separate price areas on both sides of the bottleneck and hence give price signals to increase production and decrease consumption in the higher-priced side of the bottleneck. A creation of several zones can be observed, for example, in Norway³⁶. Second, SvK can pay generators (or large consumers) on both sides of the bottleneck to change their planned production (or consumption), which effectively reduces the transmission flow on the bottleneck ("counter-trade")³⁷. The costs of such counter-trade are paid by all network users of the TSO who carries out counter-trading. Lastly, SvK can limit (curtail) available transmission capacity for trade with another zone, to relieve the foreseen congestion on the bottleneck within its network.

4.5.2. SvK has curtailed export capacity on interconnectors

³⁴ For peak load in Sweden see Nordel (2007) document with title: "Power balance: Winter 2007-2008"

See www.svk.se/Global/01_Om_oss/Pdf/Driftradet/DRAD_4-07_BILAGA4_NordelPowerbalance200708.pdf.

³⁵ Congestion can also be alleviated by re-balancing regional electricity supply and demand through, for example, the building of new generation facilities which are not, however, in the operational remit of SvK but can be accomplished by market players.

³⁶ See: www.statnett.no, *Statnetts praktisering av systemansvaret* (2009). See also figure 1.

³⁷ In practice, when counter-trade is applied, the TSO pays for extra generation or a decrease in consumption in the area which does not have enough supply on one side of the bottleneck and pays for a decrease in production or an extra consumption in the area with excess production on the other side of the bottleneck. The costs of counter-trade are fed in the network tariffs.

- (38) According to the Commission's preliminary assessment, SvK limited electricity exports, due to internal bottlenecks, on several interconnectors during a significant number of hours in the period January 2002- April 2008. This procedure concerns only limitations of capacity due to internal congestion and there may be other reasons why SvK curtailed interconnector capacity (technical unavailability for example) in a number of hours during the period. The frequency of export capacity limitations by SvK ranged between 26% and 34% of all hours between 2005 and 2008 on the Öresund interconnector, the SwePol interconnector, the Baltic Cable interconnector and the Hasle interconnector. On the interconnector to Finland, SvK curtailed capacity less often but still 6% of all hours, whereas on the interconnectors towards mid- and north Norway, SvK almost never curtailed export capacity.
- (39) According to the Commission's preliminary assessment, the interconnectors to eastern Denmark and southern Norway have been the most acute cases of capacity curtailments. Congestion and export capacity limitations have been very frequent on the Öresund interconnector and the Baltic Cable especially in the years 2005 and 2007, while for the interconnector to southern Norway congestion and export capacity limitations occurred in the years 2003, 2004, 2006 and 2007 and on the SwePol cable in the years 2005, 2006, 2007 and 2008.
- (40) The proportion of the capacity curtailed by SvK due to internal congestion has on average exceeded half of the overall interconnector capacity on all interconnectors in most years within the investigated period.
- (41) A limitation of the interconnectors' export capacity can affect the prices of bidding zones when it causes congestion or contributes to it. According to the Commission's preliminary assessment, in hours when capacity limitation and congestion on the interconnectors have occurred due to the behaviour of SvK in Sweden, the average prices in the neighbouring countries were significantly higher than the prices in Sweden. In those hours, the behaviour of SvK contributed to the price difference between zones. The average prices in eastern Denmark were almost EUR 35.6 higher than in Sweden in 2006 and about EUR 20.6 higher than in Sweden in 2007. Also the prices in western Denmark were about EUR 23.1 higher than the prices in Sweden in 2005 and almost EUR 40 higher than the prices in Sweden in 2007. With more transmission capacity between Sweden and those zones, the prices of those zones would have been lower³⁸.
- (42) The preliminary assessment of the Commission was that SvK's practice of restricting exports by reducing interconnection capacity between Sweden and neighbouring Member States as well as Contracting Parties to the EEA Agreement due to internal congestion leads, *de facto*, to discrimination between the customers in Sweden and customers in the Member States and Contracting Parties to the EEA Agreement importing electricity from Sweden. Discrimination between

³⁸ This does not exclude that in addition to the behaviour of SvK other factors, such as the behaviour of operators, has affected prices, see for instance Elsam in western Denmark, Case 4/0120-0204-0038 *Elsam A/S v Danish Competition Council*.

customers based on residence constitutes, in view of the Court's case law, an abuse of dominant position in violation of Article 102 TFEU³⁹.

- (43) It is useful to recall the general principle enshrined in Article 18 TFEU according to which any discrimination on the basis of nationality is prohibited. Moreover, Article 35 TFEU expressly prohibits quantitative restrictions on exports and all measures having equivalent effect. It is thus clear that a Member State would not be entitled to restrict exports of electricity so as to reserve such electricity for domestic consumption. Similarly, a dominant undertaking cannot seek to achieve the same objective through its conduct on the market without falling foul of Union competition rules⁴⁰. Practices that do so are generally considered to have as their object the restriction of competition⁴¹.
- (44) The Commission's preliminary assessment was that by curtailing interconnector capacity because of internal congestion, SvK treated domestic transmission services and transmission services to an interconnector intended for exporting electricity differently. Demand for domestic transmission services was satisfied where transmission capacity was available, whereas in a significant number of hours and to a significant extent demand for transmission services to/over interconnectors was refused despite transmission capacity being available. Domestic transmission services excluding the Swedish interconnectors and transmission services using an interconnector with a view to exporting electricity are equivalent transactions within the meaning of the case law of the Court of Justice⁴². They take place on the same market, that is, the Swedish transmission market. The preliminary assessment of the Commission was that SvK curtailed interconnector capacity because of internal congestion which has led indirectly to a different treatment of customers depending on their residence. Ultimately, SvK has contributed to a segmentation of markets between Member States, and contracting parties to the EEA Agreement impeding customers and producers from reaping the benefits of the internal market contrary to the fundamental aims of the Union.

³⁹ The Court has so far applied Article 102 TFEU to practices which were discriminatory directly or indirectly on grounds of nationality in two categories of cases: (a) discrimination by a dominant undertaking by reason of the nationality/residence of the parties concerned: Case T-139/98 *AAMS v Commission*, [2001] ECR II-3413, Case 7/82 *GVL v Commission*, [1983] ECR 483 and also Case 27/76 *United Brands and United Brands Continental v Commission* [1978] ECR 9, paragraphs 204-234; (b) discrimination taking the form of applying dissimilar conditions to equivalent transactions: Case C-18/93 *Corsica Ferries Italia* [1994] ECR I-1783, Case C-163/99 *Portuguese Republic v Commission* [2001] ECR I-2613 and Case C-82/01 *Aéroports de Paris v Commission* [2002] ECR I-9297.

⁴⁰ Joined cases 56 and 58-64 *Établissements Consten and Grundig v Commission* [1966] ECR 299, p. 340.

⁴¹ Case 41-69 *ACF Chemiefarma v Commission*, [1970] ECR 661, paragraph 128 and Joined cases 56 and 58-64 *Établissements Consten and Grundig v Commission* [1966] ECR 299, p. 342 and 343.

⁴² Cf. footnote 39 b.

- (45) According to the Commission's preliminary assessment, SvK did not provide the evidence necessary to demonstrate that the suspected conduct is objectively justified.

4.6. Effect on trade between Member States

- (46) In its preliminary assessment, the Commission considered that there is a direct and appreciable effect on trade between Member States as SvK's behaviour restricts the flow of electricity from Sweden to its neighbouring Member States and to Contracting Parties to the EEA.

5. PROPOSED COMMITMENTS

- (47) According to the commitments offered by SvK on 4 September 2009 to meet the Commission's competition concerns SvK will subdivide the Swedish transmission system into two or more bidding zones and operate the Swedish transmission system on that basis by 1 July 2011 at the latest. The configuration of the bidding zones will be flexible enough so that it can be modified to adapt to foreseen and unforeseen changes in the future flow patterns on the Swedish transmission system. From the date the bidding zones are operative, SvK will manage congestion in the Swedish transmission system without limiting trading capacity on interconnectors.
- (48) There will be one exception to this principle of management of internal congestion: congestion in the West-Coast-Corridor. SvK has argued that congestion in the West-Coast-Corridor cannot be managed in an efficient manner by bidding zones as this area would not contain sufficient suitable generation resources to be able to set a market price by itself. SvK commits to reinforce the West-Coast-Corridor section by building and operating a new 400 kV transmission line between Stenkullen and Strömme-Lindome by 30 November 2011.
- (49) During the interim period, that is, the period between the notification of the commitment decision and the date on which the bidding zones become operative, SvK commits to manage any congestion that it would anticipate in the Swedish transmission system by taking into account regulating resources suitable for counter-trade to address congestion. In practice, in the planning phase, once it has anticipated a congestion point and thus identified a corresponding curtailment need (MW), SvK commits to identify all regulating resources which it can expect to be available in the operational phase to address such congestion. SvK will subsequently rank those resources in merit order and select the cheaper ones which add up to the amount of curtailment identified. Out of these selected resources, SvK will further select those located in Sweden and add them up to obtain an amount (MW). SvK commits to deduce this amount from the curtailment need initially anticipated. There may still remain an amount of curtailment. In the operational phase, SvK commits to use any available regulating resource suitable to address congestion in order to guarantee the interconnector trading capacities that it will have given to the market.

6. COMMISSION NOTICE PURSUANT TO ARTICLE 27(4)

- (50) In response to the publication on 6 October 2009 of a notice pursuant to Article 27(4) of Regulation (EC) No 1/2003, the Commission received 57 responses from interested third parties. While some respondents, among them national regulating and competition authorities, generally welcomed the proposed commitments which they believed would address the concerns expressed by the Commission, others submitted arguments which are addressed in the following paragraphs.

6.1 Adequacy of bidding zones as a remedy to tackle internal congestion in Sweden

- (51) Some respondents argued that the bidding zones are not the right remedy to tackle internal congestion and that network investments and counter-trade would better solve the competition concerns identified by the Commission.
- (52) As bidding zones were proposed by SvK as a principal commitment in the present case, they can be made binding by the Commission according to Article 9 of Regulation 1/2003 if they are sufficient to remedy the concerns and are not disproportionate. Section 7 of this Decision, entitled "Proportionality of the amended commitments", demonstrates that bidding zones are a sufficient and proportionate commitment to address the concerns.

6.2. Impact of bidding zones on concentration and prices in Sweden

- (53) Some respondents argued that the introduction of bidding zones would lead to increased concentration on retail, wholesale and balancing markets in Sweden. In addition, some respondents pointed to potentially higher prices in southern Sweden. The Commission takes the view that neither the comments on concentration nor the comments on higher prices require a modification of the commitments.

Concentration

- (54) Concentration in electricity markets is a result of physical factors (such as network topology and location of production and demand in the network) and the introduction of bidding zones will have no impact on those factors. Hence, market concentration exists already today on wholesale, retail and balancing markets without bidding zones. However its existence and impact are hidden because of SvK's curtailing practice and because the market for counter-trade resources where concentration can already have an impact today is not as transparent as for instance the retail market. Thus, bidding zones can reveal market concentration but do not enhance market concentration.
- (55) The Commission investigation shows that in countries where several bidding zones are operated by the TSOs (Norway for instance), the retail markets remain competitive. It is therefore clear that bidding zones, in themselves, are not an obstacle to competition. For instance Norway counts 97 electricity suppliers and has a switching rate of 8% in 2008, which is the same rate as in Sweden.⁴³ There is

⁴³ Source: Nordic market report 2009, NordReg: <https://www.nordicenergyregulators.org/upload/Reports/Nordic%20market%20report%204-2009%20%20final.pdf>

no evidence that bidding zones will decrease competition in the retail market. As an example, a 2008 report from the regulator in Sweden compared the retail margins in Norway with Sweden and found in the period from February to September 2008 that the margins in the latter were almost twice as high⁴⁴.⁴⁵ Overall, as assessed in a survey carried out by the Nordic Council of Ministers in 2008⁴⁶, the introduction of bidding zones in Sweden would be positive for the European consumer and should pave the way for more transparent energy markets for final customers in Sweden, and in the Union.

- (56) Some respondents argued that the complexities of zones will create additional costs and risks for retailers which will deter entry in retail markets, thereby leading to more concentration on retail markets than currently. It is correct that the subdivision will affect market conditions and, consequently, the risk policy of market participants as evidenced in other markets. It would not necessarily result in less competitors in retail markets. However, there are instruments such as Contracts for Differences ("CfD contracts") to manage the risk in the short term. In addition and in the longer term, market participants may invest in new generation capacities so that they are able to meet the demand of customers that are located in zones where generation capacities are scarce.
- (57) As regards wholesale and balancing markets, the introduction of bidding zones will prevent a distortion of price signals and reflect real market conditions: prices will increase in the zones where there is a deficit of cheap generation or in zones where consumption is significant (and vice-versa: prices will decrease in zones where there is an excess of cheap generation or in zones where consumption is relatively lower). These price signals will give clearer indications to investors on the most relevant places to build new generation capacities. Market power will diminish consequently in the long-term. In addition, the national regulator has the power to monitor the electricity prices as foreseen in the Swedish regulation⁴⁷.

Prices

- (58) Some respondents complained that prices will increase due to the new system of zones. First, to the extent that one can anticipate how prices will change after subdivision, prices will likely not increase in all future bidding zones in Sweden. It is likely in the near future that in northern Sweden, electricity prices will decrease due to excess of cheap hydro generation and lack of sufficient transmission capacity between north and south. In southern Sweden, prices will likely increase in the near future due to insufficient amount of cheap generation assets in that area and the lack of transmission capacity from northern Sweden. This is a necessary

⁴⁴ The comparison was based on the customers with market-based contracts (spot price contracts), and the price zone NO1 in Norway was used in the study.

⁴⁵ See: <http://www.ei.se/Bibliotek/Rapporter-2008/Svenska-elhandelsforetag-har-dubbelt-sa-hoga-marginaler-som-norska/>.

⁴⁶ "Congestion Management in the Nordic Market – evaluation of different market models" by Ea Energy Analyses, May 2008 (Ea report).

⁴⁷ See: <http://www.riksdagen.se/webbnav/index.aspx?nid=3911&bet=2007:1153>.

consequence of the remedy which puts an end to the alleged discrimination between Swedish and non-Swedish customers which is not compatible with Article 102 TFEU. Second, the aim of the proposed subdivision is to let the market fully reflect the conditions of supply and demand in all zones in the network. Further, bidding zones will give important investment signals for both new grid investments and new generation capacity that will lead to price convergence between the zones in the long run.

- (59) Some consumers in south Sweden complained that the introduction of bidding zones will affect the prices for the industry in south Sweden and that will affect their ability to compete in their own markets. Currently, other European industrial customers outside Sweden are facing unfair competition from these Swedish industrial customers that are paying for their electricity at prices which do not reflect market conditions. The commitments will establish a level playing field for industrial customers in the Union. Bidding zones will result in prices reflecting true market conditions.

6.3. Delay for the introduction of bidding zones

- (60) Some respondents argued that the introduction of bidding zones as early as from 1 July 2011 would jeopardize some of the financial and long-term supply contracts that have already been signed.
- (61) In particular, some energy suppliers and traders underlined the fact that they signed CfD contracts traded on Nord Pool ASA to hedge their positions against future price zone risks. Those financial contracts will not expire before 2012. According to those market players, an early introduction of the bidding zones from 1 July 2011 would change the value of the financial contracts signed for 2011 and 2012, which would jeopardize their hedging strategy and result in some of them incurring losses. Accordingly, they argued that the introduction of the bidding zones should be delayed up to 2013 in order to take into account the existence of those financial contracts.
- (62) In addition, other respondents mentioned the fact that they signed fixed-price long-term supply contracts with final customers and that the introduction of bidding zones from 1 July 2011 would have an impact on their margins for those contracts (some of the contracts are valid for up to five years). As a result, those market players argued that the introduction of the bidding zones should be delayed after the expiration of the long-term contracts.
- (63) The Commission takes the view that the arguments to delay the introduction of the bidding zones due to existing contracts do not justify postponing the implementation of the commitments.
- (64) First, as regards the financial contracts, market players were informed that the structure of the zones may be subject to further changes when these contracts were signed. Indeed, in Appendix 2 of the trading rules for Nord Pool ASA⁴⁸ which are in force since 2002, it is stated that "*the Area divisions* [bidding zones]

⁴⁸ See the definition of "Area" in section 3.1 of Appendix 2 of the trading rules for Nord Pool ASA: <http://www.nordpool.com/upload/Clearing/LegalFrameworkTrading/tradingappendix220091222.pdf>.

may be subject to change, possibly affecting one or several of the Area prices". Therefore, market players that signed financial contracts for 2011 and 2012 were aware that the structure of the bidding zones on which these contracts were based could potentially be changed. As a result, the mere existence of financial contracts for 2011 and 2012 is not a valid justification to delay the introduction of the bidding zones in Sweden until the expiry of those contracts on 1 January 2013.

- (65) In addition, market participants have been aware for some time that there was a high probability that a subdivision of Sweden would become operational in the near future.⁴⁹ As a result, they knew that these CfDs were exposed to extra risk. For instance, on 30 September 2008, an action plan was adopted by the Nordic Council of Ministers, which states that the Nordic Electricity markets should be sub-divided into a greater number of bidding zones. In the text of this plan it is stated that "The national TSOs are asked to start the process of dividing the Nordic electricity market in further price/bidding zones with the aim of reaching the implementation within 2010." In addition, at the end of 2008, the Swedish government instructed SvK to start a process to subdivide Sweden in several bidding zones by means of regulation.
- (66) Further, the Commission notes that the remedy and the introduction of bidding zones by July 2011 have only an indirect effect on market participants. Indeed, market participants in electricity markets are exposed to all kinds of risks and a general change of regulation, namely, the introduction of bidding zones, is merely one example. This also applies to CfD contracts.
- (67) This line of argument also applies to fixed-price long-term supply contracts. Energy suppliers take a certain risk when they sign long-term fixed-price contracts with final customers. One element of the risk is the fact that market conditions and, in particular, prices on spot markets may evolve in a different way than energy suppliers had planned when they signed the contracts. As mentioned in Section 7 of this Decision, entitled "Proportionality of the amended commitments", the introduction of bidding zones will put an end to the alleged distortions of competition on the wholesale market in Sweden and in neighbouring countries. As a result, prices may decrease in some areas and increase in other areas. Energy suppliers that have customers under long-term contracts located in the areas where prices were low (southern Sweden) are likely to have their profit margins decreased if their contracts remain unchanged. Nevertheless, the fact that these energy suppliers operated in allegedly distorted market conditions and profited from a situation which may not have been compatible with Article 102 TFEU should not justify delaying the introduction of bidding zones until these long-term contracts have expired.
- (68) The Commission thus takes the view that the arguments made about existing contracts do not warrant an extension of the delay for implementing bidding zones.

⁴⁹ The debate in the Nordic countries to introduce bidding zones in Sweden date back for several years and cannot be portrayed as something new to the market. See for instance a report from the Swedish regulator titled: "Price Formation and Competition in the Swedish Electricity Market" was published in November 2006; <http://www.ei.se/Energy-Markets-Inspectorate/Library/>.

- (69) Further, as regards the practical implementation of zones, some respondents argued for longer delays while some argued for shorter delays, however the submissions were not substantiated. SvK has confirmed that there is a need to adapt regulations, market routines and IT systems. SvK informed the Commission that such operational steps require 18 months and that the implementation of the zones should be at the start of a month. SvK thus proposed to delay the implementation of the new system until 1 November 2011 and submitted modified commitments on 26 January 2010 accordingly. The Commission thus takes the view that 1 November 2011 is an acceptable date to implement the zones.

6.4. Impact of bidding zones on new investment projects on renewable energies

- (70) Some respondents argued that the introduction of bidding zones will reduce the incentives to build more generation based on renewable energy in Sweden. They underlined the fact that the largest potential to invest in renewable energy is located in northern Sweden. As the introduction of the bidding zones may prompt a decrease in prices in northern Sweden, it is likely that some investment projects to build more renewable in northern Sweden would not be profitable any longer and would be given up. As a consequence, market players fear that the objective to reach an ambitious share of renewable energy in the overall electricity generation in Sweden for 2020, as laid out in Directive 2009/28/EC on the promotion of the use of energy from renewable sources⁵⁰, may not be achieved.
- (71) The Commission notes that at this stage the network in Sweden is not able to transport at all times all electricity from the north to the south of Sweden, where the electricity is essentially consumed. Adding more renewable generation in the north would simply increase the already existing bottlenecks in Sweden. Therefore, new renewable generation could not be transmitted to the south where most of the electricity is consumed. Moreover, generation in the north is virtually all made of renewable sources. Hence, as electricity cannot be stored in large scale, investing in more renewable generation in the north cannot effectively contribute to a larger proportion of renewable generated electricity for 2020, irrespective of the bidding zones.
- (72) In addition, it is important to note that Sweden has a green certificate scheme aimed at promoting renewable energy sources which is independent from bidding zones.

6.5. The interim period

- (73) A number of interested third parties argued that the measures foreseen for the interim period, namely an increased use of counter-trade to limit curtailments, were not clear. Furthermore, they criticized that only resources in Sweden and no foreign resources for counter-trade were considered. In response to these comments received pursuant to the notice published according to Article 27 (4) of Regulation (EC) No 1/2003, SvK modified its commitments with a revised

⁵⁰ Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC, OJ L 140, 5.6.2009, p. 16.

proposal submitted to the Commission on 26 January 2010. SvK clarified the procedure and included non-Swedish resources for counter-trade.

- (74) According to the modified commitment text, SvK will determine in the planning phase, on the basis of information from previous days with similar market and weather conditions and other relevant information, whether day-ahead internal congestion will occur. SvK will then estimate how much interconnector capacity would need to be curtailed from the maximum interconnector trading capacities, assuming a scenario in which no counter-trade is performed to relieve the congestion. Starting from this scenario, SvK will then assess the volumes and prices of counter-trade capacity for up-regulation taking into account regulating resources located not only in Sweden but also located in neighbouring countries if those countries are assessed to be exporters to Sweden and if there will be sufficient interconnector capacity in the operating hours. SvK will rank this volume of regulation resources in price order and remove those resources that are assessed to be more expensive than the resources in the importing countries' spot market or regulation market. Finally, SvK will reduce the initial estimated need for curtailment by the amount of the potential volume of counter-trade and increase the trading capacities for the market for the next day. During the operational phase, SvK will perform the necessary counter-trade to address internal congestion in order to secure the trading capacities.

6.6. Conclusion

- (75) In conclusion, the observations received did not lead the Commission to identify new competition concerns and contained no points such as to make the Commission reconsider the concerns it expressed in the preliminary assessment. In view of the results of the market test, the Commission maintains the position that it took in the notice published according to Article 27 (4) of Regulation (EC) No 1/2003, namely that, apart from the amended implementation period for the bidding zones and the clarification regarding the procedure applied in the interim period, the commitments are adequate to meet the competition concerns expressed in the preliminary assessment.

7. PROPORTIONALITY OF THE AMENDED COMMITMENTS

- (76) According to settled case law, the principle of proportionality requires that the measures adopted by Union institutions must not exceed what is appropriate and necessary for attaining the objective pursued.⁵¹ Where there is a choice between several appropriate measures, recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued.⁵²

⁵¹ Case T-260/94 *Air Inter v Commission* [1997] ECR II-997, paragraph 144, and Case T-65/98 [2003] ECR II – 4653 *Van den Bergh Foods v Commission*. paragraph 201.

⁵² Case 265/87 *Schröder* [1989] ECR 2237, paragraph 21, and Case C-174/05 *Zuid-Hollandse Milieufederatie and Natuur en Milieu* [2006] ECR I – 2243, paragraph 28.

- (77) The commitments in their final form are sufficient to address the concerns identified by the Commission in its preliminary assessment without being disproportionate.
- (78) The commitments were offered by SvK on a voluntary basis in the context of a procedure pursuant to Article 9 of Regulation 1/2003 to address the concerns of the Commission on the Swedish electricity transmission market. The public consultation pursuant to Article 27 (4) of Regulation 1/2003 has confirmed that the commitments offered by SvK were sufficient to address the Commission's concerns without imposing disproportionate conditions on either SvK or third parties.

Bidding zones, counter-trade and investments

- (79) SvK will no longer address internal congestion by curtailing interconnector capacity on the Swedish borders after introducing a system of two or more bidding zones in the transmission network in Sweden.
- (80) First, SvK will not need to curtail capacity due to congestion at a border between zones because of the bidding zone system itself. In that system, the borders between zones will correspond to bottlenecks in the network. The links between two adjacent zones will be the lines forming the bottleneck. The bidding zones will be separate markets in which consumers and generators submit day-ahead bids indicating what they want to consume or produce in that bidding zone. The capacity on the links between the bidding zones will be made fully available to the market. If congestion occurs on the links between two zones, the market-clearing mechanism will automatically adjust the amounts of supply and demand cleared in each zone and set different prices for the two zones so that the amount of electricity transmitted between the zones is equal to the capacity between the zones. The market-clearing mechanism will thus eliminate the congestion. As a consequence, SvK will no longer need to curtail capacity on the interconnectors to other countries or on any other line.
- (81) Secondly, SvK will not need to curtail capacity due to congestion within zones (except the West Coast Corridor) because it can carry out counter-trade within the zones to address such congestion.
- (82) Thirdly, congestion in the West Coast Corridor will be alleviated through the only measure available to SvK, which is the building of the new 400 kV transmission line between Stenkullen and Strömme-Lindome by 30 November 2011.
- (83) In conclusion, all current or potential future sources of internal congestion will be managed without the need to curtail any interconnector capacity with other countries. The commitment proposed by SvK will thus be sufficient to address the concerns expressed by the Commission.
- (84) The commitment proposed by SvK is also a proportionate measure to mitigate internal congestion and therefore avoid any curtailment of interconnector to address such congestion. The commitments do not create disproportionate disadvantages for SvK or third parties.

- (85) First, there is no equally effective remedy to bidding zones and counter-trade which were voluntarily proposed by SvK to address the concerns on the Swedish electricity transmission market. Network investments could be an alternative remedy. However, the Commission takes into account that they require long leading times to be implemented (often 10 years⁵³) and the outcome cannot be guaranteed because SvK cannot control all factors (such as the consent of third parties which is necessary to build a new line). Indeed, current projects in Sweden have been under consideration for almost ten years and are yet to materialise. Thus, network investments are not an equally effective remedy in this procedure. Of course, bidding zones and counter-trade do not prevent SvK from investing in new lines and continuing with its current projects to alleviate congestion in the long-term.
- (86) Second, there is no significant effect of the introduction of bidding zones on concentration in the wholesale, retail and balancing markets which could affect third parties negatively (see recitals (54) et seq.). As regards wholesale and balancing markets, it has to be emphasized that bidding zones will rather help to identify the right areas for new investments.
- (87) Third, price effects resulting from the commitments do not lead to a disproportionate burden for third parties (see recitals (58) et seq.). With the introduction of bidding zones, prices will decrease in some areas (such as northern Sweden) and increase in other areas (such as southern Sweden). The price increase in some areas is an unavoidable consequence of the commitment which brings the alleged discrimination between Swedish and non-Swedish customers to an end. Furthermore, as bidding zones will likely lead to new investments in the network, prices will align overtime.
- (88) Fourth, possible negative effects of bidding zones for new investments into renewable energy projects do not make the commitment disproportionate. Due to higher prices in the southern Sweden, there will be an incentive to build renewable energy capacity in this area. In addition, investments in the northern part of Sweden will become more attractive once the congestion of the network is removed. Furthermore, the Swedish government has introduced a green certificate scheme to meet the renewable targets and is thereby in a position to influence investments in renewable energy projects (see recital (71)).
- (89) Fifth, the costs for counter-trade which have to be borne by network users do not render the remedy disproportionate. Counter-trade will be used only as an additional measure to address remaining internal congestion in a system of several bidding zones. Following the introduction of these bidding zones, the amount of counter-trade necessary to address internal congestion will be rather limited as it is only needed for temporary new congestion within the new bidding zones. Most of the amount of counter-trade, which was already carried out in the Swedish network due to internal congestion will disappear following the introduction of bidding zones.

⁵³ This is not the case for the West Coast Corridor where the project is already at an advanced stage.

- (90) Sixth and finally, it is proportionate to exclude the West Coast Corridor from the commitments of bidding zones and counter-trade. Counter-trade and bidding zones are not feasible measures for the West Coast Corridor due to technical reasons and therefore those commitments would be disproportionate (*ultra nemo posse obligatur*). The isolated topology of the West Coast Corridor contains insufficient flexible generation (or load) units that can provide up-ward and down-ward regulation energy. For these reasons, congestion in this part of the network cannot be managed by introducing a separate bidding zone or by means of counter-trade. Consequently, it is justified on this part of the network to curtail interconnector capacity in the short term and reinforce the network by investments.
- (91) In the absence of a short-term remedy (bidding zones and counter-trade), the long term measure of grid reinforcement in the West Coast Corridor to relieve congestion on the network is a proportionate remedy. In that respect, a new 400kV line, which SvK commits to build near Gothenburg in western Sweden and operate by 30 November 2011 at the latest, will be sufficient to relieve the transmission bottleneck on the West Coast Corridor.

Delay for implementation and interim period

- (92) Following comments of the interested third parties in the market test that additional time is required to prepare regulations, market routines and IT systems for the new bidding zones, SvK proposed to delay the implementation of the bidding zones until 1 November 2011. Such a delay corresponds to the required time for those practical implementation measures after notification of this Decision. The Commission considers that the date for the implementation of the bidding zones is sufficient and proportionate.
- (93) A further delay with regards to interests of stakeholders which are parties of financial and long-term supply contracts that have already been signed is not justified in terms of proportionality (see recitals (63) to (68)).
- (94) During the interim period, that is, the transitional period of 18 months between the notification of the commitment decision and the date on which the remedy of bidding zones becomes operative, SvK will manage internal congestion by applying counter-trade with the aim to mirror the situation after the implementation of bidding zones.
- (95) Following comments by third parties in the market test, the procedure for the selection of counter-trade resources was clarified and SvK sent a modified commitment text on 26 January 2010. In particular, SvK clarified that regulating resources to be used for counter-trade also include non-Swedish resources from neighbouring countries where SvK assesses that such countries are exporters to Sweden in the period considered and that there is sufficient interconnector capacity. Therefore, the Commission finds that the revised commitment regarding the selection of counter-trade resources is sufficient and proportionate to meet the concerns.

Duration of the commitments

- (96) The commitments will be binding on SvK for a period of 10 years from the effective date of the Decision. The 10 year duration is necessary to remedy the concerns as the commitments contain behavioural elements in particular as regards the change of the configuration of the bidding zones which may become necessary due to a change of demand and supply of electricity overtime. As market circumstances of the Swedish electricity transmission market may fundamentally change after a longer period of time, the duration of the commitments was limited to 10 years after the effective date of the Decision.

Other provisions of the commitments

- (97) The remaining provisions of the commitments such as the monitoring provisions are ancillary to the main commitments. Those provisions are necessary and proportionate to ensure the implementation of the commitments offered by SvK. Such provisions are in line with previous Commission Decisions and reflect Union rules relating to commitment decisions of the Commission.

8. ADDRESSEE OF THE DECISION

- (98) This Decision is addressed to SvK. The fact that SvK does not have a separate legal personality from that of the Swedish state does not affect this conclusion. It is sufficient for a public administration to have the capacity to be a party in legal proceedings independently from the State.⁵⁴ SvK is not subject to ministerial supervision, which means that Government ministers are not allowed to control the specific activities of SvK and enjoys considerable organisational autonomy to be the addressee of a decision⁵⁵. It also enjoys autonomy as regards decision-making in concrete issues concerning the management of the electricity transmission network and, in particular, the concerns described in the decision. In the performance of its duties, SvK is independent as regards concrete decisions towards individuals or local authorities or the application of the law.

9. CONCLUSION

- (99) 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. The Commission's assessment of whether the commitments offered are sufficient to meet its concerns is based on its preliminary assessment, representing the preliminary view of the Commission based on the underlying investigation and analysis, and the observations received from third parties

⁵⁴ See recital 21 of Commission Decision 98/538/EC of 17 June 1998 relating to a proceeding pursuant to Article 86 of the EC Treaty, IV/36.010-F3 - Amministrazione Autonoma dei Monopoli di Stato, OJ 1998 L 252, p. 47.

⁵⁵ The Swedish government can only issue general guidelines to SvK via general regulations.

following the publication of a notice pursuant to Article 27(4) of Regulation (EC) No 1/2003.

- (100) In the light of the 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.
- (101) The Commission retains full discretion to investigate and open proceedings under Article 102 TFEU 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 Commitments in the Annex shall be binding on Svenska Kraftnät for ten years from the date when Svenska Kraftnät receives formal notification of this Decision.

Article 2

It is hereby concluded that there are no longer grounds for action in this case.

Article 3

This Decision is addressed to:

Svenska Kraftnät, Sturegatan 1, SE-172 24 Sundbyberg, Sweden

Done at Brussels, 14.4.2010

For the Commission

Joaquín ALMUNIA

Member of the Commission

ANNEX

THE COMMITMENTS