

COMMISSION DECISION

**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/39.386 – Long-term contracts France)

(Only the French 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 the agreement on the European Economic Area,

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, and in particular Article 9(1) thereof,

Having regard to the Commission decision of 18 July 2007 to initiate proceedings in this case,

Having expressed concerns in the Statement of Objections dated 19 December 2008,

Having given third parties the opportunity to submit their observations pursuant to Article 27(4) of Council Regulation (EC) No 1/2003 on the commitments offered to address these concerns²,

Having consulted the Advisory Committee on Restrictive Practices and Dominant Positions,

Having regard to the final report of the Hearing Officer³,

Whereas:

1. SUBJECT

- (1) This Decision concerns EDF S.A., its subsidiaries, in particular Electricité de Strasbourg S.A., and the undertakings that they control (taken together, 'EDF') and concerns EDF's behaviour in the French market for the supply of electricity to large industrial customers.
- (2) In its Statement of Objections dated 19 December 2008, the Commission concluded provisionally that EDF holds a dominant position in the market for the supply of electricity to large industrial customers in France. The Commission's preliminary assessment, as set out in the Statement of Objections, is that EDF may

¹ OJ L 1, 4.1.2003, p. 1. With effect from 1 December 2009, Articles 81 and 82 of the EC Treaty became Articles 101 and 102 of the Treaty on the Functioning of the European Union ("TFEU"). In both cases, the substance of the two provisions remained identical. For the purposes of this Decision, references to Articles 101 and 102 TFEU should be taken to mean Articles 81 and 82 of the EC Treaty where appropriate.

² OJ C 262, 4.11.2009, p. 32.

³ Final Report of the Hearing Officer in Case COMP/39.386 Long-term Contracts France of 3 March 2010.

have abused its dominant position within the meaning of Article 102 of the Treaty on the Functioning of the European Union (hereafter "the TFEU")⁴:

- by concluding supply contracts which, by virtue of their scope, i.e. the total volume covered by all the contracts, their duration and their nature, significantly limit the possibilities for other undertakings to conclude contracts for the supply of electricity with large industrial customers in France as the principal or secondary supplier;
 - by including resale restrictions in its supply contracts with large industrial customers.
- (3) The Commission considers that the effect of these practices has been to impede the entry of alternative suppliers to the French market and exacerbate the lack of liquidity in the trading market, thereby delaying the effective liberalisation of the electricity market.

2. ADDRESSEES

- (4) EDF S.A. is the incumbent operator in electricity markets in France. The company is the parent company of the EDF group. Under French law, the French State is the majority shareholder in EDF and must hold at least 70% of EDF's share capital. On 31 December 2008 it held 84.7 % of the capital and of the voting rights. Through EDF S.A. and the companies that it controls directly or indirectly, EDF is involved in a number of activities in France and the rest of the world.
- (5) In 2008 EDF generated 53.3% of its consolidated turnover in France. Its activities in the country comprise the generation, transmission (via its subsidiary RTE, the transmission network operator), distribution, supply and trading of electricity. EDF has stated that EDF S.A. controls, directly or indirectly, a number of companies that are currently active in French electricity markets (independently of whether or not the companies are established in France).
- (6) In particular, EDF S.A. has an 89 % controlling stake in Electricité de Strasbourg S.A. the only company owned by EDF that is also active in France in the retail supply market, in particular to large industrial customers. The company distributes electricity to local authorities in the Bas-Rhin *département* under concessionary contracts.

3. PROCEEDINGS UNDER REGULATION (EC) NO 1/2003

- (7) On 7 November 2006 the Commission sent EDF a request for information concerning its supply contracts concluded with large industrial customers. The information requested concerned, in particular, the contract volumes per customer

⁴ References in this Decision to Article 102 TFEU should be taken to mean references to Article 102 TFEU and Article 54 of the EEA Agreement.

and the minimum annual quantities that each customer undertakes to buy from EDF, the volumes of electricity actually bought, and the duration of the contracts.

- (8) On 18 July 2007 the Commission notified EDF that it had initiated proceedings under Article 2(1) of 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 Treaty⁵ and Article 11(6) of Regulation (EC) No 1/2003. Following the initiation of proceedings, a detailed investigation was carried out, including in particular requests for information sent to EDF and to third parties that were considered useful for the investigation of the case.
- (9) By letter dated 24 April 2008 the Hearing Officer informed the company Iberdrola that it had shown a sufficient interest to justify being recognised as a third party within the meaning of Article 27(3) of Regulation (EC) No 1/2003. Likewise, Union des Industries Utilisatrices d'Energie (UNIDEN), and the companies KalibraXE, Rhodia Energy, Solvay Energie France, Rio Tinto Alcan and UPM-Kymmene were subsequently recognised as third parties within the meaning of the same Article by letters dated 10 February 2009 (KalibraXE), 9 March 2009 (UNIDEN), 25 March 2009 (Rhodia Energy, Solvay Energie France, Rio Tinto Alcan) and 31 March 2009 (UPM-Kymmene) respectively.
- (10) On 19 December 2008 the Commission adopted a Statement of Objections in accordance with Article 27(1) of Regulation (EC) No 1/2003 and Article 10(1) of Regulation (EC) No 773/2004, which sets out its concerns regarding the compatibility of EDF's behaviour in the French market for the supply of electricity to large industrial customers with the competition rules. The Statement of Objections was notified to EDF S.A. and Electricité de Strasbourg S.A. on 23 December 2008.
- (11) On 4 March 2009 (Electricité de Strasbourg S.A.) and on 9 March 2009 (EDF S.A.) EDF submitted written observations on the Commission's Statement of Objections and expressed disagreement with its main findings.
- (12) On 2 April 2009 a hearing was held, during which EDF and three of the third parties (Iberdrola, KalibraXe and UNIDEN) presented their arguments orally. Following the hearing, EDF, Iberdrola, KalibraXe, Rhodia Energy, Solvay Energie France and UNIDEN submitted written observations to the Commission.
- (13) On 14 October 2009 EDF proposed commitments to address the concerns identified by the Commission in its Statement of Objections.
- (14) On 4 November 2009 a notice pursuant to Article 27(4) of Regulation (EC) No 1/2003 was published in the Official Journal of the European Union summarising the case and the proposed commitments, and inviting interested third parties to submit their comments on the commitments no later than one month following the date of publication of the notice.

⁵ OJ L 123, 27.04.2004, p. 18

- (15) On 10 and 14 December 2009 the Commission notified EDF of the comments received from interested third parties following publication of the notice. On 5 February 2010 EDF proposed amended commitments.
- (16) On 1 March 2010 the Advisory Committee on Restrictive Practices and Dominant Positions was consulted. On 3 March 2010 the Hearing Officer submitted his final report.

4. PRELIMINARY ASSESSMENT

4.1. Relevant markets

4.1.1. Relevant product markets

- (17) In accordance with its previous decision-making practice concerning the electricity sector, the Commission has identified three distinct markets for the retail supply of electricity to final customers⁶: (i) the supply of electricity to large industrial and commercial customers; (ii) the supply of electricity to small industrial and commercial customers; and (iii) the supply of electricity to residential customers;
- (18) With regard, more specifically, to the market for the supply of large industrial and commercial customers, the Commission drew a distinction in its Statement of Objections between customers who have exercised their eligibility and other customers⁷, a distinction that is supported by the French energy regulator (La Commission de régulation de l'énergie, hereafter "the CRE") and the French competition authority⁸. The relevant market concerns only those customers who have exercised their eligibility. This distinction is justified by a number of features specific to the regulated sector and to the price differentials between the regulated tariff and the price at which alternative suppliers are able to supply their electricity. The result is that consumers who are currently supplied under the regime of regulated prices have little or no incentive to accept an offer from an alternative supplier, even in the case of small but non-transitory variations in the regulated tariff and in the market price for those customers who have exercised their eligibility.
- (19) In order to differentiate large customers who have exercised their eligibility from smaller customers, the Commission took the view that a distinction should be made on the basis of the volume of consumption, and that the relevant market should be limited to the supply of large customers for sites with an annual consumption of 7 GWh or more⁹. This threshold is one of the consumption

⁶ See in particular Case COMP/M. 4180 *GDF/SUEZ*.

⁷ See also Case COMP/M. 4180 *GDF/SUEZ*.

⁸ See in particular Case COMP/M. 4180 *GDF/SUEZ*, paragraphs 346-353. The decision-making practice of the French competition authority is comparable to that of the Commission. See in particular Decision 07-MC-04 of 28 June 2007 on a request by Direct Energie for interim measures.

⁹ Given the high level of consumption in question, these customers are classified as large industrial customers in the Statement of Objections and in this Decision.

thresholds laid down in French legislation to define the eligibility criteria when transposing Community legislation. Customers whose consumption exceeds this threshold are easily identified by suppliers and receive specific contract offers. Arbitrage by customers between the different contract conditions addressed to the different categories of customers is not possible because of the existence of resale restrictions in the contracts. In addition, the much higher consumption volumes of the large industrial customers, and the specific features of their profile, require larger operators with their own generating capacity. Suppliers who are active in the market for large industrial customers are very different from those who operate in the market for small customers. Given the barrier to entry represented by access to generating capacity in the French market, the Commission concluded that a small but non-transitory increase in price in the market for large industrial customers would not be reflected by the entry to that market of suppliers who are currently active in the market for the supply of small customers.

- (20) The Commission nonetheless took the view that it was not necessary to distinguish, within the relevant market, between undertakings benefiting from the *tarif réglementé transitoire d'ajustement du marché* (transitory regulated tariff for market-adjustment, hereafter "TarTAM") and undertakings which do not benefit from it. Although the effect of this mechanism has been to reduce switching between suppliers on large and medium-sized sites¹⁰ and to limit price competition in the free market, to the extent that the TarTAM price is lower than the market price, switching supplier in the free market is a real possibility, which was moreover used in 2007 by a significant number of the large industrial customers supplied at the TarTAM tariff. The Commission therefore takes the view that contracts at market price are substitutable products for consumers supplied on the TarTAM tariff. All suppliers in the free market are able to propose the benefit of TarTAM to their customers, and the mechanism leaves all contract clauses apart from price unchanged. A customer on TarTAM may therefore wish to switch supplier to benefit from a more flexible contract, with more favourable payment or other clauses. Moreover, the supply price becomes a selection criterion again during the final period of the contract because many customers consult electricity suppliers about periods extending beyond the date when TarTAM ceases to apply.
- (21) In its Statement of Objections, the Commission excluded from the relevant market the supply of electricity to compensate for network losses, which was supported in particular by CRE, given the differences in the characteristics between these two markets on both the supply and demand sides. It also excluded from the relevant market auto-consumption, i.e. consumption by a firm, usually an industrial firm, of electricity that it generates itself as part of its main industrial production process. The Commission concluded that even in the case of small but non-transitory price variations in the market for the supply of large industrial customers, the electricity produced by the firms themselves would not be offered in the market for the supply of large industrial customers for reasons related, in particular, to the opportunity cost of such resale, to specific constraints on the main production process and the market in which the production is marketed, and to the difficulties

¹⁰ CRE Annual Report, June 2007 (p. 80).

associated with establishing a marketing activity for the retail sale of electricity that would allow the firm to sell to large industrial customers.

- (22) The relevant market retained by the Commission in the Statement of Objections is therefore the market for the supply of electricity to the sites of large industrial customers who have exercised their eligibility and whose annual consumption is 7 GWh or more, excluding purchases by network operators to offset network losses and auto-consumption.

4.1.2. Relevant geographic market

- (23) In line with its previous decision-making practice¹¹, and like the French competition authority¹², the Commission took the view in its Statement of Objections that the geographic dimension of the market for the supply of electricity to large industrial customers was national, and rejected a wider dimension.

- (24) In reaching this conclusion, the Commission, in its Statement of Objections, relied in particular on the very specific nature of the regulatory framework for the relevant market in France, by virtue of which competitive conditions are not homogeneous between France and its neighbours. The Commission noted that a number of other factors also contribute to creating competitive conditions that are peculiar to France and not comparable to those prevailing in the markets for the supply of electricity to large industrial and professional customers in neighbouring countries. These factors include, in particular, the rules for nominations to interconnectors, the duration of available capacity at auctions of interconnector capacity, the frequency and intensity of interconnector congestion, the exposure of new entrants to the balancing system, the illiquid trading market, the importance of having access to (flexible) generating capacity within the balancing zone and the specific risks associated with supplying large customers.

4.1.3. EDF's dominant position in the relevant market

- (25) In its Statement of Objections, the Commission concluded that EDF, which had a near-monopoly of the production, transmission, distribution and supply of electricity in France before the electricity market was liberalised, continues to hold a dominant position in the market for the supply of electricity to large industrial customers in France.
- (26) The Commission took the view that a number of factors, taken together, contributed to EDF holding a dominant position in the relevant market even today. Apart from its high market share, both absolutely and relative to its competitors,

¹¹ See, for example, the Commission's decisions in Cases COMP/M.4180 *GDF/SUEZ* p. 169, COMP/M.3883 *GDF/CENTRICA/SPE*, COMP/M.3318 *ECS/Sibelga* p. 8, COMP/M.3075 to 3080 *ECS/Intercommunales* p. 7, COMP/M.2857 *M.Ecs/IEH* p. 5. With regard to the market for the supply of electricity to large customers in France in particular, see the Commission's decisions in Cases COMP/M.1853 *EDF/EnBW* p. 4, and COMP/M.1557 *EDF/LOUIS DREYFUS* p. 6.

¹² Decision 07-MC-04 of 28 June 2007 concerning a request by Direct Energie for interim measures, p. 13.

there are considerable barriers to entry to the market, relating to the difficulty to acquire electricity for resale, to the regulatory framework and to the access to information on customers. Other factors, such as EDF's vertical integration which allows it to benefit from a variety of means of production, including competitive means of production with low variable costs, and the size of its client portfolio, strengthen EDF's position.

- (27) In the light of the above, EDF would occupy a dominant position in the market for the supply of electricity to large industrial customers in France.

4.2. Substantial part of the internal market

- (28) The Commission's analysis demonstrates that the practices in question affect a substantial part of the internal market within the meaning of Article 102 TFEU. These practices in the market for the supply of electricity to large industrial customers would have concerned the entire territory of France. It is established practice that a Member State is a substantial part of the internal market¹³.

4.3. Practices giving rise to competition problems

- (29) In its Statement of Objections, the Commission took the view that EDF may have abused its dominant position in the relevant market in breach of Article 102 TFEU by concluding in France contracts with large industrial customers of electricity which, by their scope, duration and nature, foreclose the market for the supply of electricity to large industrial customers both to firms wishing to operate as principal suppliers and to firms wishing to operate as secondary suppliers (see Section 4.3.1) and by imposing resale restrictions in its contracts for the supply of electricity to large industrial customers in France (see Section 4.3.2).

4.3.1. Practices concerning the foreclosure of the French market for the supply of electricity to large industrial customers

- (30) In its Statement of Objections, the Commission took the view that EDF may have abused its dominant position by concluding in France contracts with large industrial customers of electricity which, by their scope, duration and nature foreclosed the market for the supply of electricity to large industrial customers for both principal and secondary suppliers.
- (31) The Commission's analysis is based, in particular, on the fact that almost all EDF supply contracts have features that make it more difficult for alternative suppliers, whether principal or secondary, to acquire EDF's customers, in whole or in part.
- (32) Of the contracts concluded by EDF in the relevant market, almost all the contracted volumes are exclusive, whether this is the result of an explicit clause in the supply contract (*de jure* exclusivity) or of the application of a set of clauses

¹³ See judgement from the Court of justice of 9 November 1983 in Case 322/81, *Nederlandsche Banden-Industrie Michelin/Commission* [1983] ECR 3461, paragraphs 25 to 28.

having the same effect, thereby creating strong incentives for customers to source their electricity exclusively from EDF (*de facto* exclusivity).

- (33) The result of the exclusive nature of the contracts combined with the volumes covered and the duration of the contracts is that a principal supplier seeking to acquire industrial customers from EDF for the whole of their needs would come up against EDF's market foreclosure. Moreover, as set out in the Statement of Objections, the result of the exclusive nature of the contracts combined with the volumes covered is that a secondary supplier seeking to supply EDF's industrial customers with part of their needs would come up against EDF's market foreclosure.
- (34) The foreclosure of the relevant market is all the more harmful since, as stated in the Statement of Objections, access to large industrial customers in the relevant market is important for new entrants wishing to become established in France as an electricity supplier since they represent an important part of the customers that have exercised their eligibility.
- (35) Against the background of generally stable demand, EDF's behaviour may have had a direct and significant impact on the prospects for entering the market and the possibility for new entrants to expand their activities.

4.3.2. Practices concerning the imposition of resale restrictions in supply contracts

- (36) The Commission also took the view in its Statement of Objections that EDF imposed clauses in its supply contracts that restricted the resale of electricity by large industrial customers. According to the Commission, these clauses restricting the use of electricity by the customer were widespread and had been so for a number of years.
- (37) The effect of such clauses may have been to prevent EDF customers from optimising their portfolio, either by themselves or with the support of specialised companies, for example by selling electricity when conditions make the sale attractive. Such restrictions have made it impossible for industrial firms to resell electricity (themselves or through an intermediary) when the contract price was below the market price.
- (38) By limiting the number of potential sellers of electricity and the volumes available for resale, the resale restrictions may have exacerbated the lack of liquidity on the trading market and, consequently, the barriers to entry to the relevant market. Likewise, they may have prevented greater integration of electricity markets at Union level because the resale restrictions also concerned resale outside France.

4.4. Effect on trade between Member States

- (39) According to the Commission's Statement of Objections, EDF's abusive behaviour affects trade between Member States within the meaning of Article 102 TFEU. According to the case law of the Court of Justice and the Commission's decision-making practice, an influence, direct or indirect, actual or potential, on

the pattern of trade between Member States, provided that it is not insignificant, is enough to satisfy the criterion of effect on trade between Member States¹⁴.

- (40) According to the Commission's Statement of Objections, therefore, EDF's contractual practices in question may affect trade between Member States. In particular,
- as the Court of Justice has held, abuses of a dominant position with an exclusionary effect seek to impair the structure of the market, which must have repercussions on trade, at least in the long term¹⁵;
 - the resale restrictions include resale to customers outside France. The Court of Justice has held in a number of cases¹⁶ that such an infringement, by its very nature, has the object of partitioning the internal market because it limits cross-border sales of the products in question, and consequently has an effect on trade between Member States.

5. COMMITMENTS INITIALLY PROPOSED

- (41) EDF contests the Commission's findings set out in the Statement of Objections. It has nevertheless offered commitments pursuant to Article 9(1) of Regulation (EC) No 1/2003 to address the Commission's competition concerns. The key elements of the commitments may be summarised as follows (for details of all the points, see the text of the commitments in annexe).
- (42) The relevant market to which the commitments apply is the supply of electricity in France to industrial clients with an annual consumption of 7 GWh or more, excluding distribution losses and own consumption.

5.1. Commitments concerning foreclosure of the relevant market

- (43) EDF undertakes that from 1 January 2010, for each calendar year during which the commitments apply, at least 60%, and on average for all the calendar years during which the commitments apply, at least 65% of the electricity supplied to large industrial customers¹⁷, either directly or through a buying group, will be returned to the market.

¹⁴ See Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty, points 24 and following, 44 and following and 93 and following. OJ C 101, 27.4.2004, p. 81.

¹⁵ Judgment in Joined Cases 6 and 7/73 *Istituto Chemioterapico Italiano and Commercial Solvents v Commission* [1974] ECR 223, paragraph 32. See also judgment of the Court of First Instance of 1 April 1993 in Case T-65/89 *BPB Industries and British Gypsum v Commission* [1993] ECR II• 389, paragraphs 134-135.

¹⁶ See judgments of the Court of Justice of 31 March 1993 in Joined Cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85 *Ahlström Osakeyhtiö and others v Commission* ('Wood pulp') [1993] ECR I-1307, paragraph 176.

¹⁷ Large industrial customers are defined in the commitments as consumers of electricity (i) whose sites have an annual consumption of 7 GWh or more and (ii) who have exercised their eligibility.

- (44) If, however, for a given calendar year during the commitment period, the volume of EDF's portfolio in the relevant market is less than in 2009, i.e. [90-110]* TWh, EDF's commitment for that calendar year will be amended. The commitment will be to ensure that the volumes of its portfolio that are not returned to the relevant market are no more than [20-30]* TWh, increased in proportion to the growth of the relevant market between the calendar year in question and 2009. If, after the above provisions are implemented, the volume of EDF's portfolio is the same or greater than the volume of its portfolio in 2009, EDF's commitment will be recalculated in accordance with paragraph 43.
- (45) EDF pledges that the maximum duration of new contracts for the supply of electricity to large industrial customers will not exceed five years.
- (46) In its offers to large industrial customers, EDF undertakes to systematically offer large industrial customers two alternative types of contract, one of which will effectively allow the customer to contract for additional supplies with another supplier of his choice.
- (47) The commitments concerning the foreclosure of the French market for the supply of electricity to large industrial customers will be applicable for ten years from 1 January 2010. They will not apply if the volumes sold by EDF on the reference market amount to 40% at most of the total volumes sold on the reference market during the preceding civil year. The commitments will be terminated early if the volumes sold by EDF in the relevant market are not more than 40% of the total volumes sold in the relevant market over two consecutive years.

5.2. Commitments concerning resale restrictions

- (48) EDF has also proposed commitments to address the Commission's concerns about resale restrictions in EDF's supply contracts with large industrial customers.
- (49) In this regard, EDF undertakes to cease restricting the resale of volumes of electricity bought from it by large industrial customers. In order to implement this measure, EDF pledges that from 1 July 2010 new contracts concluded with large industrial customers, and the general and specific conditions of sale, will not include any resale restrictions. EDF will inform large industrial customers who have concluded a contract for the supply of electricity that any clause restricting resale will be deemed null and void, and that the provisions of their supply contract no longer restrict the resale of the electricity purchased under the contract.
- (50) Moreover, and independently of the commitment set out in paragraph 49, EDF undertakes to allow large industrial customers, by giving notice, to substitute one or more power withdrawal points of large industrial customers for the withdrawal point originally stipulated in the contract. However, this commitment is limited to the contracted volume stipulated in the contract for the supply of electricity to the initial power withdrawal point, and subject to the condition that the volume actually consumed at the initial withdrawal point and the amount of energy

* These parts of the Decision were adapted in order not to reveal confidential information.

supplied at the new withdrawal point(s) respect the consumption profile initially defined in the contract for the supply of electricity for the initial withdrawal point.

- (51) In order to allow monitoring of compliance with its commitments, EDF must draw up an annual report on compliance with its commitments and send it to the European Commission and to the CRE by 31 March of the year following the calendar year covered. The last report will be drawn up by 31 March 2021. The annual report will be based on data audited by an independent external auditor.

6. COMMISSION NOTICE PURSUANT TO ARTICLE 27(4) OF REGULATION (EC) No 1/2003

- (52) In response to the publication on 4 November 2009 of a notice pursuant to Article 27(4) of Council Regulation (EC) No 1/2003, the Commission received observations from sixteen undertakings, large industrial customers and electricity generators. It has also discussed EDF's commitments with the CRE and the French competition authority.

- (53) In general, the observations received by the Commission did not contain any information that gave it cause to reconsider the problems identified in the Statement of Objections. The observations received generally welcome the very principle of the proposed commitments, and in particular their objective of remedying the foreclosure of the market for the supply of electricity to large industrial customers and the resale restrictions on electricity supplied by EDF. The overall view expressed in the observations received was that the commitments were an adequate response to the concerns expressed by the Commission in the Statement of Objections. Most of the comments received sought to allow genuinely effective implementation of the proposed commitments and therefore to improve the practical arrangements.

- (54) By way of introduction, the observations received stressed the importance of ensuring that EDF's commitments are linked in an appropriate manner to future legislative or regulatory reform, both in France and at Community level. The Commission takes the view that these remarks are relevant, and evidently takes account of the legislative or regulatory framework, as well as its foreseeable evolution, in its analysis of the proposed commitments. Nonetheless, the Commission takes the view that the observations going further than this are disproportionate, or outside the scope of these proceedings with regard to the objections set out by the Commission in the Statement of Objections.

- (55) The more specific observations received may be classified into four categories.

- (56) The first category of observations concerns the need to clarify the method for calculating the volumes of electricity regarded as returned to the market by EDF under the terms of its commitments. A number of third parties who submitted observations had neither understood how this aspect of the commitments would work in practice, nor the method for calculating the volumes that EDF undertakes to return to the market. Third parties who had submitted observations also raised the question of the possible difference between the volumes regarded as having

been returned to the market according to the calculation method used in the commitments and the actual volumes available every year to competitors.

- (57) The Commission takes the view that the observations mentioned paragraph 56 concerning the transparency of the methodology proposed in the commitments are relevant and should be taken into consideration in the commitments proposed by EDF. The methodology used to determine the volumes returned to the market has therefore been clarified in the text of the commitments.
- (58) The second category of observations concerns EDF's commitment that the duration of its contracts for the supply of electricity to be concluded with large industrial customers will not exceed five years. In general, the observations received on this question reflect to a large extent the particular perspective of their author, depending on his position in the market. No real consensus emerges from the third-party observations on this point, so they cannot be regarded as arguments that validly call into question the overall balance of the commitment proposed by EDF on the duration of supply contracts.
- (59) The third category of observations concerns the need to ensure that EDF's commitments are genuinely effective in attaining their objective, thereby avoiding any possibility of EDF side-stepping or overturning the commitments, in particular concerning the three main points.
- (60) The first point concerns the method for calculating volumes returned to the market for a specific contract where the contract includes an opt-out without penalty. According to the wording of the initial commitments, the supply contracts which include an opt-out without cancellation penalty for the customer are deemed to expire on the date of the first possibility of exercising the opt-out. Consequently, the objective of the commitments is that the possibility of exercising such an opt-out makes the customer available for the remainder of the contract term (and hence for the volumes yet to be supplied under the contract after the date of the opt-out). A number of third parties who submitted observations indicated that to have such an effect, it was necessary for the opt-outs to be genuinely without contractual consequences for the customer other than to release them from the supply contract for the remainder of the contract term. In particular, it was argued that exercising the opt-out should not involve the payment of a penalty by the customer or the loss of certain contractual advantages, in particular financial ones. If the opposite were true, the opt-out would be devoid of any effectiveness and would not be a genuine possibility for the customer to source electricity from other suppliers for the remainder of the contract term.
- (61) The second risk of EDF side-stepping its commitments was identified as relating to the commitment to systematically offer two alternative types of contract, one of which will effectively allow the customer to contract for additional supplies with another supplier of his choice. On this point, the comments received generally seek to ensure that the non-exclusive contract offer will actually be effective and sufficiently attractive to be a genuine alternative for customers. In particular, some third parties mentioned the need to prevent EDF from tying the non-exclusive offer to contract clauses, such as the imposition of non-objective costs, which would make the offer unattractive to customers. Other third parties take the view

that additional clarifications are needed, for example which part of the supply of electricity the non-exclusive offer should concern (peak load or base load), or suggest limiting the offer of two alternative types of contract to certain customers only among the large industrial customers.

- (62) The third point about which third parties who submitted observations raised possible risks of overturning or side-stepping commitments concerns EDF's commitment to no longer restrict the resale of electricity supplied to large industrial customers. Of the third parties, the large industrial customers welcomed this commitment and submitted a number of observations in order to strengthen it or make it more effective. Some third parties underlined the risk that the contract clauses would prevent any real possibility for large industrial customers to resell electricity. In particular, there may be stipulations that would make the application of certain contract clauses (for example, the application of a given price) conditional on the customer's level of 'consumption', which would exclude the volumes bought by the customer but resold by him. Other third parties stressed the need to ensure that no artificial, or non-objective, cost is imposed by EDF on customers who exercise their right to resell the contracted volumes, in particular where use is made of the possibility enshrined in the commitments for a customer to request that EDF supply electricity to the power withdrawal point(s) of another large industrial customer to which electricity had been resold.
- (63) The Commission takes the view that all the observations received concerning the possibilities of side-stepping or overturning EDF's commitments should be taken into account.
- (64) The fourth and final category of remarks received from third parties includes remarks which are either unrelated or clearly disproportionate to the competition problems identified by the Commission in its Statement of Objections. In particular, a number of undertakings submitted comments that argue for the commitments proposed by EDF to be beefed up in a number of respects. The points concerned are in particular the definition of a maximum market share that would apply to EDF in the market for the supply of electricity to large industrial customers, a substantial lowering of the level of sales below which EDF would be released from its commitments, and the degree of flexibility which must be left to EDF in defining the volumes returned to the market, based on the predicted consumption under the contract.
- (65) In reply to the observations received by the Commission under the market test, on 5 February 2010 EDF submitted its amended commitments (hereinafter: 'final commitments') which take into account the observations.
- (66) In the light of the outcome of the market test, the Commission takes the view that the final commitments proposed by EDF are sufficient to remedy effectively the competition problems identified during its preliminary assessment.

7. NEED FOR AND PROPORTIONALITY OF THE FINAL COMMITMENTS

7.1. Introduction

- (67) It is settled case-law that the principle of proportionality requires that the acts of the Community institutions be adequate and do not exceed the limits that are appropriate and necessary in order to achieve the aim pursued¹⁸. When there is a choice between several appropriate measures, recourse must be made to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued¹⁹.
- (68) In its assessment of the proportionality of the proposed commitments under Article 9(1) of Council Regulation (EC) No 1/2003, the Commission takes account of the fact that it is imposing commitments, not on its own initiative following an infringement established under Article 7(1) of Council Regulation (EC) No 1/2003, but after the commitments have been offered voluntarily by the undertaking seeking to bring the proceedings to an end without the adoption of a decision formally recognising the existence of an infringement.
- (69) The final commitments proposed by EDF are a necessary and proportionate solution to the competition problems identified by the Commission in its Statement of Objections, i.e. foreclosure of the relevant market for undertakings wishing to act as principal or secondary supplier and the imposition of resale restrictions in supply contracts with large industrial customers.
- (70) These proceedings concern solely certain alleged practices by EDF in the market for the supply of electricity in France. Consequently, observations by third parties stressing the need for additional commitments concerning the wholesale electricity market in France, and in particular the need to have access to nuclear energy in France, are not directly connected to the subject of these proceedings.

7.2. Commitments concerning foreclosure of the relevant market

- (71) The commitments proposed by EDF, as amended following the comments received by the Commission, are a necessary and proportionate response to the concerns expressed by the Commission about EDF's practices, the effect of which was to foreclose the market for the supply of electricity to large industrial customers to undertakings wishing to act as principal or secondary supplier.

¹⁸ Judgments of the Court of First Instance of 19 June 1997 in Case T-260/94 *Air Inter v Commission* [1997] ECR II-997, paragraph 144, and in Case T-65/98 *Van den Bergh Foods v Commission* [2003] ECR II-4653, paragraph 201.

¹⁹ Judgments of the Court of Justice of 11 July 1989 in Case 265/87 *Schröder v Hauptzollamt Gronau* [1989] ECR 2237, paragraph 21, and of 9 March 2006 in Case C-174/05 *Zuid-Hollandse Miliefederatie and Natuur en Milieu* [2006] ECR II-2243, paragraph 28.

7.2.1. Determination of thresholds for volumes of electricity to be returned to the market

- (72) First, EDF undertakes to organise its portfolio in such a way that significant volumes are regularly returned to the market (65% of its portfolio on average throughout the duration of the commitments, and at least 60% per calendar year). In other words, the purpose of this commitment is to ensure that, on average, 65% of EDF's total portfolio volumes in the relevant market are made available every year to EDF's competitors. The available volumes for a given year are the average volumes covered by the contracts which expire that year or are deemed to expire, or, which is equivalent, in respect of which an opt-out clause may be exercised that year at no cost. It is EDF's responsibility to organise its portfolio of customers and contracts that it concludes with them so that this average is met for the duration of the commitments.
- (73) This aspect of the commitments is necessary to guarantee a real possibility for customers of sourcing their electricity from alternative suppliers and for the latter to have a real possibility over a significant period of time of entering the market or expanding in the market.
- (74) The minimum annual guarantee of 60% ensures that sufficiently large volumes will be available regularly throughout the duration of the commitments. As the market test revealed, it is true that there may be a difference between the volumes returned to the market as determined by the methodology set out in the commitments and the volumes corresponding to contracts that actually expire in a given year (or in respect of which an opt-out may be exercised that year). Nonetheless, such differences are not likely to impair the effectiveness of the commitments. The thresholds are set at levels (65% and 60%) such that EDF's leeway to tie in substantial volumes contractually in the long term will be limited and, in order to comply with its commitments, it will have to organise its contract portfolio in such a way that substantial volumes are actually returned to the market every year.
- (75) It should be noted that, following the comments received, the wording of the commitments has been improved to clarify the methodology used to calculate the portfolio volumes returning to the market. Moreover, in order not to strip the commitments of their effectiveness where contracts include opt-outs, it was necessary that customers exercising such opt-outs did not have to pay anything (for the purposes of calculating the volumes returned to the market, the options are equivalent to contract cancellation). Therefore, not only can no cancellation fee be required from a customer who exercises such an opt-out, but the contracts will be drafted so that the exercise of an opt-out does not deprive the large industrial customer of any benefits, in particular financial benefits.
- (76) The proposed commitments are also a proportionate solution to the Commission's concerns. First, the 65% and 60% thresholds do not exceed what is necessary for alternative suppliers to have a real possibility of competing for EDF customers and hence entering the market or expanding in the market, without for all that imposing an excessive limit on EDF's leeway in the management of its portfolio of contracts with large industrial customers. Second, given the size of the relevant

market in France, the 65% and 60% thresholds represent a large volume that will give a number of potential competitors the possibility of expanding. Third, it would be excessive to take the view that customers are tied to EDF for the entire duration of their contract when they have a real opt-out during the term of the contract. The fact that exercising an opt-out is free means that such an opt-out may be deemed equivalent to the expiry of the contract, at which point the customer must be regarded as available to other suppliers.

7.2.2. Maximum duration of five years for new contracts concluded by EDF

- (77) In order to address fully the Commission's concerns about market foreclosure, EDF must not be able to choose to tie in its best customers for a very long period by concluding very short-term contracts with other customers. In order to ensure the effectiveness of the commitments, it is therefore necessary to add to the thresholds of 65% and 60% the commitment by EDF to limit the duration of new contracts to five years. EDF can however conclude contracts for a longer duration provided that these contracts contain free opt-outs for the customer at least every five years and, as a consequence, EDF's competitors have an opportunity to acquire the customer at least once every five years.
- (78) A number of third parties suggested that the maximum duration be reduced to three years. In general, they were current or potential competitors for whom the existence of a longer-term contract may affect their possibility of entering the market or expanding in the market. By contrast, a number of industrial customers expressed their interest in long-term contracts on the grounds of greater cost transparency.
- (79) The Commission takes the view that the maximum duration of five years offers EDF a certain flexibility to offer long-term contracts to large industrial customers under specific conditions, for which some customers had expressed a wish in their comments, while ensuring that all large industrial customers (even customers regarded as the most profitable) are accessible regularly by EDF's competitors. Moreover, the Commission notes that EDF can also conclude contracts with industrial customers for a period longer than five years provided that these contracts contain free opt-outs for the customer at least every five years. Furthermore, the Commission notes that nothing prevents the industrial customers from concluding contracts for a duration exceeding five years with suppliers that are EDF's competitors, as they are not in a dominant position on the relevant market.
- (80) Limiting the maximum duration to three years, for which a number of third parties had expressed a wish in their comments, would be disproportionate in the context of the proposed commitments. Those third parties, for the most part competing suppliers, had argued that it was impossible for them to plan their supplies over a five-year time horizon in the wholesale electricity market in France. They therefore felt there were grounds for limiting the maximum duration of new contracts to be concluded by EDF to three years. Nonetheless, the Commission takes the view that it is for the suppliers to manage their different sources of supply so that they are able, if they so desire, to propose long-term supply contracts, either by buying

in the wholesale market or, if the wholesale market does not sufficiently offer appropriate products, by investing in generating capacity.

- (81) Given the above, the Commission considers that the maximum contract duration of five years, foreseen in the commitments for the contracts that do not contain free opt-outs for the benefit of the client, is both necessary and proportionate.

7.2.3. The commitment to systematically offer a contract that allows the customer to contract for additional supplies with a supplier of his choice

- (82) With regard specifically to undertakings wishing to act as secondary suppliers, the commitment will allow EDF's customers to choose freely whether they prefer to obtain supplies at the same time from several suppliers.
- (83) The initial commitment whereby EDF undertook to propose systematically two alternative types of contract was excessive. In order to allay the Commission's concerns, it is sufficient that EDF's customers have access to an offer of non-exclusive supply from EDF. Therefore, where EDF intends to propose a non-exclusive contract offer to a customer, it would be disproportionate for it to undertake at the same time to systematically make a second offer to the same customer. Moreover, it follows from the text of the commitments that the non-exclusive offer must allow the customer to have supplies from another supplier in an effective manner.
- (84) The final commitment is appropriate and proportionate because it guarantees that the large industrial customers to which EDF wishes to offer an exclusive contract will always have the possibility of opting for a non-exclusive offer of supply. Nonetheless, it will naturally be for the undertakings wishing to act as a secondary supplier to win customers on their merits since customers are free to decide to obtain their supplies from a single supplier.
- (85) The Commission takes the view that in this case, and having regard to the characteristics of the market and of the proposed commitments, it would be disproportionate for it to intervene upstream in order to validate the type of non-exclusive offer that EDF will have to systematically offer its customers, as suggested by a number of third parties in their comments. EDF's commitment is clearly specified and large industrial customers are so sophisticated that the effectiveness of this clause will be guaranteed by direct monitoring by market operators.
- (86) This commitment is part of the framework of Community legislation that will be implemented during the period of the commitments. Under the twentieth recital of Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC²⁰, whose deadline for implementation is 3 March 2011, in order to develop competition in the internal market in electricity, large non-household customers should be able to choose their suppliers and enter into

²⁰ OJ L 211, 14.8.2009, p. 55.

contracts with several suppliers to secure their electricity requirements. Pursuant to Article 37, paragraph 1, under k) of the Directive, the national regulators shall monitor the occurrence of restrictive contractual practices, including exclusivity clauses which may prevent large non-household customers from contracting simultaneously with more than one supplier or restrict their choice to do so, and, where appropriate, inform the national competition authorities of such practices. Monitoring of the commitments will therefore be facilitated by the future legislative framework, which will help to ensure that the commitments continue to be effective.

7.2.4. Definition of the conditions under which EDF is released from its commitments

- (87) Under the commitments, EDF is definitively released from its commitments after ten years, or released earlier for the rest of the period if the annual volumes of its sales in the relevant market account for 40% or less for two consecutive years.
- (88) Some third parties indicated in their comments that a lower (and therefore stricter) threshold should be applied, while others suggested that the threshold should be tightened by allowing EDF to be released from its commitments only if its market share is below 40% and the difference between its market share and that of its main competitor does not exceed a certain amount. No third party suggested increasing the threshold of 40%.
- (89) The Commission takes the view that the 40% threshold is necessary and a proportionate solution. Although the 40% threshold selected in the commitments is stricter than that already selected in the Commission's decision-making practice in the past²¹, such a threshold is necessary in view of EDF's market share, the stability of its market share over time and, more generally, its established position with large industrial customers. A relatively strict threshold is therefore necessary so that EDF is not released from its commitments until it becomes evident that they are no longer necessary. However, the Commission takes the view that a reduction in EDF's market share to 40% would justify the non-application of the commitments in the succeeding year and that, if the reduction in market share would be sustained in a non occasional manner (over two consecutive years), it would necessarily result in a significant change to the competition conditions in the relevant market and the retention of the commitments would therefore not be justified.
- (90) In the light of the above, it does not seem relevant or necessary to reduce the threshold or to add a supplementary threshold concerning the difference in market share between EDF and its main competitor.

²¹ In its Decision of 11 October 2007 in Case COMP/37966 – *Distrigaz*, the threshold adopted was as follows: either the company's market share fell to 40% or less, or the difference between the market share of *Distrigaz* and its main competitor was below 20%.

7.3. Commitments concerning the deletion of resale restriction clauses

- (91) EDF's proposed commitments are a necessary and proportionate response to the concerns expressed by the Commission in its Statement of Objections concerning resale restrictions imposed by EDF in its supply contracts concluded with large industrial customers.
- (92) In order to respond to the Commission's concerns, it was first necessary to have a guarantee that the restrictions would disappear for both future and existing contracts. EDF has therefore undertaken to change its general and specific conditions of sale to reflect the absence of resale restrictions in its contractual relations with large industrial customers in future. With regard to ongoing contracts, this undertaking is supplemented by EDF providing systematic information to its large industrial customers that any clause in the contract documentation whose purpose or effect is to restrict the possibility of them reselling electricity supplied by EDF will be deemed null and void, and that such resale is no longer restricted. This information will immediately clarify the situation for the customers in question.
- (93) In order to remedy the effects of imposing clauses restricting resale in its supply contracts, EDF has given a positive undertaking to facilitate the resale of electricity by its customers in addition to no longer restricting the resale by its large industrial customers of the electricity it supplies to them. Thus a large industrial customer will be able to ask EDF to substitute the contractually defined power withdrawal point by one or more other power withdrawal points to which certain contracted volumes will be distributed by EDF. A large industrial customer will therefore be able to ask EDF to distribute certain volumes of electricity to the site of another large industrial customer to which he has sold certain volumes, conditional on compliance with the technical and regulatory constraints relating to this type of transaction.
- (94) It should be noted that, following the comments received by the Commission, it appeared necessary to strengthen a number of aspects of the proposed commitments in order to ensure their effectiveness. First, the distinction between the 'negative' commitment not to restrict resale by large industrial customers of electricity bought from EDF (resale to another customer, whether industrial or not, or in the wholesale market) and the positive commitment for EDF to reroute electricity to one or more other power withdrawal points, has been clarified.
- (95) Second, due to the comments received, certain clarifications have been provided to reduce the possibility of EDF side-stepping or overturning its commitments. In particular, it has been made clear that the availment of the resale possibility by a large industrial customer will not give rise to the imposition of any costs or penalty, whether direct or indirect, such as the loss of an advantage for the large industrial customer in the event of resale, for example. With the same objective, EDF has also undertaken that the volumes resold by the customer are deemed to be bought and consumed under the contract(s) concluded with EDF. Thus, where the acquisition of certain advantages for the customer will be linked to a condition of volumes of electricity bought from EDF, the fact that those volumes are

consumed by the customer or resold to a third party will not have any impact, which guarantees greater effectiveness of the commitments.

- (96) Finally, following the comments received, the notice that EDF is entitled to require with regard to the substitution of one or more power withdrawal points for the power withdrawal point initially contracted for, has been spelled out. In order to avoid an excessively long notice period thwarting in practice the possibility of effective resale by a customer when his electricity needs fall temporarily, EDF has pledged that the notice period will not exceed what is technically necessary for EDF to make the necessary notifications to balance the system in good time.
- (97) Taking into account in the commitments the various technical constraints on EDF concerning its positive commitment to route the electricity bought by a large industrial customer, at his request, to a power withdrawal point other than that initially contracted for, it may be concluded that the proposed commitments are a proportionate solution to the competition concerns identified in the Statement of Objections by the Commission with regard to resale restrictions in EDF supply contracts.

7.4. Commitments concerning monitoring of compliance with the commitments

- (98) EDF's commitment concerning monitoring of compliance with the commitments is necessary and sufficient to guarantee that EDF complies with its commitments. Market data, and in particular the volumes returned to the market every year, will have to be audited by an independent third party. On this basis, an annual report will be prepared by EDF and sent to the Commission and to the CRE.
- (99) The Commission takes the view that the audit of the EDF data, combined with monitoring by the Commission and the CRE on the basis of the annual report from EDF, and vigilance by market operators, is sufficient.
- (100) Moreover, it should be noted that the submission of the annual report to the CRE is fully consistent with the general objectives of the regulatory authorities under Article 36(g) of Directive 2009/72/EC, which is to ensure that customers benefit through the efficient functioning of their national market, to promote effective competition and to help to ensure consumer protection.

7.5. Conclusion regarding the commitments

- (101) The commitments proposed by EDF will allow the foreclosure of the French market for the supply of electricity to large industrial customers in France to be ended in a proportionate manner and, consequently, guarantee a real possibility for customers of sourcing their electricity from alternative suppliers and for the latter to have a real possibility over a significant period of time of entering the market or expanding in the market. Moreover, the proposed commitments, by removing all restrictions on the resale of electricity supplied by EDF, and by facilitating such resale subject to certain conditions, will enable the customers in question to manage their supplies of electricity with more ease and flexibility and will, in the long term, boost the liquidity of the wholesale market in France.

(102) In view of the results of the public consultation carried out in accordance with Article 27(4) of Regulation EC No 1/2003, it appears that EDF's commitments, as modified, are appropriate and necessary to resolve the competition problems identified by the Commission in the French market for the supply of electricity to large industrial customers having exercised their eligibility.

8. CONCLUSION

(103) By adopting a decision under Article 9(1) of Council Regulation (EC) No 1/2003, the Commission makes the final commitments proposed by the undertakings concerned legally binding in order to resolve the competition problems identified in its Statement of Objections. This Decision does not take a position on the existence of any past or present infringement. The assessment carried out by the Commission to determine whether, while proportionate, the proposed commitments are enough to resolve the competition problems that it has identified, is based on the preliminary assessment which it carried out following its investigation and its analysis, and is set out in the Statement of Objections, and on the observations received from third parties following publication of a notice pursuant to Article 27(4) of Regulation (EC) No 1/2003.

(104) With regard to the final commitments proposed by EDF, the Commission takes the view that there is no longer any need for it to act and that the proceedings opened in this case must therefore be closed, without prejudice to the provisions of Article 9(2) of Regulation (EC) No 1/2003,

HAS ADOPTED THIS DECISION:

Article 1

In accordance with the scope of the commitments proposed by EDF S.A. for the entire EDF group, the commitments in annexe are rendered binding on EDF S.A., and the legal entities under its direct or indirect control, including its subsidiary Electricité de Strasbourg S.A.

Article 2

There is no longer any need for the Commission to act and the proceedings in this case shall be closed.

Article 3

This Decision is addressed to:

- EDF S.A. 22-30, Avenue de Wagram F – 75382, Cedex 08; and,
- Electricité de Strasbourg S.A. 26, boulevard du Président Wilson, F - 67953 Strasbourg Cedex 9.

Done at Brussels,

For the Commission

Joaquín ALMUNIA
Vice-President of the Commission