

COMMISSION DECISION

of 18 III 2009

**relating to a proceeding under Article 82 of the EC Treaty and Article 54 of the
EEA Agreement**

(Case COMP/39.402 – RWE Gas Foreclosure)

(Only the German text is authentic)

(Text with EEA relevance)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

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

Having regard to the Commission decision of 20 April 2007 to initiate proceedings in this case,

Having expressed concerns in the Preliminary Assessment of 15 October 2008,

Having given interested third parties the opportunity to submit their observations pursuant to Article 27(4) of Regulation 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,

WHEREAS:

1. SUBJECT MATTER

- (1) This Decision is addressed to RWE AG, Essen and its subsidiaries, namely RWE Energy AG, Essen ("RWE Energy"), and RWE Transportnetz Gas GmbH ("RWE TSO", collectively referred to as "RWE") and concerns RWE's behaviour on the German gas markets, notably the gas transmission markets.
- (2) In its Preliminary Assessment of 15 October 2008, the Commission came to the provisional conclusion that RWE holds a dominant position on the German gas transmission market(s) within its network area. The Preliminary Assessment expressed the concern that RWE may have abused its dominant position according to Article 82 of the EC Treaty³, notably by way of a refusal to supply gas transmission services to third parties and by a behaviour aiming at lowering the margins of RWE's downstream competitors in gas supply ("margin squeeze").

¹ OJ L 1, 04/01/2003, page 1.

² OJ C 310, 05/12/2008, page 23.

³ In the following text a reference to Article 82 of the EC Treaty means a reference to both provisions, Article 82 of the EC Treaty and Article 54 of the EEA Agreement.

2. THE ADDRESSEE

- (3) RWE is a German-based energy and utility company, primarily active in the production and supply of electricity and gas. RWE is a fully integrated gas company, with activities in the production and import of gas⁴, in the gas transmission and storage businesses as well as in the downstream gas distribution business⁵. RWE's activities in the German gas sector have been traditionally focused on the area of North-Rhine Westphalia⁶, but today RWE is also active in several other countries⁷. In 2007, RWE's turnover was EUR 42,507 million⁸.

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

- (4) The investigation was based on the results of an inspection at RWE's premises in May 2006⁹ and further fact-finding that was carried out *inter alia* by way of various requests for information to RWE and other market participants between 2006 and 2008.
- (5) On 20 April 2007, the Commission initiated proceedings against RWE pursuant to Article 2 of Regulation 773/2004 of the Commission of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty¹⁰ with a view to adopting a decision pursuant to Chapter III of Regulation 1/2003.
- (6) On 15 October 2008, the Commission adopted a Preliminary Assessment as referred to in Article 9(1) of Regulation 1/2003 which set out the Commission's competition concerns. That assessment was notified to RWE by letter of 15 October 2008.

⁴ Annual gas production in 2007: 3.2 bn m³ (see: RWE Facts & Figures, Update May 2008, page 198).

⁵ RWE supplied 1 million gas customers directly and further 2 million indirectly (through Stadtwerksbeteiligungen of more than >20%) in Germany in 2007, with a focus on distributors (total sales volume in 2007: 164.2 TWh, thereof 57% to distributors/Stadtwerke, 28% to industrial / corporate customers and 15% to household customers, see: RWE Facts & Figures, Update May 2008, page 192/196).

⁶ In this area, RWE held a number of state-granted regional supply monopolies ("Demarkationsgebiete") under the traditional German energy supply system in force until 1998.

⁷ RWE is *inter alia* active in the gas transmission and supply businesses in the Czech Republic, the UK, Hungary, and in the Netherlands.

⁸ RWE, Annual Report 2007, page 67.

⁹ Inspection Decision of 5 May 2006 in case COMP/B-1/39.317 concerning RWE and other undertakings active in transmission and supply of natural gas in Germany. The case number was subsequently changed to COMP/B-1/39.402.

¹⁰ OJ L 123, 24/04/2004, page 18

- (7) On 26 November 2008, RWE submitted comments to the Preliminary Assessment in which it expressed its disagreement with main findings of the Preliminary Assessment. Also on 26 November 2008, RWE submitted commitments to the Commission in response to the Preliminary Assessment.
- (8) On 5 December 2008, 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 Commission's concerns and the commitments and inviting interested third parties to give their observations on the commitments within one month following publication.
- (9) On 19 January 2009, the Commission informed RWE of the observations received from interested third parties following the publication of the notice. On 2 February 2009, RWE submitted an amended commitment proposal.
- (10) On 5 March 2009, the Advisory Committee on Restrictive Practices and Dominant Positions was consulted. On 6 March 2009, the Hearing Officer issued his final report.

4. PRELIMINARY ASSESSMENT

- (11) The Commission has gathered evidence that RWE may have abused its dominant position on the transmission market to the detriment of competitors, competition and ultimately consumers on downstream supply markets.

4.1. Relevant markets

4.1.1. The relevant product markets

- (12) In line with the Commission's previous decision practice, the Preliminary Assessment distinguished between markets for the *sale (supply)* of gas on the one hand and infrastructure-related markets, such as *gas transport services*¹¹, on the other hand.
- (13) Within the *gas transport* market, the Preliminary Assessment defined a *gas transmission* market for services offered by Transmission System Operators ("TSOs"/*Fernleitungsnetzbetreiber*) which is separate from the gas distribution market (gas transport services offered by Distribution System Operators ("DSOs"/*Verteilnetzbetreiber*), since competitive conditions in both areas differ significantly.

¹¹ See e.g. case IV/493 – Tractebel/Distrigas II (paragraph 27 et seq.); COMP/M.3410 - Total/Gas de France, paragraphs 15-16; COMP/M.3696 – E.ON/MOL, paragraph 97.

- (14) Within the gas *supply* market¹², the Preliminary Assessment distinguishes between markets for gas sales to *wholesalers* and *end customers*. Within these groups, it defined, in line with its previous practice, two separate markets for *wholesales*, namely one to "Regionalferngasgesellschaften" and one to smaller distributors ("Stadtwerke")¹³ and for the supply of gas to end customers, further distinguishing between *large industrial customers* and to *smaller customers* (household and small commercial customers)¹⁴.

4.1.2. The relevant geographic markets

- (15) The Preliminary Assessment concluded for the purpose of this case that the gas transmission market cannot be defined larger than *grid-wide*. This is not only in line with the Commission's previous case practice, but also with a recent decision of the Bundesnetzagentur ("BNetzA")¹⁵. As in most cases the construction of competing parallel gas networks is not economically viable¹⁶, competitive constraints from TSOs outside RWE's network remain negligible¹⁷.
- (16) Given missing competitive constraints from suppliers outside RWE's gas network, also the (downstream) *supply* markets in Germany were defined as grid-wide in scope in the Preliminary Assessment. This is in line with the decision practice of the Commission¹⁸ and German Competition authorities and courts¹⁹.

¹² Also referred to as gas "sales" markets.

¹³ See e.g. IV/M.1383 – *Exxon/Mobil* (paragraph 69); COMP/M. 1673 - *Veba/Viag*; paragraph 184; COMP/M.2822 - *EnBW/ENI/GVS*, paragraph 14-15. See for the Bundeskartellamt e.g. the prohibition decision of 12.3.2007 in the merger case RWE - *Saar Ferngas AG* (B 8 – 40000 – U 62/06), page 12 f.

¹⁴ Regarding possible further product market distinctions, it could be left open whether the markets for the sale of gas should be further divided, since the competitive assessment would not change under either market definition.

¹⁵ BNetzA, decision BK4-07-106 of 5 December 2008, page 17 et seq.

¹⁶ See in this context also Commission, Report on Sector Inquiry of 10.01.2007, SEC (2006) 1724, page 26; case COMP/M.3696 – *E.ON/MOL*, Rn 97.

¹⁷ See on the concept of the relevant geographic market and the role of competitive constraints for market definition Commission notice on the definition of relevant market for the purposes of Community competition law OJ C 372/5 of 9 December 1997, paragraphs 8 and 13.

¹⁸ See e.g. case IV/M.713 – *RWE/Thyssengas*, paragraphs 15-19; case COMP/M.2822 - *EnBW/ENI/GVS*.

¹⁹ See *inter alia* BKartA, Decision of 12.2.3007 - *RWE - Saar Ferngas AG* (B 8 – 40000 – U 62/06), S. 12 f. m.w.N.; Monopolkommission, 49. Sondergutachten, at paragraph 444 et seq.; see Bundesgerichtshof, OLG Düsseldorf - *E.ON/Eschwege* (2. Kartellsenat, Beschluss vom 06.06.2007 – VI-2 Kart 7/04 (V), Randnummer 113); see also Bundesgerichtshof - *Stadtwerke Garbsen* (Beschluss vom 15.07.1997 (KVR 21/96)).

4.1.3. RWE's dominant position on the relevant markets

- (17) The Commission concluded in its Preliminary Assessment that RWE may have held a dominant position not only in the gas transmission market within its grid area since 2003, but also in downstream supply markets within its grid.
- (18) As concerns *gas transmission*, the Commission found that almost all customers connected to RWE's grid had, absent economically viable possibilities to build new connections to other pipelines, only one possibility for their gas transmission needs, namely RWE. High entry barriers for potentially competing TSOs such as the high construction costs and the high barriers to supply via other market areas, which are of a structural nature, guarantee that RWE TSO's position in the transmission business within its network area will not be challenged within the foreseeable future.
- (19) As concerns the downstream *gas supply* markets, it can be observed that the chances for third party suppliers to compete with RWE in the supply markets within RWE's grid were, according to the Preliminary Assessment, limited by the small volumes of transport capacities available to them. The low share of gas transported for third suppliers on RWE's TSO pipelines translated into equally low market shares on supply markets served by these pipelines, notably on the wholesale supply markets. Absent a functional third party access system and in view of the fact that almost the entire available capacity was booked on a long term basis for RWE Energy, the risk for RWE Energy to lose customers in case of a price increase was negligible. The Preliminary Assessment therefore concluded that RWE may have held a dominant position on the supply markets within its grid area, notably the wholesale supply markets.

4.2. Substantial part of the common market

- (20) The Preliminary Assessment of the Commission took the view that the area covered by RWE's gas transmission networks is a substantial part of the common market as required by Article 82 EC Treaty²⁰. Indeed, the affected geographic markets approximately cover the territory of the most populated German Bundesland, North-Rhine Westphalia²¹. The volume of all gas sales within RWE's core area is approx. 164,2 bn kWh²², and most of RWE's more than 3 million

²⁰ Cf. Commission Decision, Case COMP/M.2822 – EnBW/ENI/GVS, paragraph 32, in which the regional market for gas supply, encompassing the "Bundesland" Baden-Württemberg, was regarded as a substantial part of the common market.

²¹ See e.g. judgement of the Court of Justice of the European Communities C-475/99 *Ambulanz Glöckner* [1999] ECR I-8089, at paragraph 38, where it was held that the Bundesland of Rheinland-Pfalz may constitute a substantial part of the common market as "it covers a territory of almost 20 000 km² and has a high number of inhabitants, around four million, which is higher than the population of some Member States".

²² Siehe: RWE Facts & Figures, Stand Mai 2008, S. 196.

direct and indirect German customers are served via RWE's grid in North-Rhine Westphalia. The affected markets for gas transmission and supply markets with RWE's grid are thus of such an economic importance in relation to the whole common market that they must be considered a substantial part of the common market.

4.3. Practices raising concerns

- (21) The Preliminary Assessment has identified concerns that RWE may have abused its dominant position on the relevant markets, thereby violating Article 82 EC Treaty, notably by a *refusal to supply* (see below, 4.3.1) and a *margin squeeze* (see below, 4.3.2)²³.

4.3.1. Practices concerning capacity management (refusal to supply)

- (22) The Preliminary Assessment took the view that RWE TSO's gas transmission network can be considered an essential facility, since access to it was objectively necessary to carry out business in the gas supply markets within RWE's grid areas²⁴.
- (23) According to the Commission's findings, RWE TSO may have refused access to its network, notably by various means related to RWE TSO's capacity management. Indeed, there is evidence that RWE TSO may have pursued a strategy according to which it tried to systematically keep the transport capacities on its own network for itself²⁵.
- (24) The relevant factual background against which practices causing concern need to be considered includes the fact that chances for competitors to get access to RWE's transmission network are already reduced because RWE has booked almost the entire capacities on its transmission network on a long term basis. This situation contrasts with a steady and significant demand of third transport

²³ The long term capacity bookings by RWE are not part of the concerns identified in the Preliminary Assessment that are addressed by the commitments submitted by RWE.

²⁴ See in this respect also judgement of the Court of 26/11/1998 in case C-7/97 *Oscar Bronner* [1998] ECR I-7791, paragraph 46. The Commission notes in this context that RWE has erected its gas transmission network in a period during which RWE's market position was protected by a regional monopoly granted by the German State; see also the Communication from the Commission on *Guidance on the Commission's Enforcement Priorities in Applying Article 82 EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings*, of 09.02.2009, paragraph 82.

²⁵ In this context it is noteworthy that the mere fact that the current capacities are fully used by the essential facility holder (i.e. RWE) is not sufficient to exclude an abuse under Article 82 EC (see e.g. Commission decision of 19.4.1977, JO L 117, 1/9; *Sea-Link*, 21.12.1993, JO L 15/18; decision of 21 December 1993 – *Port of Rødby*, OJ L 55, 26.02.1994, page 52; *Frankfurt Airport*, 14.1.1998, L 72/30). In such a situation, a dominant essential facility holder is under the obligation to take all possible measures to remove the constraints imposed by the lack of capacity and to organise its business in a manner that makes the maximum capacities of the essential facility available.

customers for transmission capacities on RWE's network. The Commission's investigation showed that the demand of third transport customers largely exceeded the offered capacities, which led to *numerous rejections* of transmission requests. Access RWE's transmission networks was made even more difficult by the fact that RWE operated a highly fragmented network (consisting of 9 market areas until August 2006), making transports over longer distances complicated and costly.

- (25) As a result, third party shippers only accounted for a fraction of the transports on RWE's transmission grid and could not compete in an effective manner in the downstream supply business.

Indication of available capacity

- (26) The Preliminary Assessment took the view that RWE may have *understated the capacity* that was technically available to third customers, leading to unjustified refusals and deterring transport customers from requesting transport capacities. In fact, it can be observed that on many bottleneck points RWE actually used significantly more capacity than indicated by RWE TSO as maximum technical capacity²⁶. Irrespective of whether network operators may enjoy a certain degree of flexibility when calculating the maximum technical capacity they offer to customers, the Preliminary Assessment concluded that the difference between indicated and actually used capacity was so significant in the present case that it may indicate an intentional strategy aimed at foreclosing potential third transport customers by understating the maximal technical capacity offered to the market²⁷.

Inefficient capacity allocation mechanism

- (27) The Preliminary Assessment set also out concerns that RWE TSO may not have implemented an *effective congestion management* system to manage the scarce capacities on its network, which could have avoided many of the refused and delayed capacity requests, harming third party transport customers and ultimately consumers. The Commission has gathered evidence that RWE TSO may not have used all available means to make capacities available to its customers. The evidence indicates that RWE's intention may have been rather to protect RWE Energy from new competitors than to attract new transport customers for RWE TSO and that RWE TSO's few efforts to make unused capacities available to third party customers remained ineffective.

²⁶ The availability of transport capacity depends on the volume of *booked capacity* on the one hand and on the *maximum technical capacity* on the other hand. The maximum technical capacity indicates the maximum capacity volume that can be transported without a risk of interruption. If the booked capacity equals the maximum technical transport capacity, TSOs, which correctly evaluated missing technical capacity, indicate that their network is fully booked (e.g. by a "red light" in their booking system).

²⁷ See in this context also Bundesnetzagentur in case *EnBW/E.ON Ruhrgas*, decision BK7-06-008 of 5.5.2006, page 6.

Conclusion on refusal to supply

- (28) The Preliminary Assessment therefore concluded that RWE's behaviour described in paragraphs 22-27 may have negatively affected competition on the downstream gas supply markets, and may thus constitute an abuse under Article 82 EC Treaty.

4.3.2. Practices concerning a margin squeeze

- (29) The Commission also identified concerns as to a possible abuse of RWE's dominant position on the TSO-level by way of a margin squeeze. In the Preliminary Assessment, the Commission raised the concern that RWE may have followed a strategy which aimed at squeezing competitors' downstream gas supply margins²⁸.

Elevated tariffs for network access

- (30) There is evidence that RWE may have intentionally set its transmission tariffs at an artificially high level in order to squeeze RWE's competitors' margins. Such a behaviour has the effect of preventing even an as efficient competitor to compete effectively on the downstream gas supply markets or limiting competitors' or potential entrants' ability to remain in or enter the market.
- (31) It appears that in the period under investigation, RWE constantly had negative results in its downstream gas supply business. It has to be underlined that RWE's downstream results were negative despite the important rebates granted by RWE TSO to RWE Energy for its long-term capacity bookings, which granted a significant advantage to RWE vis-à-vis its competitors, and despite the potentially inflated prices paid by RWE TSO to RWE Energy for internal services (see below). RWE's negative results in the downstream gas business contrast with its overall profitable German gas business, including its network business, where RWE achieved, according to the available evidence, considerable annual revenues.
- (32) The Preliminary Assessment identified concerns that the margin squeeze may be a result of RWE's elevated prices for access to its transmission network. RWE, as a vertically integrated and dominant company controlling the gas transmission network, may have embarked upon a strategy of raising its own network costs in

²⁸ See in this respect judgement of the Court of the European communities of 30/11/2000 in case T-5/97 *Industrie des Poudres Sphériques v Commission* [2000] ECR II-3755 paragraph 178. See also Commission Decision 88/518/EEC of 18 July 1988 relating to a proceeding under Article 86 of the EEC Treaty (Case No IV/30.178 Napier Brown - British Sugar) (OJ L 284 of 19.10.88, page 41, paragraph 66). See also Commission Decision of 4 July 2007 relating to proceedings under Article 82 of the EC Treaty (Case COMP/38.784 – *Wanadoo España vs. Telefónica*, paragraph 282). See also Commission's Notice on access agreements in the telecommunications sector at paragraphs 117-118.

order to charge higher network tariffs while at the same time taking steps to shield its elevated network profits from regulatory intervention²⁹.

Asymmetric cost elements disadvantaging competitors

- (33) According to the Preliminary Assessment, there is evidence that the network tariffs, which were already generally high, may have been in practice even higher for RWE's competitors than for RWE Energy. This is because important elements of the network tariffs applied only to third party users, which led to an asymmetric effect of the already elevated network access costs, to the detriment of downstream competitors. Such asymmetric cost elements include a rebate scheme favourable for RWE, and a deterrent balancing system.
- (34) RWE's *rebate policy* may, according to the Preliminary Assessment, have increased the existing cost disadvantages for RWE's competitors in the downstream supply market. In fact, RWE granted significant rebates for transmission contracts with a long duration. Although these high rebates were, theoretically, available also to competitors, in practice almost only RWE benefited from its rebate scheme, not the least because it was almost impossible for new competitors to obtain the necessary long-term capacities.
- (35) The Preliminary Assessment also raised concerns that RWE's *balancing fees* within in its balancing zones had an asymmetrical negative impact on new entrants³⁰. While RWE was itself exempted from paying balancing costs, due to agreements between RWE Energy and RWE TSO, other transport customers had to pay high penalty fees within RWE TSO's network. This may have deterred competitors from entering into competition on the downstream supply markets. According to the Preliminary Assessment, the effect of the balancing regime was not limited to the *actual* high payments for imbalances. Already the *mere risk* of very high penalty fees may have caused many competitors to abstain from attempts to submit offers to downstream customers. According to the Preliminary Assessment, the balancing system was an efficient deterrent for access to RWE's network and one of the main reasons for competitors' low market shares³¹.

²⁹ Although RWE TSO was temporarily exempted from cost regulation pursuant to the GasNEV, since it had filed for an exemption pursuant to paragraph 3(2) GasNEV, the BNetzA has in the meantime rejected this exemption (see BNetzA, decision BK4-07-106 of 5 December 2008).

³⁰ Balancing services are intended to bridge the differences between forecasted and actual transport volumes, i.e. the balancing service provider buys gas from shippers if these have unexpected excess capacities and sells gas to shippers if they need more gas than expected. In order to avoid that transport customers abuse the balancing services of TSOs, they usually charge a certain "penalty" to their transport customers in imbalance.

³¹ The harmful effect of RWE's balancing regime for potential transport customers may have been aggravated by the fact that RWE's balancing zones were extremely fragmented. Since new entrants necessarily have a smaller portfolio of customers, it may have been particularly harmful for them that RWE only integrated its balancing zones at a late stage.

Conclusion on cost-related behaviour

- (36) The Preliminary Assessment therefore concluded that there is evidence that RWE may have squeezed competitor's downstream margins by elevated network tariffs and an asymmetric cost structure, disadvantaging downstream competitors and ultimately final consumers, which may therefore constitute an abuse.

4.4. Effect on trade between Member States

- (37) The Preliminary Assessment of the Commission is that the potentially abusive behaviour affected trade between Member States within the meaning of Article 82 of the EC Treaty. According to the Court of Justice of the European Communities and the Commission an influence, direct or indirect, actual or potential, on the pattern of trade between Member States is sufficient as long as the effect is appreciable³². According to the Commission's Preliminary Assessment, RWE's behaviour was capable of affecting trade between Member States, notably by affecting import and export flows or hindering foreign competitors from competing with RWE within its grid area.

5. PROPOSED COMMITMENTS

- (38) RWE does not agree with the Commission's Preliminary Assessment. It has nevertheless offered Commitments pursuant to Article 9 of Regulation (EC) 1/2003, to meet the Commission's competition concerns. The key elements of the Commitments can be summarised as follows:

1. RWE will divest its current German gas transmission system business to a suitable purchaser which must not raise *prima facie* competition concerns. RWE notably committed to divest:
 - a) RWE's German high-pressure gas transmission network, with a total length of approx. 4 000 km. This corresponds to RWE's entire current German high-pressure gas transmission network, with the exception of some network parts in the area of Bergheim (length: approx. 100 km)³³. For parts of the network which are currently not exclusively owned by RWE but co-owned with other parties, RWE commits to divest its entire share;

³² See Commission Notice, Guidelines on the effect on trade concept contained in Arts 81 and 82 of the Treaty, (2004) OJ C101/07, paragraphs 23 *et seq.* and 44 *et seq.*

³³ These 100 km of the transmission network can, according to RWE, not be economically divested to a third purchaser since there are no sufficient measurement facilities for the gas flows to downstream grid parts in this area, see Schedule 4 of the commitment text.

- b) auxiliary equipment necessary for the operation of the transmission network (such as the gas conditioning facilities in Broichweiden and Hamborn, a dispatching centre [Prozessleitsystem] etc.);
 - c) intangible assets necessary for the operation of the transmission network (such as software for the dispatching centre, contracts and licenses);
2. RWE also commits to supply the purchaser for a limited period of up to five gas years following the closing of the divestiture with auxiliary services necessary for the operation of the transmission network, such as the provision of gas flexibility services.
 3. The business will be endowed with personnel and key personnel necessary for the operation of the transmission network.

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

- (39) In response to the publication on 5 December 2008 of a notice pursuant to Article 27(4) of Regulation (EC) No. 1/2003, the Commission received 7 responses from interested third parties.
- (40) Overall the observations received did not lead the Commission to identify new competition concerns related to the commitments and contained no points such as to make the Commission reconsider the concerns it expressed in the Preliminary Assessment. Adequately, most respondents welcomed the Commitments and acknowledged that they would address the concerns expressed by the Commission.
- (41) Some commenting third parties suggested to clarify in the proposed Commitments text that the divestiture of RWE's gas transmission network is without prejudice to RWE's obligations to cooperate with other network operators and to continue the process of further market integration³⁴. The Commission agrees that a clarification of this issue may contribute to avoid any misunderstanding with regard to RWE's cooperation obligations under German law.
- (42) A number of comments concerned RWE's obligation to provide certain products and services ("Gaswirtschaftliche Produkte" und "Lastflusszusagen") to the purchaser after the closing of the transaction. It was in particular mentioned that no particular reasons would justify exempting the provision of "Betriebsgas"³⁵ from the list of products and services in Schedule 2 to the Commitment text, since it might be necessary for the purchaser to acquire "Betriebsgas" from RWE even after closing. It was also mentioned that the catalogue of products and services in

³⁴ See notably paragraph 20(1)(b), Satz 5 and 7 Energiewirtschaftsgesetz.

³⁵ Also referred to as "Treibgas".

Schedule 2 should be formulated in a more flexible manner in order to address the issue of possible changes in the practice or legal framework concerning these products. The Commission considers the comments concerning products and services provided by RWE as pertinent.

- (43) Other comments could not be taken into account, since they concerned issues outside the scope of the procedure or could not be considered as valid arguments against the effectiveness of the remedies. Notably the fact that the Commitment text allows³⁶ the purchaser to pay the purchase price by way of a "swap" of own assets or shares (instead of money) does not weaken the effectiveness of the remedies. Competition concerns, which may arise irrespectively of the payment modalities, can be effectively prevented by the condition in the Commitment text that the acquirer must not give rise to *prima facie* competition concerns and by national and European merger control rules.
- (44) In response to the comments received, RWE submitted a revised commitments proposal ("Final Commitments") on 2. February 2009 which took account of the comments received³⁷.
- (45) In view of the results of the market test, the Commission considers the Final Commitments as sufficient to effectively remove the competition concerns expressed in the Preliminary Assessment.

7. PROPORTIONALITY OF THE FINAL COMMITMENTS

- (46) According to settled case law, the principle of proportionality requires that the measures adopted by Community institutions must be suitable and not exceed what is appropriate and necessary for attaining the objective pursued³⁸. Where there is a choice between several appropriate measures, recourse must be had to the least onerous one, and the disadvantages caused must not be disproportionate to the aims pursued³⁹. For the assessment of the proportionality of Commitments

³⁶ It should be noted that the commitment text only *allows* swaps as a payment method, without giving preference to this kind of transaction, see paragraph 19 (d) of the commitment text.

³⁷ See for modifications in the Final Commitments notably paragraph 10(a) and Annex 2, paragraphs 1 and 3 concerning RWE's obligations to cooperate with other network operators as well as to continue the process of further market integration and to provide certain gas products and services to purchaser after the closing of the transaction.

³⁸ Judgement of the Court of First Instance of 19/07/1997 in case T-260/94, *Air Inter v Commission* [1997] ECR II-997, paragraph 144, and Case T-65/98, *Van den Bergh Foods v Commission* [2003] ECR II – 4653, paragraph 201. See in detail *Koch*, *Der Grundsatz der Verhältnismäßigkeit in der Rechtsprechung des Gerichtshofs der Europäischen Gemeinschaften*, page 198 et seq.

³⁹ Judgement of the Court of 11/07/1989 in case 265/87, *Schröder* [1989] ECR 2237, paragraph 21, and judgement of the Court of 9/03/2006 in case C-174/05, *Zuid-Hollandse Milieufederatie and Natuur en Milieu* [2006] ECR I – 2243, paragraph 28.

submitted within the framework of Article 9 of Regulation 1/2003, the Commission takes into account that the Commitments are *not imposed* by the Commission for an established infringement under Article 7 (1) of Regulation 1/2003, but *voluntarily proposed* by the undertaking seeking to bring the procedure to an end without a formal decision on the existence of an infringement. The Commission also takes into account the relevant national regulatory framework.

- (47) The Final Commitments proposed by RWE are sufficient and necessary to address the concerns identified by the Commission in its Preliminary Assessment, without being disproportionate.
- (48) The divestiture of RWE's gas transmission network can be considered as a *structural* remedy, as it does not only oblige RWE to behave in a certain manner, but consists in the *divestment* of its gas transmission activities, which effectively removes the possibility for RWE to engage in infringements of the same type.
- (49) The Final Commitments are *suitable* to remove the Commission's competition concerns expressed in the Preliminary Assessment. The sale of RWE's transmission business will ensure that RWE has no control over the gas transmission network and that RWE cannot engage in anti-competitive practices relating to the access to its network anymore.
- (50) The Final Commitments proposed by RWE are also *necessary*, since there is no equally effective remedy as a divestment of RWE's transmission network to address the Commission's concerns. It can in particular not be expected that a remedy which would oblige RWE to a certain *behaviour* would have been equally effective. Not only would a behavioural remedy have been difficult to administer and monitor⁴⁰, involving high burdens for RWE. Also, a mere behavioural remedy would not have removed the underlying *incentives* of RWE to engage in the alleged anti-competitive conduct, as ensured by the proposed structural remedy. Indeed, there is strong evidence that RWE's restrictive capacity management policy and its margin squeeze strategy were used to protect its own gas supply business. These forms of behaviour derive in this case and taking into account the elements which form the basis of the Preliminary Assessment from an inherent conflict of interest within RWE as a vertically integrated gas company which controls both transmission and supply of gas. Absent a structural remedy, the incentives to further engage in such behaviour would not have been removed as effectively, resulting in a risk of a lasting or repeated infringement.
- (51) The Final Commitments provide for a clear-cut solution to the identified competition concerns. Not the least with a view to the large number of customers connected to RWE's gas transmission network and the important potential harm

⁴⁰ See on the difficulties to implement behavioural remedies also Commission Notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004, OJ C 267, 22.10.2008, page 1 et seq., paragraphs 15, 17 and 69.

for these customers, the Final Commitments must be regarded as adequate and *proportionate* to the identified competition concerns.

- (52) The public consultation pursuant to Article 27 (4) of Regulation (EC) No. 1/2003 confirmed that the divestiture of RWE's network is proportionate to the identified competition concerns on the German gas markets.
- (53) The remaining elements of the Final Commitments such as the preservation of the viability of the business to be divested, the hold-separate obligations, and the provisions on ring-fencing, non-solicitation, due diligence and reporting as well as the role conferred upon the Trustee are transitional and ancillary to the main commitments. Those provisions are necessary to ensure the implementation of the commitments offered by RWE and are proportionate. They also reflect the standard practice of the Commission in case of divestiture remedies in merger proceedings as set out in the Commission notice on remedies acceptable under Council Regulation (EEC) No 139/2004 and under Commission Regulation (EC) No 802/2004.

8. CONCLUSION

- (54) By adopting a decision pursuant to Article 9(1) of Regulation (EC) No. 1/2003, the Commission makes the Final Commitments, offered by the undertakings concerned to meet the Commission's concerns expressed in its Preliminary Assessment, binding upon them. This decision does not conclude whether or not there has been or still is an infringement. The Commission's assessment of whether the Final Commitments offered are sufficient to meet its concerns and proportionate at the same time, 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 following the publication of a notice pursuant to Article 27(4) of Regulation 1/2003.
- (55) In the light of the Final Commitments offered, the Commission considers that there are no longer grounds for action on its part and, without prejudice to Article 9(2) of Regulation (EC) No. 1/2003, the proceedings in this case should therefore be brought to an end.

HAS ADOPTED THIS DECISION:

Article 1

The Commitments in the Annex shall be binding on RWE AG and all its subsidiaries.

Article 2

There are no longer grounds for action by the Commission and the proceedings in this case shall be brought to an end.

Article 3

This Decision is addressed to RWE AG, Opernplatz 1, 45128 Essen, and all its subsidiaries, in particular

RWE Transportnetz Gas GmbH, Königswall 21, 44137 Dortmund and

RWE Energy AG, Rheinlanddamm 24, 44139 Dortmund

Done at Brussels, 18 III 2009

For the Commission

Neelie KROES

Member of the Commission

[For the commitment text and the schedules (only in German language)
see the *German version* of the decision]