



EUROPEAN COMMISSION
Competition DG

CASE AT.39767-BEH ELECTRICITY

(Only the English text is authentic)

ANTITRUST PROCEDURE Council Regulation (EC) 1/2003

Article 9 Regulation (EC) 1/2003

Date: 10/12/2015

This text is made available for information purposes only. A summary of this decision is published in all EU languages in the Official Journal of the European Union.

Parts of this text have been edited to ensure that confidential information is not disclosed. Those parts are replaced by a non-confidential summary in square brackets or are shown as [...].

TABLE OF CONTENTS

1.	Subject Matter	2
2.	The Undertaking Concerned	3
3.	Procedural Steps Under Regulation (EC) No 1/2003	4
4.	Preliminary Assessment	5
4.1.	Background	5
4.2.	Relevant markets	7
4.3.	Dominance	8
4.4.	Substantial part of the internal market	10
4.5.	Practices raising concerns	10
4.6.	Likely impact on competition	12
4.7.	Absence of objective justification or efficiencies	13
4.8.	Effect on trade between Member States	14
5.	Proposed initial Commitments	14
5.1.	The commitment to cease and desist	15
5.2.	The commitment to set up a power exchange	15
5.3.	The commitment concerning liquidity on the day-ahead market	15
5.4.	The commitment concerning the divestiture of the power exchange	16
5.5.	Duration of the commitments	16
5.6.	Other provisions of the commitments	16
6.	Commission Notice Pursuant to Article 27(4) of Regulation (EC) No 1/2003	16
6.1.	Respondents' views on the commitment to set up a power exchange	16
6.2.	Respondents' views on the commitments concerning liquidity on the day-ahead market	17
6.3.	Respondents' views on the commitment concerning the divestiture of the power exchange	18
6.4.	Respondents' views on the duration of the commitments	18
7.	Final Commitments	18
8.	Proportionality of the final commitments	18
8.1.	Principles	18
8.2.	Application in this Case	19
9.	Conclusion	24

COMMISSION DECISION

of 10.12.2015

relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union

Case AT.39767 - BEH Electricity

(Only the English text is authentic)

THE EUROPEAN COMMISSION,

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

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

Having regard to the Commission decision of 27 November 2012 to initiate proceedings in this Case,

Having expressed concerns in the Statement of Objections of 12 August 2014,

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

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

Having regard to the final report of the Hearing Officer,

Whereas:

1. SUBJECT MATTER

- (1) This Decision is addressed to Bulgarian Energy Holding EAD ('BEH') and concerns territorial restrictions on resale in contracts for the sale of electricity on the market for the wholesale supply of electricity at freely negotiated prices in Bulgaria by BEH's wholly owned subsidiaries Natsionalna Elektrieska Kompania EAD ('NEK'), TPP Maritsa East 2 EAD ('TPP Maritsa East 2') and NPP Kozloduy EAD ('NPP Kozloduy'), collectively referred to hereafter as 'BEH's subsidiaries'.

¹ OJ L 1, 4.1.2003, p. 1. With effect from 1 December 2009, Articles 81 and 82 of the EC Treaty have become Articles 101 and 102, respectively, of the Treaty on the Functioning of the European Union ('TFEU'). The two sets of provisions are, in substance, identical. For the purposes of this Decision, references to Articles 101 and 102 of the TFEU should be understood as references to Articles 81 and 82, respectively, of the EC Treaty when where appropriate. The TFEU also introduced certain changes in terminology, such as the replacement of 'Community' by 'Union' and 'common market' by 'internal market'. The terminology of the TFEU will be used throughout this Decision.

- (2) In its Statement of Objections ('SO') of 12 August 2014, which constitutes a preliminary assessment for the purposes of Article 9(1) of Regulation (EC) No 1/2003, the Commission came to the provisional conclusion that BEH holds a dominant position on the market for the wholesale supply of electricity at freely negotiated prices in Bulgaria and that the clauses in electricity supply contracts entered into by BEH's subsidiaries with third parties, which restrict the territory into which the electricity sold by BEH's subsidiaries can be resold, infringed Article 102 of the Treaty.
- (3) BEH disagrees with the Commission's preliminary assessment. Nevertheless, on 16 October 2015 it offered commitments under Article 9(1) of Regulation (EC) No 1/2003 to meet the concerns expressed by the Commission. This Decision makes those commitments binding on BEH.

2. THE UNDERTAKING CONCERNED

- (4) BEH is the successor to the state-owned oil and gas company that was originally incorporated in 1973 and was restructured as a joint stock company in 1990. On 18 September 2008, the company was renamed Bulgarian Energy Holding EAD. The Bulgarian State is the sole owner of BEH's capital; the rights of ownership are exercised by a minister, at present the Minister of Energy.
- (5) BEH's activities include the acquisition, sale and participation in the management of companies active in the fields of the generation, production, transmission, transit, storage, management, distribution, and the sale and purchase of electricity, natural gas, coal, as well as other types of raw materials used for the production of electricity.
- (6) BEH's assets amount to approximately BGN 14 480 million² (EUR 7 400 million³) and its consolidated revenue is approximately BGN 6 500 million⁴ (EUR 3 320 million⁵).
- (7) Since 18 September 2008, BEH holds 100 % of the capital in the following companies that are active in the electricity sector and that are concerned by this Decision: NEK, NPP Kozloduy and TPP Maritsa East 2.⁶ BEH exercises its shareholder rights at the general assembly of each of BEH's subsidiaries and through their boards of directors, which it appoints. BEH also wholly owns the Independent Bulgarian Power Exchange EAD ('IBEX') which was incorporated in January 2014 with a view to setting up a power exchange in Bulgaria.
- (8) The activities of NEK include the generation of electricity; the purchase and sale of electricity; the supply of electricity to customers connected to the domestic

² Bulgarian Energy Holding EAD, Consolidated Annual Management Report and Consolidated Financial Statements, 31 December 2012, p. 13.

³ Values in euro on the basis of the European Central Bank reference average exchange rate for 2012, namely Bulgarian lev/euro = 1.9558.

⁴ Bulgarian Energy Holding EAD, Consolidated Annual Management Report and Consolidated Financial Statements, 31 December 2012, p. 13.

⁵ Values in euro on the basis of the European Central Bank reference average exchange rate for 2012, namely Bulgarian lev/euro = 1.9558.

⁶ Reply by BEH dated 30 May 2013 to the Commission's request for information dated 24 April 2013, p. 2.

transmission network; the import and export of electricity and the construction and maintenance of power generation and transmission facilities.

- (9) The activities of NPP Kozloduy include the use of nuclear power for the generation of electricity and heat; the investment activity relating to its activities; activities relating to the construction, installation and repair in the electric power and thermal power industry; the sale of electricity; and the operation of a radioactive waste management facility.
- (10) TPP Maritsa East 2's activities include the generation and sale of power, and construction and repair activities in the electric power industry.
- (11) IBEX holds the sole licence to operate a power exchange in Bulgaria,⁷ but it is not yet active on the market.

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

- (12) On an *ex-officio* basis, the Commission carried out a number of investigative measures between 2010 and 2014 in relation to electricity markets in Bulgaria. These included requests for information sent to BEH, to its customers, and to other market players. The Commission also held meetings with BEH during that period.
- (13) On 27 November 2012, the Commission opened proceedings with a view to adopting a decision under Chapter III of Regulation (EC) No 1/2003.
- (14) On 12 August 2014, the Commission adopted a SO which set out the Commission's competition concerns; those concerns related to the territorial restrictions on the resale of electricity, contained in the contracts that BEH's subsidiaries enter into with third parties. This assessment was notified to BEH by letter of 14 August 2014.
- (15) On 25 November 2014, BEH submitted its reply to the SO. An oral hearing took place on 16 January 2015 during which BEH and BEH's subsidiaries made known their views on the Commission's assessment as set out in the SO.
- (16) On 15 May 2015, BEH offered commitments to meet the concerns expressed by the Commission (the 'Initial Commitments'), while continuing to dispute the Commission's preliminary assessment as set out in the SO.
- (17) On 19 June 2015, a notice was published in the *Official Journal of the European Union*⁸ pursuant to Article 27(4) of Regulation (EC) No 1/2003, summarising the case and the Initial Commitments and inviting interested third parties to give their observations on those commitments within one month following publication.
- (18) On 8 September 2015, the Commission informed BEH of the observations received from interested third parties following the publication of the notice. On 16 October 2015, BEH offered revised commitments ('the Final Commitments').
- (19) On 30 November 2015, the Advisory Committee on Restrictive Practices and Dominant Positions was consulted. On 2 December 2015, the Hearing Officer issued his final report.

⁷ On 31 March 2014, licence No JI-422-11 was issued by the Energy and Water Regulatory Commission of Bulgaria to IBEX for a period of 10 years.

⁸ Communication from the Commission published pursuant to Article 27(4) of Council Regulation (EC) No 1/2003 in Case AT.39767 — BEH Electricity (OJ C 202, 19.6.2015, p. 2).

4. PRELIMINARY ASSESSMENT

- (20) BEH owns 100 % of the shares of NEK, TPP Maritsa East 2 and NPP Kozloduy and the Commission, in the SO, relied on the presumption that BEH exercises a decisive influence over them and is liable for their conduct.
- (21) BEH argued that it does not exercise a decisive influence over the conduct of BEH's subsidiaries. The Commission, however, takes the view that BEH has not provided any evidence of a nature to rebut the presumption of decisive influence.
- (22) Furthermore, the Commission notes that BEH has wide-ranging powers to decide on questions within the competence of the general assemblies of BEH's subsidiaries. BEH appoints and dismisses the members of the boards of directors of BEH's subsidiaries, it approves decisions concerning the dismissal of the CEOs, it is informed of the agenda of the meetings of the boards of directors of BEH's subsidiaries and receives the minutes of these meetings, and it approves the business plans of BEH's subsidiaries. In addition, a number of persons have, since 2008, at one time or another been a member of both the board of directors of BEH and the board of directors of one or more of BEH's subsidiaries. Under the successive articles of association of BEH's subsidiaries in force between 2008 and 2014 and BEH's internal rules, BEH's subsidiaries have, in addition, been required to submit to BEH for approval all transactions above certain thresholds and to provide BEH with information concerning contracts that they intend to enter into.

4.1. Background

4.1.1. *Regulatory framework for the supply of electricity in Bulgaria*

- (23) The supply of electricity at wholesale and retail level in Bulgaria operates according to a hybrid model, with 'regulated' transactions, under which electricity is supplied at regulated prices, operating alongside liberalised or 'free' transactions, on which electricity is supplied at freely negotiated prices.⁹

4.1.2. *Regulated prices transactions*

- (24) At the retail level, household and non-household customers connected to the low voltage electricity distribution network are supplied with electricity at regulated prices.¹⁰ There are four 'end-suppliers'¹¹ in Bulgaria, each of which holds a sole licence to supply electricity at regulated prices to household and non-household customers connected to the low voltage electricity distribution network at regulated

⁹ The Energy Act, promulgated in the State Gazette (SG) No 107 of 9 December 2003, as amended and corrected, most recently in the SG No 56 of 24 July 2015 ('the Energy Act'). A further category of electricity transactions take place between producers and the operator of the electricity transmission system for the purposes of ensuring the proper functioning of the grid (namely, to supply electricity for balancing, ancillary services and cold reserve).

¹⁰ Point 9 of Article 30(1), Article 94a and point 4 of Article 97(1) of the Energy Act. Prior to the amendment of the Energy Act which took effect on 17 July 2012, customers benefiting from regulated tariffs were household customers and small businesses with less than 50 employees and less than BGN 19.5 million (EUR 9.97 million) annual turnover.

¹¹ The 'end supplier' of electricity is defined in paragraph 1(28a) of the Supplementary Provisions of the Energy Act as: '*an energy undertaking supplying with electricity household and non-household customers connected to the electricity distribution network in the respective licensed area, when these customers have not selected another supplier*'.

prices in a given area. If those customers choose another supplier, the price becomes freely negotiated.

- (25) At the wholesale level, in order to meet downstream demand from end-customers for electricity at regulated prices, end-suppliers purchase electricity at regulated prices from a ‘public provider’¹² which in turn purchases from producers.¹³ BEH's subsidiary NEK holds the sole licence as ‘public provider’ in Bulgaria.¹⁴

4.1.3. *Freely negotiated prices transactions*

- (26) At the retail level, traders sell electricity on the free retail market to end-users connected to the distribution grid.
- (27) Wholesale transactions of electricity in Bulgaria at freely negotiated prices may take place notably between producers, traders (including NEK), the operator of the power exchange,¹⁵ as well as large industrial users connected to the high voltage grid. Producers and importers of electricity sell to customers, including traders or large industrial users. Electricity trading in Bulgaria is based on bilateral contracts. To date, there is no power exchange in Bulgaria.
- (28) Traders resell electricity on the wholesale market to large industrial customers and to other traders in Bulgaria or abroad.
- (29) According to the Energy Regulator, the Energy and Water Regulatory Commission (‘EWRC’), the proportion of the total net supply of electricity in Bulgaria that is accounted for by customers exercising their right to choose a supplier and by commercial exports (the ‘free’ market according to the EWRC terminology) in 2014 amounted to 43.4 %.¹⁶

4.1.4. *BEH's sales of electricity at freely negotiated prices*

- (30) The practices which give rise to the competition concerns, as set out in the SO, relate to the wholesale sales of electricity at freely negotiated prices carried out by BEH's subsidiaries NEK, NPP Kozloduy and TPP Maritsa East 2 to entities other than end-users, as from 18 September 2008, which was the date on which BEH was created.
- (31) The transactions referred to in recital (30) are entered into on the basis of bilateral negotiations between the BEH's subsidiaries and entities other than end-users, and in

¹² Point 3 of Article 97(1) of the Energy Act.

¹³ The ‘public provider’ is entrusted with a number of tasks that are defined in the Energy Act. Article 21(1)(21) of the Energy Act provides that the Energy and Water Regulatory Commission (EWRC) shall: ‘set the availability for generation of electricity of producers, from which the public provider purchases electricity, as well as the amount of electricity in accordance with which the public provider is obligated to conclude agreements with end suppliers’. Article 93a(2) of the Energy Act provides that: ‘the public provider shall purchase electricity, defined within the availability under Article 21, paragraph 1, item 21, in order to provide electricity to end suppliers’. In addition, NEK is obliged to purchase electricity from producers connected to the transmission system under certain long-term availability and power purchase agreements at freely negotiated prices, as well as electricity produced from renewable sources, from high-efficiency combined electricity and heat generation and from local fuel (for security of supply purposes) at regulated prices (see Article 93a(1) and point 8 of Article 4(2) of the Energy Act). The end suppliers, for their part, are obliged to purchase at regulated prices electricity from renewable sources and high-efficiency combined electricity and heat generation, where the producers are connected to the distribution system (Article 94a(3) of the Energy Act).

¹⁴ Paragraph 15(2) of the Transitional and Final Provisions of the Energy Act.

¹⁵ Article 100 and Article 100(2) of the Energy Act.

¹⁶ EWRC Report to the European Commission 2015, p. 28.

particular traders. In recent years, BEH's subsidiaries have published invitations to tender for the selection of trading partners, with which they subsequently enter into electricity supply contracts.

- (32) The majority of the tender invitations and the majority of the contracts reviewed by the Commission contain provisions that stipulate where the electricity shall be consumed or that stipulate where the electricity may be resold (hereafter referred to together as 'destination clauses'). These contracts limit customers' freedom to choose whether to sell the purchased electricity in the territory of Bulgaria or to export it. These contracts also contain clauses which allow BEH's subsidiaries to monitor whether or not the electricity purchased in fact reaches the destination stipulated in the contract. In addition, customers who fail to comply with the destination clause may be subject to financial penalties or may have their contracts terminated early, or both.

4.2. Relevant markets

4.2.1. Product market

- (33) In line with its previous decisions,¹⁷ the Commission's preliminary assessment distinguishes between the wholesale supply of electricity at regulated prices and the wholesale supply of electricity at freely negotiated prices.
- (34) As regards the scope of the market for the wholesale supply of electricity at freely negotiated prices, the Commission found in previous decisions in the field of mergers that there is a single product market for both electricity generation and wholesale supply,¹⁸ which includes the electricity generated in and imported into the relevant geographic area through interconnectors.¹⁹ However, a number of Commission merger decisions regard the relevant market for the wholesale supply of electricity as including not only electricity generated and electricity imported into the relevant geographic area, and which is first sold onto the market in that area, but also electricity traded on the wholesale market, that is to say, electricity resold within that geographic area.
- (35) On the basis of the data gathered during its market investigation, the Commission's preliminary assessment, as set out in the SO, is that in this Case the relevant product market is the market for the wholesale supply of electricity at freely negotiated prices. The factors taken into account by the Commission include the fact that in Bulgaria, where there is no operational power exchange and no organised spot market for electricity, liquidity on the wholesale market cannot be guaranteed through traders. Consequently, the relevant product market comprises the generation of electricity and imports of electricity into the relevant geographic area, and the first sale of that electricity onto the market. The subsequent trading between market participants is, however, in this instance not included in the relevant product market,

¹⁷ Commission Decision 2006/622/EC in Case COMP/M.3696 - *E.On/MOL* (OJ L 253, 16.9.2006, p. 20); Commission Decision 2007/194/EC in Case COMP/M.4180 - *Gaz de France/SUEZ* (OJ L 88, 29.3.2007, p. 47); Commission Decision in Case COMP/39.386 - *Long-term contracts France*, see recitals 18 and 19.

¹⁸ For example, see Commission Decision of 30 October 2003 in Case COMP/M.3268 - *Sydkraft/Gräninge*.

¹⁹ Commission Decision of 23 June 2009 in Case COMP/M.5467 - *RWE/Essent*, see recitals 231 and 232.

since it does not exercise a competitive constraint on the generation and imports of electricity.

4.2.2. *Geographic market*

(36) In line with its previous decision-making practice,²⁰ the Commission's preliminary assessment is that, for the purposes of this Case, the market for the wholesale supply of electricity at freely negotiated prices is national in scope.

(37) This finding is based on the structure of supply in Bulgaria,²¹ the existence of congestion at interconnection points with neighbouring Member States, the existence of price differentials, a lack of price transparency in the wholesale supply of electricity at freely negotiated prices in Bulgaria which represents a significant barrier to trade, and the different nature of supply and demand on both sides of congestion points.²²

4.3. **Dominance**

(38) The Commission's preliminary assessment is that BEH holds a dominant position on the wholesale market for the supply of electricity at freely negotiated prices in Bulgaria, on the basis of the share of supply of electricity at freely negotiated prices accounted for by sales by BEH's subsidiaries and the absence of any significant competitive pressure from other producers or imports.

(39) BEH, taking into account the activities of BEH's subsidiaries, which are wholly-owned, had the highest share of supply of electricity on the relevant market throughout the period of the Commission's investigation. BEH's production subsidiaries TPP Maritsa East 2 and NPP Kozloduy alone (accordingly, excluding the electricity compulsorily purchased by NEK) accounted for up to [70-75] % (in 2012) of the share of supply on the market for the wholesale supply of electricity at freely negotiated prices in Bulgaria. Taking into account the electricity available to NEK through its own production and its compulsory purchases, the figure was up to [80-85] % (in 2012).

²⁰ Concerning the wholesale supply of electricity in Germany and the Netherlands, see Commission Decision of 23 June 2009 in Case COMP/M.5467 - *RWE/Essent*; in Belgium, see Commission Decision of 12 November 2009 in Case COMP/M.5549 - *EDF/Segebel*; in Portugal and Belgium, see Commission Decision of 26 January 2011 in Case COMP/M.5978 - *GDF Suez/International Power*.

²¹ Electricity markets in Bulgaria are characterised by the significant proportion of electricity that is destined to be sold on the regulated markets at regulated tariffs. This affects demand on the wholesale market for the supply of electricity at freely negotiated prices, and contributes to restricting the size of this market. The significant regulated wholesale market limits the ability and incentives for producers in Bulgaria to supply electricity at freely negotiated prices, and consequently to develop the export of electricity. The existence of the regulated market in Bulgaria also affects imports to the extent that it affects the volume of demand on the wholesale market for the supply of electricity at freely negotiated prices. Furthermore, it is worth noting that one characteristic of the wholesale supply of electricity in Bulgaria is a lack of price transparency. The lack of price transparency represents a significant barrier to imports since potential exporters to Bulgaria are often not able to identify and realise export opportunities.

²² As regards the scope for imports of electricity from neighbouring Member States and third countries, throughout the period from 2008 to 2012 almost all interconnection capacity between Bulgaria and neighbouring Member States and third countries was fully booked. On average, prices for export capacity were higher than for import capacity. For instance, the price of export capacity towards Greece was 7.5 EUR/MWh in December 2008 which indicates a significant price difference of around 20 % between the two Member States.

- (40) Moreover, the significant gap between BEH's share of supply on the market for the wholesale supply of electricity at freely negotiated prices in Bulgaria and that of its closest competitor, as well as the fact that the total market share of all its competitors taken together remain at least two times smaller than BEH's market share, indicate that BEH is not exposed to any significant competitive pressure from other producers or imports.²³
- (41) The Commission's preliminary assessment is that the Bulgarian thermal power plants TPP Varna, TPP Bobov Dol and TPP Maritsa III, which are owned by third parties, have only limited capacity available to produce electricity for the free market since: (a) they are subject to quota obligations to supply electricity for the regulated market; and (b) they also supply electricity to the transmission system operator for ancillary services and cold reserve obligations. Other producers, which generate electricity from renewable energy sources and high-efficiency combined electricity and heat generation, for their part have no incentive to make sales on the free market since NEK is obliged to purchase their production at regulated tariffs. Finally, under the terms of long-term power purchase agreements entered into with the thermal power plants TPP Contour Global Maritsa East 3 and TPP AES-3C Maritsa East 1, which are also owned by third parties, NEK is obliged to purchase [...] electricity production of those power plants.
- (42) Furthermore, BEH is not significantly constrained by imports. In general, production costs are lower in Bulgaria than in the neighbouring Member States and third countries: in particular, BEH's production subsidiaries have low marginal costs in the form of nuclear and hydro production. This enables BEH, by way of its subsidiaries on the market, to supply electricity at a lower price than imports. Imports may also be discouraged by the fact that the Bulgarian wholesale market lacks transparency. As noted by the EWRC, there is no power exchange and there is no generally known wholesale price for electricity in Bulgaria.²⁴ The market share of imports was in the range of 3 % to 8 % during the period from 2008 to 2012.
- (43) BEH is not constrained by the possibility of existing competitors increasing their sales, for the reasons set out in recitals (38) to (42), nor by the possibility of any new entry in electricity generation. The cost of investing in new electricity generation facilities, the time-frame for such an investment and the fact that there is currently significant overcapacity in electricity generation facilities in Bulgaria constitute significant barriers to entry and expansion which effectively 'shield' BEH from any significant potential competitive pressure in the short to medium term.
- (44) Nor is BEH subject to a competitive constraint exercised by traders, since for the most part the electricity resold by traders is sourced from BEH's subsidiaries under short-term contracts. This means that BEH, acting on the market by way of BEH's subsidiaries, is in a position to unilaterally reduce output or raise prices to traders in the short term, which prevents those traders from exercising a competitive constraint on BEH.

²³ See Case 27/76 *United Brands Company and United Brands Continentaal BV v Commission* [1978] ECR 207, EU:C:1978:22, paragraph 111; Case 85/76 *Hoffmann-La Roche & Co AG v Commission* [1979] ECR 461, EU:C:1979:36, paragraphs 48 and 51; Case T-219/99 *British Airways plc v Commission* [2003] ECR II-05917, EU:T:2003:343, paragraph 210 (point not challenged on appeal in Case C-95/04P *British Airways plc v Commission* [2007] ECR I-02331).

²⁴ EWRC Annual Report to the European Commission, July 2013, pages 29 and 32.

(45) Thus, the Commission's preliminary assessment is that BEH is not subject to competitive pressure from either current or potential competitors.

4.4. Substantial part of the internal market

(46) The Commission's preliminary assessment is that the free wholesale market for the supply of electricity in Bulgaria should be considered as a substantial part of the internal market, as referred to in Article 102 of the Treaty.

(47) The General Court ruled that if the relevant geographic market corresponds to the territory of a Member State, it can be regarded as constituting a substantial part of the internal market.²⁵

(48) BEH, taking account of the activities of BEH's subsidiaries, is the largest electricity generating company in Bulgaria. The wholesale market for the supply of electricity at freely negotiated prices in Bulgaria covers the whole territory of a Member State. Consequently, the practices at issue in this Case cover the whole territory of Bulgaria, which constitutes a substantial part of the internal market.

4.5. Practices raising concerns

(49) The Commission's preliminary assessment is that BEH was abusing its dominant position on the free wholesale market for the supply of electricity in Bulgaria, contrary to Article 102 of the Treaty, by way of the destination clauses in the contracts entered into by BEH's subsidiaries, for the wholesale supply of electricity at freely negotiated prices to entities other than end-users.

(50) The Commission's preliminary assessment, as set out in the SO, is that these destination clauses amount to territorial restrictions on the resale of electricity insofar as they limit the buyers' freedom to choose whether to sell the purchased electricity in the territory of Bulgaria or to export the electricity.

(51) Territorial restrictions on resale constitute a breach of Union competition law. Commission Regulation (EU) No 330/2010²⁶ classifies restrictions of the territory into which a buyer may sell the contract goods, as restrictions under Article 101 of the Treaty that remove the benefit of the block exemption.²⁷

(52) In addition, the case-law of the Court of Justice of the European Union indicates that a contract that imposes on the purchaser restrictions on the use to which it can put goods or the territory into which goods can be resold may be regarded as a restriction on competition, contrary to Article 101 of the Treaty.²⁸ It follows that a clause requiring a buyer to sell goods only outside a given territory or outside a Member State (that is to say, an 'obligation to export') has the effect of partitioning markets along national lines by protecting that territory from the competition that would result from that buyer's direct sales into the territory or from resales into the territory by third parties re-importing the goods.

²⁵ Case T-228/97 *Irish Sugar v Commission* [1999] ECR II-02969, EU:T:1999:246, paragraph 99.

²⁶ Article 4(b) of Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices (OJ L 102, 23.4.2010, p. 1).

²⁷ See paragraph 51 of the Guidelines on vertical restraints (OJ C 130, 19.5.2010, p. 1).

²⁸ Case 319/82 *Société de vente de ciments et béton de l'Est SA v Kerpen & Kerpen GmbH und Co. KG* [1983] ECR 04173, EU:C:1983:374, paragraph 6.

- (53) Further, the Court of Justice has ruled that a clause prohibiting exports (namely, an obligation to sell on the domestic market) constitutes a restriction on competition.²⁹ It is settled case-law that, by its nature, a territorial restriction clause in a supply agreement designed to prevent a buyer from exporting goods to other Member States is liable to partition markets within the Union, contrary to Article 101 of the Treaty.³⁰
- (54) It is also settled case-law that a dominant undertaking may commit an abuse by entering into anticompetitive agreements.³¹ In *Hoffmann-La Roche*, the Court of Justice explained that in such cases ‘*the Commission is entitled, taking into account the nature of the reciprocal undertakings entered into and the competitive position of the various contracting parties on the market or markets in which they operate to proceed on the basis of Article 85 [now Article 101] or Articles 86 [now Article 102]*’.³²
- (55) The Court of Justice has also applied Article 102 of the Treaty to territorial restrictions practiced by dominant companies. In the *Suiker Unie* Case, a dominant sugar refinery was found to have violated Article 102 of the Treaty by threatening to stop sugar supply unless the distributors complied with its restrictive export policy.³³ In the *United Brands* Case the Court of Justice stated, regarding a contractual provision imposed by United Brands on wholesalers not to sell bananas while they were still green, that ‘*to impose on the ripener the obligation not to resell bananas so long as he had not had them ripened and to cut down the operations of such a ripener to contacts only with retailers is a restriction of competition*’, notably because it had the effect of partitioning the market along national lines.³⁴ The Court of Justice considered that the clause at issue in that case infringed Article 102 of the Treaty (then Article 86).³⁵
- (56) In the energy sector, the Commission took the view that a clause in a gas transport agreement between GDF and ENI that precluded ENI from selling in France the gas that was being transported through France was a restriction of competition contrary to Article 101 of the Treaty on the grounds that it prevented customers in France from purchasing that gas.³⁶ The Commission also accepted legally binding commitments from EDF in response to its concerns that resale restrictions included

²⁹ Case 19/77 *Miller International Schallplatten GmbH v Commission* [1978] ECR 00131, EU:C:1978:19, paragraph 7.

³⁰ Case T-176/95 *Accinauto SA v Commission* [1999] ECR II-01635, EU:T:1999:100, paragraph 104; 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 A. *Ahlström Osakeyhtiö and others v Commission* [1993] ECR I-01307, EU:C:1993:120, paragraph 76.

³¹ Case 27/76 *United Brands Company and United Brands Continentaal BV v Commission*, paragraph 161.

³² Case 85/76 *Hoffmann-La Roche & Co AG v Commission*, paragraph 116.

³³ Joined cases 40 to 48, 50, 54 to 56, 111, 113 and 114-73 *Coöperatieve Vereniging "Suiker Unie" UA and others v Commission* [1975] ECR 01663, EU:C:1975:174, paragraph 396 to 401.

³⁴ Case 27/76 *United Brands Company and United Brands Continentaal BV v Commission*, paragraphs 157 and 159.

³⁵ Case 27/76 *United Brands Company and United Brands Continentaal BV v Commission*, paragraph 161.

³⁶ See Commission Decision of 26 October 2004 in Case COMP/38662 *GDF/ENI*, paragraphs 66 to 69; see also Commission Decision of 26 October 2004 in Case COMP/38662 *GDF/ENEL*.

in the supply contracts EDF entered into with large industrial customers could infringe Article 102 of the Treaty.³⁷

- (57) The practices that are the subject of the Commission's concerns are set out in the contracts that the BEH's subsidiaries enter into with purchasers, but the Commission considers that it is nonetheless appropriate to assess these practices under Article 102 of the Treaty. The Commission's preliminary assessment is that the dominant position occupied by BEH on the relevant market means that BEH is in a position to impose such conditions on its purchasers.
- (58) The Commission's preliminary assessment is that the invitations to tender published by BEH's subsidiaries make clear that the existence of destination clauses are not the result of negotiation between the parties to the contract but have in fact been imposed by BEH's subsidiaries as a condition for entering into the contract.
- (59) The Commission's preliminary view is that BEH's commercial policy, as reflected in a significant proportion of contracts for the wholesale supply of electricity at freely negotiated prices, has been to pre-determine the territory into which its non-end-user customers can resell the electricity purchased from it.
- (60) The Commission's concern is that, for the reasons set out in recitals (49) to (59), the territorial restrictions on resale in the contracts concluded by BEH's subsidiaries, which restrict the purchasers' freedom to choose whether to sell the purchased electricity in the territory of Bulgaria or to export the electricity and partition the markets for electricity along national lines, can be regarded as an abuse of dominance within the meaning of Article 102 of the Treaty.

4.6. Likely impact on competition

- (61) According to settled case-law under Article 101 of the Treaty, there is no need to take account of the effects of an agreement once it appears that its object is to prevent, restrict or distort competition.³⁸ Thus in *Expedia* the Court of Justice ruled that '*there is no need to take account of the concrete effects of an agreement once it appears that its object is to prevent, restrict and distort competition*'.
- (62) In the *Intel* Case the General Court expressly recognised that where there is a restriction of competition by object, the Commission is entitled under Article 102 of the Treaty to rely on the anti-competitive object of such behaviour and is not required to demonstrate the capability of such behaviour to restrict competition.³⁹
- (63) The Commission considers that where behaviour raises barriers to trade between Member States and consequently to the internal market, such behaviour in itself affects competition within the internal market and constitutes a restriction by object⁴⁰

³⁷ Commission Decision of 17 March 2010 in Case COMP/39.386 - *Long-term contracts France*, paragraphs 36 to 39.

³⁸ Case C-226/11 *Expedia Inc. v Autorité de la concurrence and Others* [2012] ECR 00000, EU:C:2012:795, paragraph 35; Joined Cases 56 and 58 to 64 *Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH v Commission* [1966] ECR English Special Edition 00299, EU:C:1966:41; Case C-272/09 P *KME Germany and Others v Commission* [2011] ECR 00000 EU:C:2011:810, paragraph 65 and Case C 389/10 P *KME Germany and Others v Commission*, [2011] ECR 0000, EU:C:2011:816, paragraph 75.

³⁹ Judgment of the General Court of 12 June 2014 in Case T-286/09 *Intel Corp. v Commission* (not yet published) EU:T:2014:547, paragraphs 209 and 210.

⁴⁰ See the case-law referred to in recital (61) of this Decision.

which is indissociable from the potential effect of the practice.⁴¹ Consequently, there is no need to demonstrate even potential effects of the behaviour on the market in this Case.

- (64) Nonetheless, the Commission, although not required to do so, made a preliminary assessment of the potential effects on competition resulting from the territorial restrictions on resale at issue.
- (65) In the SO, the Commission took the preliminary view that as a result of the territorial restrictions, purchasers of electricity are deprived of the possibility to organise trading of electricity on the wholesale market for the supply of electricity at freely negotiated prices in accordance with their own and their customers' demand. This will tend to restrict competition between on the one hand electricity destined for the domestic market and on the other hand electricity destined for export. It will also tend to restrict competition between traders who may be unable to meet purchasers' demand as a result of the territorial restrictions.
- (66) The territorial restrictions limit market liquidity because certain transactions are prevented from taking place⁴² and they impede traders' ability to create and rely on a stable customer base and thus to develop the market for the wholesale supply of electricity at freely negotiated prices in Bulgaria.
- (67) The territorial restrictions impede trade in electricity between Bulgaria and other Member States (in particular neighbouring Romania and Greece) and hinder the development of a wider regional wholesale market within the European Union.
- (68) To conclude, the Commission's concerns are that BEH's behaviour, by raising barriers to trade between Member States, in itself has an impact on competition in the internal market and constitutes a restriction on competition by object. Furthermore, while it is not necessary for the Commission to do so, the Commission gives below an indication of the potential effects of this behaviour on the relevant market.

4.7. Absence of objective justification or efficiencies

- (69) A territorial restriction on resale may be justified if it is objectively necessary or if it produces efficiencies which outweigh the negative effect on competition. The burden of proof for such an objective justification or efficiency defence is on the dominant company.⁴³ It is for the company invoking the benefit of a defence against a finding of an infringement to demonstrate to the required legal standard of proof that the conditions for applying such a defence are satisfied.⁴⁴
- (70) BEH argued that the territorial clauses were introduced as a consequence of the legal obligation on BEH's subsidiaries to comply with the trading rules in Bulgaria, which require producers to notify the transmission system operator of the destination of the electricity produced. BEH argued that it should benefit from the 'regulated conduct defence'.

⁴¹ See paragraph 210 of the judgment of the General Court in Case T-286/09 *Intel Corp. v Commission*.

⁴² Note of conversation dated 15 July 2013 with Statkraft.

⁴³ Case C-209/10 *Post Danmark A/S v Konkurrencerådet* [2012] ECR 00000, EU:C:2012:172, paragraphs 41 and 42.

⁴⁴ See recital 5 and Article 2 of Regulation (EC) No 1/2003; see also Case C-209/10 *Post Danmark A/S v Konkurrencerådet*, paragraphs 41 and 42.

- (71) The Commission's view is that in order to comply with the reporting requirements set out in the trading rules in Bulgaria it was not necessary for an electricity supply contract to specify the destination of the electricity up to several months in advance. This was also confirmed by the fact that BEH's subsidiaries concluded contracts without resale restrictions and may have shown flexibility in adjusting the destination clauses. On this basis, the trading rules did not create a legal framework which itself eliminated any possibility of autonomous conduct for BEH.
- (72) To conclude, the Commission considers that BEH has not provided sufficient evidence that its conduct could be objectively justified or that it is necessary for the achievement of efficiency gains which could counteract any likely negative effects on competition, without eliminating effective competition.

4.8. Effect on trade between Member States

- (73) The Court of Justice has held that '*Article 82 [now 102 of the Treaty] does not require it to be proved that abusive conduct has in fact appreciably affected trade between Member States, but that it is capable of having that effect*'.⁴⁵ The Court of Justice has also clarified that it follows from well established case-law that the interpretation and application of the condition relating to effects on trade between Member States laid down in Articles 101 and 102 of the Treaty must be based on the purpose of that condition, which is to define, in the context of the law governing competition, the boundary between the areas respectively covered by European Union law and the law of the Member States. Thus, European Union law covers any agreement or any practice which is capable of constituting a threat to freedom of trade between Member States in a manner which might harm the attainment of the objectives of a single market between the Member States, in particular by sealing off domestic markets or by affecting the structure of competition within the internal market.⁴⁶
- (74) Therefore, the Commission's preliminary conclusion is that, to the extent that the supply contracts raise artificial barriers to trade and inhibit the free flow of electricity between Bulgaria and at least two other Member States, namely Greece and Romania, those contracts must be regarded as having an effect on trade between Member States.

5. PROPOSED INITIAL COMMITMENTS

- (75) The key elements of the Initial Commitments offered by BEH and BEH's subsidiaries on 15 May 2015 were as follows:

⁴⁵ Case 322/81 *NV Nederlandsche Banden Industrie Michelin v Commission* [1983] ECR 03461, EU:C:1983:313, paragraph 104; see also Joined cases C-241/91 P and C-242/91 P *Radio Telefis Eireann (RTE) and Independent Television Publications Ltd (ITP) v Commission* [1995] ECR I-00743, EU:C:1995:98, paragraphs 69 and 70.

⁴⁶ Case 22/78 *Hugin Kassaregister AB and Hugin Cash Registers Ltd v Commission* [1979] ECR 01869, EU:C:1979:138, paragraph 17; Case C-475/99 *Firma Ambulanz Glöckner v Landkreis Südwestpfalz* [2001] ECR I-08089, EU:C:2001:577, paragraph 47; Case C-407/04 P *Dalmine SpA v Commission* [2007] ECR I-00829, EU:C:2007:53, paragraph 89.

5.1. The commitment to cease and desist

- (76) BEH and BEH's subsidiaries committed to refrain from using destination clauses or any measure of equivalent effect in their contracts for the sale of electricity on the market for the wholesale supply of electricity at freely negotiated prices.

5.2. The commitment to set up a power exchange

- (77) BEH committed to set up a viable and independent power exchange in Bulgaria. In order to achieve this, BEH offered to enter into an agreement with an independent third party with expertise in the operation of a power exchange which will develop, set up and carry out all the market functions of a day-ahead trading platform⁴⁷ on behalf of the power exchange.
- (78) To this end, on 21 April 2015, IBEX, which is wholly owned by BEH and which holds the licence to operate the country's sole power exchange, signed a comprehensive package of agreements with power exchange operator NordPool Spot AS for NordPool Spot to provide day-ahead market operation services to IBEX. Under the terms of these agreements, NordPool Spot will effectively run the Bulgarian day-ahead market bidding process, matching offers to bids and calculating the market price. The terms of these agreements should give NordPool Spot significant independence in running the day-ahead market in Bulgaria, although IBEX itself will retain the legal responsibility for the exchange and will provide a number of services including membership services (in line with NordPool Spot's rules and procedures) and the clearing and settlement of transactions on the exchange.
- (79) BEH committed to making the day-ahead market on IBEX fully operational within three months of the date of formal notification of a commitments decision. This means that within three months of the date of formal notification of a commitments decision eligible market participants should be able to buy and sell electricity products on an hourly basis for delivery the next day. The commitment concerning the provision of liquidity on the day-ahead market, described in recitals (80) to (81), will also take effect on the date that the day-ahead market becomes operational.

5.3. The commitment concerning liquidity on the day-ahead market

- (80) BEH committed to procure that each of BEH's subsidiaries will enter into liquidity agreements with IBEX to offer certain volumes of electricity on an auction-based day-ahead trading platform on that exchange.
- (81) BEH and BEH's subsidiaries offered to provide certain volumes of electricity on a day-ahead platform. The key features of the proposed liquidity commitment are as follows:
- (a) the pattern of electricity volumes offered will vary on a monthly, daily and hourly basis following load profile patterns in Bulgaria;
 - (b) the offered electricity volumes will increase each year in line with volumes traded by power exchanges in the region during their first years of operation;

⁴⁷ The day-ahead trading platform is defined in section 1 of the Final Commitments.

- (c) the electricity will be offered by BEH and BEH's subsidiaries on the day-ahead market of the exchange at a maximum offer price [based on the costs of BEH's subsidiaries];
- (d) initially, the volumes of electricity offered by BEH and BEH's subsidiaries will be hourly products⁴⁸ only; as from the second year of operation, a proportion of the products could be offered as block products⁴⁹ (of between 3 and 24 hours).

5.4. The commitment concerning the divestiture of the power exchange

- (82) BEH offered to divest ownership of the power exchange within six months after formal notification of the Commission's Decision in this Case and to transfer its capital to the Bulgarian Ministry of Finance.
- (83) In order to ensure the independence of IBEX after the divestiture, BEH offered to refrain from exercising any influence in IBEX or to take any measure that could affect independent decision-making by IBEX. In addition, no member of the board of directors or staff of IBEX will be a member of the board of directors or staff of BEH or BEH's subsidiaries.
- (84) BEH may not, for a period of 10 years, acquire direct or indirect influence over the divested asset.

5.5. Duration of the commitments

- (85) The commitments will be binding from the date on which BEH receives formal notification of this Decision by the Commission pursuant to Article 9(1) of Regulation (EC) No 1/2003 and will apply for a period of five years from the start of operation of the day-ahead market on the power exchange.

5.6. Other provisions of the commitments

- (86) An independent trustee will be appointed to monitor BEH and BEH's subsidiaries' compliance with the commitments.

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

- (87) In response to the publication on 19 June 2015 of a notice pursuant to Article 27(4) of Regulation (EC) No 1/2003 (the 'Market Test Notice'), the Commission received seven substantive responses from interested third parties. The main issues raised by third parties in response to the Market Test Notice were as follows:

6.1. Respondents' views on the commitment to set up a power exchange

- (88) The respondents to the Market Test Notice generally considered that the proposed creation of a power exchange in Bulgaria was an appropriate remedy.
- (89) Some respondents noted that the power exchange should also provide a platform for the conclusion of forward electricity supply contracts,⁵⁰ in particular to ensure the

⁴⁸ Hourly product means an offer where the market participant states quantities to buy or sell at different price levels in a set of price steps defined for a specific hour. Each pair of price and quantity is handled as a point on a bid curve with linear interpolation between each pair.

⁴⁹ Block product means an offer which links several consecutive hours of electricity defined by the market participant on the day-ahead platform on an all-or-nothing basis.

financial viability of the power exchange and to create a transparent, non-discriminatory and competitive procedure where market participants may secure sufficient supply from BEH's subsidiaries on a longer-term basis.

- (90) Some respondents also claimed that the commitments should specify clear and more detailed timing and the steps leading to the Bulgarian electricity market coupling with the Romanian Power Exchange ('OPCOM') and the 4M Market Coupling.⁵¹
- (91) One respondent emphasised that the free competition between power exchanges, bilateral contracts and other platforms should be allowed.

6.2. Respondents' views on the commitments concerning liquidity on the day-ahead market

6.2.1. Volumes

- (92) The majority of respondents suggested that the volumes of electricity to be offered by BEH's subsidiaries on the day-ahead market on the power exchange are insufficient in themselves to ensure liquidity of the market.
- (93) Furthermore, one respondent argued that since the majority of the electricity in Bulgaria is directly or indirectly produced by BEH's subsidiaries and the imports account for a small percentage of the total traded volumes, the committed quantities would be almost the only quantity offered on the power exchange.
- (94) Also, due to the fact that most likely the number of potential sellers on the Bulgarian market is very limited, one respondent suggested that there is a danger that BEH's subsidiaries would be the only significant seller on the day-ahead market on the power exchange.

6.2.2. Offer price

- (95) The majority of respondents indicated that they view favourably the idea that BEH and BEH's subsidiaries offer electricity on the day-ahead market based on the variable costs of BEH's subsidiaries, but argued that the commitments should specify the volumes to be committed by each subsidiary and that each subsidiary should offer its electricity at a price based on its own variable costs. In addition, the price should be monitored by the regulator.
- (96) One respondent argued that the offer price should not be less favourable than the price at which BEH and BEH's subsidiaries sell electricity through bilateral contracts.

6.2.3. Type of products - Block products

- (97) Some respondents indicated that in their experience block products are mainly suitable for mature markets where sufficient volumes are offered. The introduction of block products too early on the Bulgarian market would have a negative impact on the liquidity of the power exchange.

⁵⁰ Contracts for the supply of electricity and/or capacity to generate electricity on the basis of a timeframe that is longer than one day ahead.

⁵¹ The market coupling project of the day-ahead electricity markets of the Czech Republic, Hungary, Romania and Slovakia.

- (98) One respondent suggested that, in order to ensure liquidity, block products should rather be offered on a platform for the conclusion of forward electricity supply contracts.

6.3. Respondents' views on the commitment concerning the divestiture of the power exchange

- (99) Some respondents argued against the transfer of ownership of the power exchange to the Bulgarian Ministry of Finance. The ownership of the power exchange should rather be shared between different market participants in order to guarantee against any market distorting intervention into the operation of the power exchange.

6.4. Respondents' views on the duration of the commitments

- (100) One respondent suggested that the five-year duration of the commitments was too short. A duration of ten years would be more appropriate, in particular in light of the objective of ensuring that sufficient quantities are being sold on the power exchange.
- (101) One respondent stated that a review mechanism after the five-year commitment period allowing for a termination or prolongation (and adjustment) of the commitments should also be introduced.

7. FINAL COMMITMENTS

- (102) On the basis of the Commission's analysis of the comments received pursuant to the Market Test Notice, BEH subsequently amended its Initial Commitments and submitted a revised proposal on 16 October 2015 (the 'Final Commitments'). The main changes made by BEH in the Final Commitments, as compared to the Initial Commitments, are summarised in recitals (103) to (105).
- (103) First, BEH and BEH's subsidiaries committed to [commitment aimed at ensuring that sufficient volumes offered by BEH and BEH's subsidiaries on the day-ahead market will be made available for third parties to purchase].
- (104) Second, BEH and BEH's subsidiaries committed to only offer hourly products on the power exchange. BEH may request the Commission to amend this commitment once the day-ahead market has reached a sufficient degree of maturity.
- (105) Finally, BEH and BEH's subsidiaries committed to submit the draft documents comprising the trading rules and general terms of participation in the power exchange for the Commission's review prior to their adoption.

8. PROPORTIONALITY OF THE FINAL COMMITMENTS

8.1. Principles

- (106) The principle of proportionality requires that the measures adopted by Institutions of the Union must be suitable and not exceed what is appropriate and necessary for attaining the objective pursued.⁵²

⁵² See, for instance, Case T-260/94 *Air Inter v. Commission* [1997] ECR II-00997, EU:T:1997:89, paragraph 144; and Case T-65/98 *Van den Bergh Foods v. Commission* [2003] ECR II-04653, EU:T:2003:281, paragraph 201.

- (107) In the context of Article 9 of Regulation (EC) No 1/2003, the application of the principle of proportionality entails, first, that the commitments in question address the concerns expressed by the Commission in its preliminary assessment and, second, that the undertakings concerned have not offered less onerous commitments that also address those concerns adequately.⁵³ When carrying out that preliminary assessment, the Commission must take into consideration the interests of third parties.⁵⁴

8.2. Application in this Case

- (108) The Commission considers that the Final Commitments are both appropriate and necessary to address the concerns identified by the Commission in its preliminary assessment.

8.2.1. The commitment to cease and desist

- (109) The Commission considers that the commitment by BEH and BEH's subsidiaries to cease and desist from using destination clauses or measures of equivalent effect in any electricity supply contracts they enter into on the market for the wholesale supply of electricity at freely negotiated prices, is necessary to address the Commission's concerns.

- (110) However, the Commission considers that the commitment to cease and desist alone is not sufficient to meet the Commission's concerns. In the Commission's view it is necessary to ensure that going forward a more transparent market structure and an anonymised sales channel for the wholesale supply of electricity shall preclude territorial restrictions on the resale of electricity.

8.2.2. The commitment to set up the power exchange

- (111) Given the nature of the suspected anticompetitive conduct by BEH, the Commission considers that BEH's commitment to establish a viable day-ahead market on the power exchange and to enter into a service agreement with an independent service provider with expertise in the operation of a power exchange (in this instance NordPool Spot) under which the market functions of the day-ahead market will be operated by that service provider, is appropriate.

- (112) The commitment offered ensures that the territorial restrictions on the resale of electricity will be effectively removed and will not recur, with respect to the volumes of electricity sold on the day-ahead market platform on the power exchange. Electricity will be traded on the day-ahead market on an anonymous basis (the power exchange will act as a central counterparty to all transactions). This will prevent sellers from tracing the electricity sold and will therefore make it impossible to impose geographical restrictions on its final destination.

- (113) Once up and running, the day-ahead market on the power exchange will provide trading results, such as prices, volumes and number of contracts. Consequently, the power exchange will provide a public price index which can be used as a reference price for contracts traded on the wholesale electricity market. The day-ahead market will therefore have an impact on the market, as a result of the increased transparency that it promotes, that goes beyond the actual volumes offered on the day-ahead

⁵³ Case C-441/07 P *Commission v Alrosa* [2010] ECR I-05949, EU:C:2010:377, paragraph 41.

⁵⁴ Case C-441/07 P *Commission v Alrosa*, EU:C:2010:377, paragraph 41.

platform by BEH and BEH's subsidiaries. The operation of the day-ahead market will help the development of the competitive wholesale electricity market in Bulgaria which at present is highly illiquid and opaque.

- (114) In response to the Market Test Notice, third parties had suggested that BEH should create a platform for the conclusion of forward electricity supply contracts.
- (115) While the setting up of a platform for forward contracts is desirable, the Commission considers that a functioning day-ahead market is needed first. As noted in recital 113, day-ahead market prices are reference prices for most contracts traded in power markets, including brokered or non-brokered over-the-counter trades, which are usually not public. Moreover, once coupled with neighbouring markets, the day-ahead market will facilitate cross-border trading in electricity.
- (116) An over-the-counter platform for bilateral contracts may have some benefits by increasing transparency in BEH's supply contracts, but it would not provide the same benefit of price transparency. Moreover, the Commission takes the view that once the day-ahead market is up and running, a forward market will be likely to develop naturally (for example, on the power exchange or on brokerage platforms).
- (117) On that basis, the Commission considers that it is not necessary for BEH to set up a forward platform on the power exchange in order to prevent the recurrence of territorial restrictions on the resale of electricity and improve transparency and liquidity on the wholesale market in Bulgaria.

8.2.3. *The commitments concerning liquidity on the day-ahead market*

8.2.3.1. Volumes

- (118) The Commission considers that it is appropriate to accept a commitment from BEH and BEH's subsidiaries to offer certain volumes of electricity on the day-ahead market on the power exchange.
- (119) Under the Final Commitments, BEH and BEH's subsidiaries will offer certain volumes of electricity for sale on the day-ahead market for a period of five years from the start of operation of the power exchange. The day-ahead market's start of operations will take place within three months from the date of formal notification of this Decision. Those volumes will be offered in a monthly, daily and hourly pattern that mirrors Bulgarian electricity consumption patterns.
- (120) The Commission notes that the volumes to be offered by BEH and BEH's subsidiaries, which on average will range from 293 MW up to 807 MW per hour, amount to a share of between approximately 14 % (in the first year) and 37 % (in the fifth year) of the market for the wholesale supply of electricity at freely negotiated prices in 2014. The volumes of electricity offered by BEH and BEH's subsidiaries will increase each year in line with volumes traded by power exchanges in the region during their first years of operation.
- (121) The volumes referred to in recital 120 are also in line with the analysis provided by a number of market players concerning the short term needs of the domestic market, in terms of unexpected variations in the load.
- (122) On that basis, the Commission considers that it is reasonable to allow BEH and BEH's subsidiaries to gradually build up the volumes offered on the day-ahead market in line with the way that similar power exchanges have developed in neighbouring Member States (such as the Czech Republic, Hungary, Poland, Romania and Slovakia).

- (123) However, taking into account the third party responses to the Market Test Notice which emphasized the need to ensure liquidity on the day-ahead market, [commitment aimed at ensuring that sufficient volumes offered by BEH and BEH's subsidiaries on the day-ahead market will be made available for third parties to purchase].
- (124) [...].
- (125) [...].
- (126) [...].
- (127) Furthermore, the electricity that may be offered on the day-ahead market is not limited to the quantities specified in those liquidity agreements. In addition to BEH and BEH's subsidiaries, other parties holding generation facilities or contracts to purchase electricity may have an interest in offering the capacity available to them on the day-ahead market. [...].
- (128) The Commission considers that the volumes of electricity that BEH and BEH's subsidiaries have committed to offer on the day-ahead market are appropriate and sufficient, particularly in light of the additional safeguards offered by BEH and BEH's subsidiaries [...].

8.2.3.2. Type of products - Block products

- (129) Following the market test, BEH and BEH's subsidiaries offered to commit to only offer hourly products on the day-ahead market of the power exchange. BEH may request the Commission to amend this commitment in order to allow part of BEH and BEH's subsidiaries' offer to take the form of block products once the day-ahead market has shown a sufficient degree of maturity so that this restriction is no longer necessary in the Commission's view.
- (130) The Commission takes the view that the introduction of block orders is a normal stage of a power exchange development. The availability of such products could attract, for example, generators with rigid generation capacities or ramping constraints. However, such products have to be introduced once the day-ahead market has reached sufficient maturity so as to ensure that its liquidity is not affected. The block orders link several consecutive hours on an all-or-nothing basis. This means that either the bid is matched on all of the hours or it is entirely rejected which would in turn affect the liquidity of the day-ahead market.
- (131) The Commission considers that BEH and BEH's subsidiaries' ability to offer part of the volumes stipulated in the Final Commitments on the day-ahead market as block orders should only be possible once the day-ahead market is sufficiently mature.
- (132) Once the uncertainty concerning the liquidity of hourly orders on a non-mature market is eliminated, the Commission may grant BEH and BEH's subsidiaries the possibility to introduce block orders for part of the committed quantities of electricity. In making an assessment as to whether the day-ahead market is sufficiently mature to support block products offered by BEH and BEH's subsidiaries, and what volume or proportion of such products, the Commission will, amongst other factors, take into account the volumes of electricity bought and sold in each hour on the day-ahead market and the price formation process for each hour.

The Commission may also take into account the views of the day-ahead platform service provider (that is to say, NordPool Spot) and the Price Coupling of Regions ('PCR') Consortium⁵⁵. NordPool Spot and the PCR Consortium will also have to determine whether the market is sufficiently mature to support block products offered by BEH and BEH's subsidiaries. NordPool Spot has indicated that they would base their assessment notably on whether or not there are sufficient single hour orders to determine a unique price in the system and whether or not block orders will have a negative effect on the price formation on hourly basis.

8.2.3.3. Offer price

- (133) The Commission considers that the maximum offer price ([based on the costs of BEH's subsidiaries]) for BEH and BEH's subsidiaries' offers of electricity on the day-ahead market is appropriate. The Commission takes the view that it is not necessary to stipulate which of BEH's subsidiaries should offer specific volumes, but that this should be determined by BEH in light of the technical and market considerations prevailing at the time.
- (134) On the basis of its market investigation, the Commission considers that the maximum offer price is attractive enough to encourage market participants to actually take up the volumes offered.

8.2.4. *The commitment concerning the divestiture of the power exchange*

- (135) Under the Final Commitments, within six months from the date of formal notification of this Decision, ownership of IBEX's capital will be transferred from BEH to the control of the Bulgarian Ministry of Finance. Currently the rights of ownership in BEH are exercised by the Bulgarian Ministry of the Economy*.
- (136) In response to the Market Test Notice, third parties expressed concerns about the transfer of ownership in IBEX within the Bulgarian State.
- (137) The Commission considers that the divestiture of the power exchange to a suitable buyer (independent of and unconnected to BEH or the Bulgarian State) would allow for a proper operation and management of the day-ahead market in line with market demand. This would provide for a clear-cut solution to the identified competition concerns.
- (138) However, the privatisation of the power exchange is subject to the Bulgarian laws on privatisation, which would be likely to impose a sale by auction organised by a third party within the Bulgarian State.
- (139) In the light of the uncertainty concerning those conditions, the Commission takes the view that the transfer of ownership out of the BEH group and to the control of the Minister of Finance⁵⁶ is the best solution at this time.

⁵⁵ The PCR Consortium is a consortium set up at the initiative of seven power exchanges of Member States of the European Union and Norway and Switzerland (APX, Belpex, EPEX SPOT, GME, Nord Pool Spot, OMIE and OTE) to develop a single price coupling solution to be used to calculate electricity prices across Europe using a common algorithm and PCR Broker and Matcher service, and allocate cross-border capacity on a day-ahead basis.

* Should read Ministry of Energy.

⁵⁶ See Commission Decision of 29 September 2010 in Case COMP/39.315 – ENI, recitals 99 to 110. See also Article 9(6) of Directive 2009/72/EC of the European Parliament and of the Council of 13 July

- (140) The contractual arrangements that BEH and IBEX have committed to and entered into with NordPool Spot for the operation of the day-ahead market, ensure that the day-to-day functioning of the day-ahead platform (that is to say, the operation of the auction process, matching of bids, determination of the market price) is entrusted to an independent third party, namely NordPool Spot. In addition, BEH and IBEX have committed to additional safeguards aimed at ensuring the independence of IBEX from BEH (including the establishment of a user committee to advise IBEX on the functioning and development of the power exchange and the obligation to consult the Commission on the rules governing the detailed operation of the power exchange).
- (141) On this basis, the Commission takes the view that the contractual arrangements with the independent third party service provider for the operation of the day-ahead market, taken together with the transfer of ownership in IBEX to the Ministry of Finance is sufficient to ensure the independence of IBEX vis-à-vis market players including BEH and BEH's subsidiaries.

8.2.5. *Review clause*

- (142) The Commission considers that the review clause, as offered by BEH, is appropriate and necessary. It provides an additional safeguard, enabling the Commission to assess how the market has evolved after a certain period from the date of adoption of this Decision and to take the appropriate measures, if necessary.
- (143) BEH can invoke *force majeure* to request the Commission to change the volumes of electricity BEH and BEH's subsidiaries must offer on the day-ahead platform, but only if technical issues affecting the production capacities of BEH and BEH's subsidiaries (such as fire or equipment failure or malfunction) which are abnormal, unforeseeable and beyond BEH and BEH's subsidiaries' control create insurmountable difficulties for the fulfilment of these obligations under the the Final Commitments.

8.2.6. *Duration of the Final Commitments*

- (144) The Commission takes the view that the five-year duration of the Final Commitments as from the date that the day-ahead market becomes operational, as proposed by BEH, is appropriate given the circumstances of this Case. The core responsibilities of the power exchange include operating the day-ahead market and providing a price reference to the electricity market. This period will give the power exchange the opportunity to establish itself and become a recognised and liquid market independent of BEH and BEH's subsidiaries which will be determinant of fair competitive prices. Moreover, the energy sector may undergo important changes (for example, deregulation) in the short to medium term that may alter the competitive dynamics on the market.

8.2.7. *Conclusion on the proportionality of the Final Commitments*

- (145) To conclude, the Commission considers that the Final Commitments offered by BEH are appropriate and necessary in order to address the concerns expressed by the Commission in its preliminary assessment. BEH has not offered less onerous commitments in response the preliminary assessment that would adequately address the Commission's concerns.

2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC (OJ L 211, 14.8.2009, p. 55.).

- (146) The Commission has taken into consideration the interests of third parties, including those of the interested third parties that have responded to the Market Test Notice.
- (147) This Decision accordingly complies with the principle of proportionality.
- (148) The Final Commitments listed in the Annex to this Decision shall be regarded as an integral part of this Decision.

9. CONCLUSION

- (149) By adopting a decision pursuant to Article 9(1) of Regulation (EC) No 1/2003, the Commission makes binding the Final Commitments offered by BEH to meet the Commission's concerns expressed in its preliminary assessment.
- (150) The Commission's assessment of whether or not the Final Commitments offered by BEH are adequate to meet the concerns expressed in the Commission's preliminary assessment represents the view of the Commission based on its underlying investigation and analysis and the observations received from interested third parties following the publication of the Market Test Notice. In the light of the Final Commitments offered by BEH, 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.
- (151) The Commission retains full discretion to investigate and open proceedings under Article 102 of the Treaty and Article 54 of the EEA Agreement as regards practices that are not the subject matter of this Decision.

HAS ADOPTED THIS DECISION:

Article 1

The Final Commitments as listed in the Annex hereto shall be binding on Bulgarian Energy Holding EAD and any legal entity directly or indirectly controlled by it, including Natsionalna Elektricheska Kompania EAD, TPP Maritsa East 2 EAD, NPP Kozloduy EAD, as well as Independent Bulgarian Power Exchange EAD, from the date of notification of this Decision and shall apply for a period of five years from date of the start of operation of the day-ahead market on the power exchange in Bulgaria.

Article 2

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

Article 3

This Decision is addressed to:

Bulgarian Energy Holding EAD

16 Veslets St.
1000 Sofia

Bulgaria

Done at Brussels, 10.12.2015

*For the Commission
Margrethe VESTAGER
Member of the Commission*