

Final report of the Hearing Officer in Cases COMP/39.388 — German Electricity Wholesale Market and COMP/39.389 — German Electricity Balancing Market ⁽¹⁾

(2009/C 36/07)

The draft Decision presented to the Commission under Article 9 of Regulation (EC) No 1/2003 relates to certain practices of E.ON. The allegations concern the withholding of capacity with a view to raising electricity prices and deterrence of investment in generation by third parties on the German electricity wholesale market and favouring of affiliated companies and passing on the costs to the final consumer on the German balancing market as well as preventing power producers from other Member States from selling balancing energy into the E.ON balancing markets.

The Commission opened proceedings with a view to taking a decision under Chapter III of Regulation (EC) No 1/2003 and adopted a preliminary assessment as referred to in Article 9(1) of Regulation (EC) No 1/2003 on 7 May 2008. Ensuing discussions with the Commission services led E.ON to submit commitments on 27 May 2008.

On 12 June 2008, the Commission published a notice in the *Official Journal of the European Union*, pursuant to Article 27(4) of Regulation (EC) No 1/2003, summarizing the concerns and the commitments and inviting interested third parties to transmit observations on this notification within one month of its publication. The comments received in response to this invitation mainly confirmed that the commitments were adequate to meet the concerns raised in the preliminary assessment.

The Commission has now come to the conclusion that, in view of the commitments proposed by E.ON, and without prejudice to Article 9(2) of Regulation (EC) No 1/2003, the proceedings should be brought to an end.

In a decision under Article 9 of Regulation (EC) No 1/2003, a breach of the competition rules is not established, but the undertaking concerned accepts to remedy the concerns expressed by the Commission in a preliminary assessment. There is in this process a willingness on both sides to simplify the administrative and legal requirements which are inherent in a full investigation of a suspected infringement. This is the reason why in several decisions taken already by the College ⁽²⁾, it has been accepted that due process is satisfied when the undertaking concerned informs the Commission that it has received sufficient access to the information it considered necessary to propose commitments in order to meet the concerns expressed by the Commission.

These cases have also been dealt with in the same manner, E.ON having submitted a declaration to the Commission to this effect on 29 October 2008.

In the light of the above, I consider that the rights to be heard have been respected in these cases.

Brussels, 10 November 2008.

Michael ALBERS

⁽¹⁾ Pursuant to Articles 15 and 16 of Commission Decision 2001/462/EC, ECSC of 23 May 2001 on the terms of reference of Hearing Officers in certain competition proceedings (OJ L 162, 19.6.2001, p. 21).

⁽²⁾ Cf. Decision of 22 June 2005 in Case COMP/39.116 — Coca-Cola; Decision of 19 January 2005 in Case COMP/37.214 — DFB; Decision of 14 September 2007 in Case COMP/39.142 — Toyota.