Summary of Commission Decision

of 18 March 2009

relating to a proceeding under Article 82 of the EC Treaty and Article 53 of the EEA Agreement (Case COMP/B-1/39.402 — RWE Gas Foreclosure)

(notified under document number C(2009) 1885)

(Only the German text is authentic)

(Text with EEA relevance)

(2009/C 133/08)

On 18 March 2009, the Commission adopted a decision relating to a proceeding under Article 82 of the EC Treaty. In accordance with the provisions of Article 30 of Council Regulation (EC) No 1/2003 [1]*, the Commission herewith publishes the names of the parties and the main content of the decision, including any penalties imposed, having regard to the legitimate interest of undertakings in the protection of their business secrets. A non-confidential version of the decision is available on the Directorate-General for Competition website at the following address:*

http://ec.europa.eu/comm/competition/antitrust/cases/index/

(1) The decision is addressed to RWE AG, Germany ('RWE'). It makes commitments binding which were offered by RWE to address competition concerns identified by the Commission's investigation in the German gas sector. In the light of the commitments offered, the Commission considers that there are no longer grounds for action on its part.

(2) The concern of the Commission was that RWE may have abused its dominant position on German gas markets by different types of anti-competitive behaviour, notably the refusal to supply gas transmission services to third parties and a behaviour aiming at lowering the margins of RWE's downstream competitors in gas supply ('margin squeeze').

(3) As regards a possible *refusal to supply* gas transmission services to third parties, the Commission had concerns that RWE may have pursued a strategy according to which it tried to systematically keep the transport capacities on its own network for itself. There are indications that in order to achieve this goal, 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.

(4) As regards a possible *margin squeeze* strategy, there were indications 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.

(5) RWE proposed commitments to address the Commission's concerns on the German gas markets. Essentially, RWE committed to divest its entire current German high-pressure gas transmission network [2] to a suitable purchaser which must not raise *prima facie* competition concerns. The divestment offer also comprises auxiliary equipment, personnel and services necessary for the operation of the transmission network.

(6) The Commission considers that the commitments are sufficient to address the initial concerns identified by the Commission, without being disproportionate.

(7) 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.

(8) The commitments are *suitable* to remove the Commission's competition concerns. 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. The commitments proposed by RWE are also *necessary*, since there is no equally effective remedy as a divestment of RWE's transmission network

[1] OJ L 1, 4.1.2003, p. 1. Regulation as amended by Regulation (EC) No 411/2004 (OJ L 68, 6.3.2004, p. 1).

[2] It may be noted that some network parts in the area of Bergheim (length: approx. 100 km) will be exempted from the divestment. 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.

to address the Commission's concerns. Finally, the commitments must be regarded as adequate and *proportionate* 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 for these customers.

(9) The decision finds that in view of the commitments there are no longer grounds for action by the Commission.

(10) The Advisory Committee on Restrictive Practices and Dominant Positions issued a favourable opinion on 5 March 2009.