Summary of Commission Decision

of 10 December 2015

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

(Case AT.39767 — BEH Electricity)

(notified under document number C(2015) 8860)

(Only the English text is authentic)

(2016/C 334/06)

On 10 December 2015, the Commission adopted a decision relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union. 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.

1. Introduction

(1) The case 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 Bulgarian Energy Holding EAD ('BEH')'s wholly owned subsidiaries, Natsionalna Elektricheska Kompania EAD ('NEK'), TPP Maritsa East 2 EAD ('TPP Maritsa East 2') and NPP Kozloduy EAD ('NPP Kozloduy') (collectively 'BEH's subsidiaries').

2. Procedure

(2) On 27 November 2012, the Commission opened proceedings with a view to adopting a decision under Chapter III of Regulation (EC) No 1/2003 and on 12 August 2014, the Commission adopted a statement of objections ('SO') which set out the Commission's preliminary 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. The SO constitutes a preliminary assessment for the purposes of Article 9(1) of Regulation (EC) No 1/2003. This assessment was notified to BEH by letter of 14 August 2014.

(3) On 25 November 2014, BEH submitted its reply to the SO. An oral hearing took place on 16 January 2015.

(4) On 15 May 2015, BEH offered commitments to meet the concerns expressed by the Commission (the 'Initial Commitments').

(5) On 19 June 2015, a notice was published in the *Official Journal of the European Union* [2] 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.

(6) 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').

(7) 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.

3. Concerns expressed in the preliminary assessment

(8) According to the preliminary assessment the relevant product market was considered to be the market for the wholesale supply of electricity at freely negotiated prices. Further, the Commission took the preliminary view that the market for the wholesale supply of electricity at freely negotiated prices was national in scope. The Commission's preliminary assessment was 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.

(9) According to the preliminary assessment 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.

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[1] OJ L 1, 4.1.2003, p. 1.

[2] 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).

(10) 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.

(11) The Commission's preliminary assessment concludes that BEH's practice has the potential effect of raising barriers to trade between Bulgaria and other Member States, thus distorting the allocation of electricity within the Single Market, and affecting liquidity and efficiency of electricity markets.

4. **The commitments and the market test**

(12) BEH did not agree with the Commission's preliminary assessment. It has nevertheless offered commitments, the key elements of which were as follows:

a) BEH will set up a power exchange in Bulgaria, with the assistance of an independent third party with expertise in the operation of power exchanges.

b) BEH will offer at least stipulated volumes of electricity on the day-ahead market of the exchange (which will increase each year in line with volumes traded by power exchanges in the region during their first years of operation) by means of liquidity provider agreements entered into between BEH and its subsidiaries and the power exchange; the pattern of volumes offered will vary on a monthly, daily and hourly basis following load profile patterns in Bulgaria;

c) the volumes will be offered by BEH and its subsidiaries on the day-ahead market of the exchange at a maximum offer price based on the costs of BEH subsidiaries;

d) initially, the volumes of electricity offered by BEH and its subsidiaries will be hourly products only; as from the second year of operation, a proportion of the products can be offered as block products (of between 3 and 24 hours);

e) BEH will divest ownership of the power exchange within six months after formal notification of the Commission's decision and transfer its capital to the Bulgarian State, whose rights will be exercised by the Ministry of Finance.

(13) The duration of the commitments will start on the date of notification of the commitments decision and will end five years from the start of operation of the power exchange. BEH will also appoint a trustee that will monitor its compliance with the commitments.

(14) Further, BEH and its subsidiaries will cease and desist from including destination clauses, or any measure of equivalent effect, in their bilateral electricity supply contracts.

(15) The observations received in response to the market test notice pursuant to Article 27(4) of Regulation (EC) No 1/2003 raised some doubts as to guarantees of sufficient liquidity on the day-ahead market. In order to take account of the results of the market test, BEH offered to commit to only offer hourly products on the day-ahead market of the power exchange and to ensure that sufficient volumes offered by BEH and BEH's subsidiaries on the day-ahead market will be made available for third parties to purchase.

(16) BEH subsequently amended its Initial Commitments and submitted a revised proposal on 16 October 2015

5. **Conclusion**

(17) 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.

(18) The Commission makes binding the Final Commitments offered by BEH to meet the Commission's concerns expressed in its preliminary assessment.