EUROPEAN
COMMISSION

CASE AT.39952 – POWER EXCHANGES

(Only the English text is authentic)

CARTEL PROCEDURE

Council Regulation (EC) 1/2003

Article 7 Regulation (EC) 1/2003

Date: 05/03/2014

EUROPEAN
COMMISSION

Brussels, 5.3.2014
C(2014) 1204 final

COMMISSION DECISION

of 5.3.2014

addressed to:
- EPEX Spot
- Nord Pool Spot AS
relating to a proceeding under Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the EEA Agreement

(AT.39952 - Power Exchanges)

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THE EUROPEAN COMMISSION,

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

Having regard to the Agreement on the European Economic Area,

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 Treaty,[1] and in particular Article 7 and Article 23(2) thereof,

Having regard to Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty,[2] and in particular Article 10a thereof,

Having regard to the Commission decision of 22 March 2013 to initiate proceedings in this case,

Having given the undertakings concerned the opportunity to make known their views on the objections raised by the Commission pursuant to Article 27(1) of Regulation (EC) No 1/2003 and Article 11(1) of Commission Regulation (EC) No 773/2004,

[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 where appropriate. The TFEU also introduced certain changes in terminology, such as the replacement of "Community" by "Union" and "common market" by "internal market".

[2] OJ L 123, 27.2.2004, p. 18.

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

Having regard to the final report of the hearing officer in this case,[3]

Whereas:

1. INTRODUCTION

(1) The addressees of this Decision participated in a single and continuous infringement of Article 101 of the Treaty on the Functioning of the European Union (hereinafter referred to as the "TFEU") and Article 53 of the Agreement on the European Economic Area (hereinafter referred to as the "EEA Agreement") in the sector of electricity trading. The infringement consists of a non-competition arrangement, which included an allocation of territories. It covered the European Economic Area ("EEA") and lasted from 21 June 2011 to 7 February 2012.

(2) This Decision is addressed to the following legal entities:

- EPEX Spot;
- Nord Pool Spot AS.

2. THE INDUSTRY SUBJECT TO THE PROCEEDINGS

(3) Wholesale electricity can be traded both on power exchanges and bilaterally (over- the-counter, hereinafter referred to as "OTC").[4] The traded electricity can be delivered either within a short time period after the trading transaction (hereinafter referred to as "spot" electricity trading) or after a longer time period (hereinafter referred to as "forward" electricity trading). Spot electricity trading also includes trading of cross-border interconnection capacities.

2.1. The services concerned

(4) The infringement concerns services provided by power exchanges to facilitate trading of spot electricity products (hereinafter referred to as "spot electricity trading services"). Such trading services include services to facilitate the actual trading itself (that is running a power exchange), the management of the implicit allocation of cross-border interconnection capacities through market coupling, and services to third parties for the development and operation of spot electricity trading.

(5) The services to facilitate the actual trading itself consist of three core functions: (i) the collection of buy and sell orders; (ii) the matching of those orders to determine the most efficient transactions between buy and sell orders; and (iii) the financial and physical execution of the trades.

[3] Final report of the Hearing Officer of 3.03.2014.

[4] OTC trading entails bilateral transactions between a buyer and a seller, possibly assisted by a broker.

(6) The management of the implicit allocation of cross-border spot interconnection capacities through market coupling consists in allocating capacities between buyers and sellers according to buy and sell orders, on the one hand, and the size of the available interconnection capacities, on the other hand.

(7) The services to third parties for the development and operation of spot electricity trading include, among other things, the licensing of a trading system, providing know-how, running market operations on behalf of another power exchange, training and market coupling services.

2.2. The undertakings concerned

2.2.1. *EPEX Spot*

(8) The relevant legal entity is EPEX Spot (hereinafter referred to as "EPEX"), with registered offices at 5, Boulevard Montmartre, F-75002 Paris, France.

(9) EPEX is a joint venture headquartered in Paris, France. It was established in 2008 through the merger of the spot activities of Powernext SA (hereinafter referred to as "Powernext") in France (Paris) and the European Energy Exchange AG (hereinafter referred to as "EEX") in Germany (Leipzig). It is owned 50%/50% by Powernext and EEX.

(10) At the time of the infringement, EPEX employed less than 50 people, among which more than one third were dedicated to the Internal Energy Market (hereinafter referred to as the "IEM").[5]

(11) EPEX's consolidated worldwide turnover was EUR 40 569 757 for the 2012 business year (from 1 January 2012 to 31 December 2012).

2.2.2. *Nord Pool Spot AS*

(12) The relevant legal entity is Nord Pool Spot AS (hereinafter referred to as "NPS"), with registered offices at Vollsveien 17 B, N-1366 Lysaker, Norway.

(13) NPS is headquartered in Oslo, Norway, with subsidiaries and branches in Sweden, Finland, Denmark and Estonia and a joint venture in the United Kingdom, N2EX (in collaboration with Nasdaq OMX). NPS is currently owned by the Nordic and Baltic Transmission System Operators (hereinafter referred to as "TSOs"). More specifically, before August 2012, the shareholders of NPS consisted of Statnett (Norway), Svenska Kraftnät (Sweden), Fingrid (Finland) and Energinet.dk (Denmark), owning respectively 30%, 30%, 20% and 20%. In August 2012, the Lithuanian (Litgrid) and Estonian (Elering) TSOs became shareholders, and, as of August 2013, the Latvian TSO (Augstsprieguma tīkls) also became a shareholder. Accordingly, the current shareholder structure of NPS is as follows: Statnett (28.2%), Svenska Kraftnät (28.2%), Energinet.dk (18.8%),

[5] The IEM entails integrating national energy networks and systems within the EU and opening up energy markets further, to create an internal EU energy market that is competitive, integrated and fluid. See Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Making the internal energy market work, 15 November 2012, COM/2012/0663 final.

Fingrid (18.8%), Elering (2%), Litgrid (2%), and Augstsprieguma tīkls (2%).

(14) At the time of the infringement, NPS employed less than 60 people. The tasks and responsibilities of the majority of staff included issues related to the IEM.

(15) NPS's consolidated worldwide turnover was EUR 25 872 219 for the 2012 business year (from 1 January 2012 to 31 December 2012).

3. PROCEDURE

(16) From 7 to 9 February 2012, inspections were carried out at the premises of EPEX (France) and NPS (Finland, Norway, and Sweden). In November 2012, inspections were carried out at the premises of the power exchange […]. […] is not an addressee of this Decision.

(17) After the inspections at their premises, the Commission sent several requests for information to EPEX and NPS as well as to third parties, pursuant to Article 18 of Council Regulation (EC) No 1/2003.

(18) On 22 March 2013, the Commission initiated proceedings pursuant to Article 11(6) of Regulation (EC) No 1/2003 against the addressees of this Decision (hereinafter also jointly referred to as the "parties") with a view to engaging in settlement discussions with them. Such discussions started after the parties had confirmed their willingness to engage in settlement discussions.

(19) Bilateral settlement discussions between the Commission and respectively EPEX and NPS took place from 3 June 2013 to 14 November 2013. During these discussions, the Commission informed the parties of the objections it envisaged raising against them and disclosed the main pieces of evidence in the Commission's file relied upon to establish the potential objections. The parties also received a copy of the relevant pieces of evidence as well as a list of all the documents in the file. The parties were further provided with an estimation of the range of fines likely to be imposed by the Commission.

(20) The parties individually expressed their views on the objections which the Commission envisaged raising against them. The comments of the parties were carefully considered by the Commission and, where appropriate, taken into account. At the end of the settlement discussions, EPEX and NPS each considered that there existed sufficient common understanding between it and the Commission as regards the potential objections as well as the estimation of the range of likely fines in order to continue with the settlement process.

(21) On […], the parties submitted to the Commission their formal requests to settle (hereinafter referred to as the "settlement submissions"), pursuant to Article 10a(2) of Commission Regulation (EC) No 773/2004. The settlement submissions of EPEX and NPS each contain:

(a) an acknowledgement in clear and unequivocal terms of the party's liability for the infringement summarily described as regards its object, its possible implementation, the main facts, their legal qualification, including its role and the duration of its participation in the infringement in accordance with the results of the settlement discussions;

(b) an indication of the maximum amount of the fine it foresees to be imposed by the Commission and which it would accept in the framework of a settlement procedure;

(c) its confirmation that it has been sufficiently informed of the objections the Commission envisages raising against it and that it has been given sufficient opportunity to make its views known to the Commission;

(d) its confirmation that it does not envisage requesting access to the file or requesting to be heard in an oral hearing, unless the Commission does not reflect its settlement submission in the Statement of Objections (hereinafter referred to as the "SO") and the Decision;

(e) its agreement to receive the SO and the final Decision pursuant to Articles 7 and 23 of Regulation (EC) No 1/2003 in English.

(22) EPEX and NPS made their settlement submissions conditional upon the imposition of a fine by the Commission which would not exceed the amount specified in the settlement submissions.

(23) On 11 December 2013 the Commission adopted an SO addressed to EPEX and NPS. On 6 and 10 January 2014, the parties replied to the SO, confirming that it reflected the contents of their settlement submissions and that they therefore remained committed to following the settlement procedure.

4. DESCRIPTION OF THE INFRINGEMENT

4.1. Nature and scope of the infringement

(24) The parties engaged in a non-competition arrangement covering all their spot electricity trading services in the EEA and beyond. The aim was to restrict competition between them, to protect their traditional strongholds, and to agree on expansion to new countries, while maintaining the power balance between them.

(25) The non-competition arrangement was established in the context of legitimate cooperation between stakeholders which, in view of the creation of the IEM, were requested to find a common technical system for intraday and day-ahead cross-border trading. Following the adoption of Directive 2009/72/EC of the European Parliament and of the Council[6], stakeholders (regulators, TSOs, power exchanges and the Commission) have been involved in a harmonisation project, to establish a "Target Model" for cross-border electricity flows.[7] On 4 February 2011,[8] the European Council decided that the IEM should be implemented by 2014 and that, in cooperation with the Agency for the Cooperation of Energy regulators

[6] Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC OJ L 211, 14.8.2009, p. 55.

[7] That model provides the long-term EU vision for cross-border electricity flows. In particular, the Target Model specifies how TSOs should calculate cross-border capacity and the main design features of coupled day-ahead and intraday markets at European level. Under the Target Model, day-ahead cross-border capacity should be allocated through price-coupled power exchanges and intraday markets should be coupled through continuous matching of bids through a central matching function.

[8] See conclusions of the European Council of 4 February 2011, EUCO 2/1/11 REV 1.

(ACER), national regulators and TSOs *"should step up their work on market coupling and guidelines and on network codes applicable across European networks*". This has resulted in an in-depth cooperation to develop innovative solutions between all stakeholders, in particular between the power exchanges, that are facing a new market environment.

(26) In this context, the parties decided to co-operate to establish a joint venture, the Sibelius project, intended to facilitate the discussions regarding a common technical solution. The Sibelius project included a Steering Committee with representatives of the parties. The parties envisaged that this project would proceed in several potential steps: in step one, the joint venture would be mandated to deliver harmonised systems for both power exchanges; in step two, the joint venture would operate the common platform for the parties and other power exchanges and offer capacity allocation services to TSOs; and step three […], although that last step was put aside already during summer 2011.

(27) However, the parties did not merely agree on a joint approach regarding the technical systems to be used for cross-border trade, but also entered into a separate non-competition arrangement that extended beyond the legitimate purpose of the cooperation between the parties in view of the creation of the IEM.

(28) The parties generally agreed not to compete with one another.[9] That agreement included, in particular, an allocation of territories.[10]

(29) The non-competition arrangement covered all the spot electricity trading services of the parties. On the basis of the general agreement not to compete, the parties discussed the allocation of, for example, which party would submit offers in what tender procedures, which party would acquire what activities of competitors and which party would provide technical know-how to a given third power exchange.

(30) In the context of the discussions relating to territorial allocation, the parties reached a common understanding to protect their traditional strongholds by not attacking each other's "home markets". For the purposes of the common understanding, NPS's home markets were Norway, Sweden, Denmark and Finland and EPEX's home markets were France, Germany and Austria. The parties also agreed to allocate their spot electricity trading services in other countries ("new markets").[11]

(31) The starting point for the territorial allocation was a north/south borderline: countries north of Poland (including Poland) were reserved for NPS. Countries south of Poland were reserved for EPEX. The parties also took into account if one or both of them had a particular interest in a given country.

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4.2. Functioning of the non-competition arrangement

(32) As part of their general agreement not to compete, the parties discussed the allocation of their spot electricity trading services, in line with the territorial allocation, as and when opportunities arose:

(a) The home-market principle, for example, required particular solutions in countries where both parties were active or planned to be active. This was the case for Germany (EPEX's home market), where both parties were active on the intraday market, and for Denmark (NPS's home market), where NPS was already active and EPEX had planned to set up an intraday market. The parties discussed the application of the home-market principle for both these markets, including the possibility that they would compensate each other financially for leaving or refraining from entering these markets (albeit that they ultimately decided not to adopt any such compensation mechanism).[12]

(b) In addition, when commercial opportunities arose in new markets, such as the marketing of services and tenders for market coupling services, the parties discussed the allocation of these commercial opportunities between them.[13]

(33) Implementation of the non-competition arrangement was discussed in relation to several of these home and new markets, including the following:

(a) The United Kingdom (new market):

(1) NPS submitted an offer in a tender procedure for market coupling services in the United Kingdom. EPEX refrained from submitting an offer.[14]

(2) The parties discussed acquiring the activities of […] and allocating […]'s activities in the United Kingdom to NPS.[15]

(b) Belgium (new market): The parties discussed acquiring the activities of […] and allocating […]'s activities in Belgium to EPEX.[16]

(c) The Netherlands (new market): The parties discussed acquiring the activities of […] and allocating […]'s activities in the Netherlands to EPEX.[17]

12 […]
13 […]
14 […]
15 […]
16 See footnote 15.
17 See footnote 15.

(d) Denmark (NPS's home market): EPEX abandoned its efforts to engage in intraday trading in Denmark and requested compensation from NPS.[18]

(e) Germany (EPEX's home market): as part of discussions to resolve the double presence in Germany, EPEX asked NPS to leave Germany in return for compensation.[19] In the end, NPS maintained its intraday trading activities in Germany but did not make any genuine attempts to expand and compete with EPEX, and EPEX noted that both parties were cooperating.[20]

(f) Poland (new market): NPS was interested in developing business in Poland[21] and submitted an offer in a tender procedure to acquire the Polish power exchange (Polpx). EPEX, which was also interested in developing business in Poland,[22] did not participate in the tender (although any company could submit an offer),[23] and more generally promised as a starting point to stay away from this country.[24]

(g) […] (new market): EPEX approved NPS's plans to sign a Memorandum of Understanding with the […] power exchange ([…]).[25]

(h) Switzerland (new market):

(1) EPEX submitted an offer in a tender procedure for market coupling services and shares in a Swiss power exchange. NPS refrained from submitting an offer,[26] even though it had been invited to do so.[27] EPEX indicated that it would expect NPS not to submit a bid in Switzerland, while EPEX would not submit a bid in the United Kingdom.[28]

(2) NPS declined an offer from […] to make a joint NPS-[…] bid to build an intraday trading platform in Switzerland.[29]

(34) Contacts between the parties took the form of physical meetings, telephone and video calls and e-mails. They involved senior management at both parties.[30]

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4.3. Geographic scope of the infringement

(35) The non-competition arrangement covered and extended beyond the EEA as evidenced by implementation discussions relating to Switzerland and […].[31] As part of that arrangement, the parties discussed the coordination of their spot electricity trading services[32] and the adoption of a common approach for new markets.[33]

4.4. Duration

(36) The evidence demonstrates that a continuous set of anti-competitive contacts involving the parties started from 21 June 2011 at the latest.[34] On this date, a meeting took place in London,[35] where the parties agreed not to compete with one another. The non-competition arrangement was further discussed at subsequent meetings between the parties, in particular on 1 July 2011,[36] 6 July 2011,[37] and 12 July 2011.[38]

(37) The parties participated in the non-competition arrangement throughout its duration. Contacts continued throughout summer 2011, in particular when specific commercial opportunities arose such as the tenders in the United Kingdom and Switzerland.[39] In autumn and winter 2011, numerous contacts took place[40] regarding several aspects of the implementation of the non-competition arrangement, such as for instance the mutual presence of the parties in Germany. Regular contacts continued to take place until the non-competition arrangement ended on 7 February 2012 (the date of the Commission's inspections at the premises of the parties).

5. LEGAL ASSESSMENT

(38) Having regard to the body of evidence, the facts as described in Section 4 and the clear and unequivocal acknowledgment by the parties of the facts and their legal qualification thereof, the Commission makes the following legal assessment.

31 […]
32 […]
33 […]
34 For earlier contacts, see […].
35 […]
36 […]
37 […]
38 […]
39 […]
40 […]

5.1. Application of Article 101(1) of the Treaty and Article 53(1) of the EEA Agreement

5.1.1. Agreements and concerted practices

5.1.1.1. Principles

(39) Article 101(1) of the TFEU prohibits agreements and concerted practices between undertakings which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market. Similarly, Article 53(1) of the EEA Agreement prohibits agreements and concerted practices between undertakings which may affect trade between Contracting Parties to the EEA Agreement and which have as their object or effect the prevention, restriction or distortion of competition within the territory covered by the EEA Agreement.

(40) An agreement may be said to exist when the parties adhere to a common plan which limits or is likely to limit their individual commercial conduct by determining the lines of their mutual action or abstention from action in the market.[41] As for a concerted practice, such a practice is a form of coordination between undertakings by which, without it having been taken to the stage where an agreement properly so-called has been concluded, practical cooperation between them is knowingly substituted for the risks of competition.[42]

(41) According to settled case-law, the concepts of agreement and concerted practice within the meaning of Article 101(1) of the TFEU are intended, from a subjective point of view, to catch forms of collusion having the same nature and are distinguishable from each other only by their intensity and the forms in which they manifest themselves.[43] Thus, conduct may fall under Article 101(1) of the TFEU and Article 53(1) of the EEA Agreement as a concerted practice even where the parties have not explicitly subscribed to a common plan defining their action in the market but knowingly adopt or adhere to collusive devices which facilitate the coordination of their commercial behaviour.[44]

(42) In the case of a complex infringement, it is not necessary for the Commission to characterise the conduct as exclusively one or other of these forms of illegal behaviour. The concepts of agreement and concerted practice are fluid and may overlap. Indeed, it may not even be possible to make such a distinction, as an infringement may present simultaneously the characteristics of each form of prohibited conduct, while, when considered in isolation, some of its manifestations could accurately be described as one rather than the other.[45]

41 Case T-349/07 *Coats Holdings Ltd v Commission*, judgment of 27 June 2012, paragraph 154.
42 Case C-8/08 *T-Mobile Netherlands and Others* [2009] ECR I-4529, paragraph 26.
43 Case C-455/11 P *Solvay* SA v *Commission*, judgment of 5 December 2013, paragraph 53.
44 Case C-199/92 P *Hüls v Commission* [1999] ECR I-4287, paragraphs 158-166.
45 Case C-49/92 P *Commission* v Anic *Partecipazioni* [1999] ECR I-4125, paragraph 81.

5.1.1.2. Application in this case

(43) The conduct described in Section 4 presents all the characteristics of an agreement and/or a concerted practice. Indeed, the various aspects of the conduct of the parties were interlinked and served the same goal: to restrict competition between them, in particular to protect their traditional strongholds and to agree on expansion to new countries, while maintaining the balance of power between them. The conduct of the parties can be characterised as a complex infringement consisting of various actions which can be classified as an agreement and/or concerted practice, whereby competitors knowingly substituted practical co-operation between them for the risks of competition. More precisely, the parties generally agreed not to compete with one another.

(44) The Commission therefore concludes that the conduct qualifies as an agreement and/or concerted practice within the meaning of Article 101(1) of the TFEU and Article 53(1) of the EEA Agreement.

5.1.2. Single and continuous infringement

5.1.2.1. Principles

(45) According to settled case-law, an infringement of Article 101(1) of the TFEU and of Article 53(1) of the EEA Agreement can result not only from an isolated act, but also from a series of acts or from continuous conduct, even if one or more aspects of that series of acts or continuous conduct could also, in themselves and taken in isolation, constitute an infringement of that provision. Accordingly, if the different actions form part of an 'overall plan', because their identical object distorts competition within the common market, the Commission is entitled to impute responsibility for those actions on the basis of participation in the infringement considered as a whole.[46]

5.1.2.2. Application in this case

(46) The conduct described in Section 4 constitutes a single and continuous infringement. The parties expressed their joint intention to behave on the market in a certain way: they agreed not to compete, which included in particular an allocation of territories. In so doing, they adhered to a common plan to limit their individual commercial conduct as regards the geographical area in which they provided services. That collusion was in pursuit of a single anti-competitive aim, namely to restrict competition between them, in particular to protect their traditional strongholds and to agree on expansion to new countries, while maintaining the power balance between them.

(47) In order to coordinate their spot electricity trading services, the parties took part in meetings and contacts that were organised at senior management level on a constant and continuous basis. Throughout the duration of the infringement, the noncompetition arrangement focused on allocating markets by agreeing which party should carry out which activity in which country. There is a clear continuity

[46] Case C-441/11 P *Commission v Verhuizingen Coppens NV*, judgment of 6 December 2012, paragraph 41.

of those meetings and contacts, of the individuals participating and of the modalities of the infringing behaviour.

(48) The Commission therefore concludes that the parties participated in a single and continuous infringement of Article 101 of the TFEU and Article 53 of the EEA Agreement.

5.1.3. *Restriction of competition*

5.1.3.1. Principles

(49) Article 101(1) of the TFEU and Article 53(1) of the EEA Agreement prohibit agreements and concerted practices that have as their object or effect the restriction of competition, for instance by sharing markets or other sources of supply. It is settled case-law that, for the purpose of the application of these provisions, there is no need to take into account the actual effects of an agreement once it appears its object is to restrict, prevent or distort competition within the internal market and the territory covered by the EEA Agreement.[47] The same applies to concerted practices.[48]

(49) Application in this case

(50) The various aspects of the conduct described in Section 4 can be qualified as a restriction of competition by object. Indeed, the various aspects of the conduct of the parties were interlinked and served the same goal: to restrict competition between them, in particular to protect their traditional strongholds and to agree on expansion to new countries, while maintaining the balance of power between them. Such behaviour, by its very nature, restricts competition within the meaning of Article 101(1) of the TFEU and of Article 53(1) of the EEA Agreement.

(51) The Commission therefore concludes that the object of the behaviour of the parties was to restrict competition within the meaning of those provisions.

5.1.4. *Effect upon trade between Member States and between Contracting Parties to the EEA Agreement*

5.1.4.1. Principles

(52) Article 101 of the TFEU is aimed at agreements and concerted practices which might harm the attainment of a single market between Member States, whether by partitioning national markets or by affecting the structure of competition within the internal market. Similarly, Article 53 of the EEA Agreement is directed at agreements and concerted practices that undermine the achievement of a homogeneous EEA.[49]

(53) The application of Article 101 of the TFEU and Article 53 of the EEA Agreement to anti-competitive agreements and concerted practices is not, however, limited to

[47] Joined Cases C-101/07 P and C-110/07 P *Coop de France bétail et viande and Others v Commission* [2008] ECR I-10193, paragraph 87.

[48] Case C-8/08 *T-Mobile Netherlands and Others* [2009] ECR I-4529, paragraph 29.

[49] Joined Cases T-25/95 a.o. *Cement*, paragraph 3930 and Case C-306/96 *Javico International and Javico AG v Yves Saint Laurent Parfums SA* [1998] ECR I-1983, paragraphs 16 and 17.

that part of participants' sales that actually involve the transfer of goods or services from one State to another, nor is it necessary, in order for these provisions to apply, to show that the individual conduct of each participant, as opposed to the agreements and concerted practices as a whole, affected trade between Member States and between Contracting Parties to the EEA Agreement.[50]

5.1.4.2. Application in this case

(54) The provision of services by power exchanges to facilitate trade of spot electricity products is characterised by a substantial volume of trade worldwide, including between Member States and between Contracting Parties to the EEA Agreement. On the basis of the sales data provided by the parties, there is ample evidence of direct sales made in the EU/EEA.

(55) The Commission therefore concludes that the infringement was capable of having an appreciable effect on trade between Member States and between Contracting Parties to the EEA Agreement.

5.2. Non-applicability of Article 101(3) of the Treaty and Article 53(3) of the EEA Agreement

(56) The provisions of Article 101(1) of the TFEU and Article 53(1) of the EEA Agreement may be declared inapplicable pursuant to Article 101(3) of the TFEU and Article 53(3) of the EEA Agreement where an agreement or concerted practice contributes to improving the production or distribution of goods or to promoting technical or economic progress, provided that it allows consumers a fair share of the resulting benefit, does not impose restrictions that are not indispensable to the attainment of those objectives and does not afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products in question.

(57) On the basis of the facts before the Commission, there are no indications that suggest that the conditions of Article 101(3) of the TFEU and Article 53(3) of the EEA Agreement are fulfilled with regard to the present infringement. An infringement amounting to secretly organised coordination between undertakings, like that which is the subject of this Decision, is, by definition, among the most detrimental restrictions of competition.

(58) The Commission therefore concludes that the conditions for exemption provided for in Article 101(3) of the TFEU and Article 53(3) of the EEA Agreement are not met in this case.

[50] Case T-13/89 *Imperial Chemical Industries* v *Commission* [1992] ECR II-1021, paragraph 304.

6. DURATION OF THE PARTICIPATION OF THE PARTIES IN THE INFRINGEMENT

(59) For the purposes of establishing the duration to be taken into account for each of the parties, the Commission has taken in this case, and without prejudice to a possible different approach in other cases, the date of the first piece of evidence of an anticompetitive agreement between them as the starting date, and the date of the Commission's inspections at their premises as the end date.

(60) As set out in Section 4.4, the parties started their participation in the infringement on 21 June 2011 at the latest. The infringement ended on 7 February 2012.

(61) The Commission therefore concludes that the duration of the participation of the parties in the infringement is from 21 June 2011 to 7 February 2012.

7. REMEDIES

7.1. Article 7 of Regulation (EC) No 1/2003

(62) Where the Commission finds that there is an infringement of Article 101 of the TFEU and Article 53 of the EEA Agreement, it may by decision require the undertakings concerned to bring such infringement to an end in accordance with Article 7 of Regulation (EC) No 1/2003.

(63) While the infringement may have ended on 7 February 2012, it is necessary to ensure that the infringement has been effectively terminated and is not re-commenced in the future. It is therefore indispensable for the Commission to require the addressees of this Decision to bring the infringement to an end (if they have not already done so) and to refrain from any agreement or concerted practice which may have the same or a similar object or effect.

7.2. Article 23(2) of Regulation (EC) No 1/2003

(64) Under Article 23(2) of Regulation (EC) No 1/2003,[51] the Commission may by decision impose on undertakings fines where, either intentionally or negligently, they infringe Article 101 of the TFEU and/or Article 53 of the EEA Agreement. For each undertaking participating in the infringement, the fine shall not exceed 10% of its total turnover in the preceding business year.

(65) In the case at hand, the Commission concludes that, based on the facts described in Section 4, and in accordance with consistent case law,[52] the infringement was committed intentionally.

(66) The Commission therefore imposes fines in this case on the undertakings that committed the infringement described in this Decision.

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[51] Under Article 5 of Council Regulation (EC) No 2894/94 of 28 November 1994 concerning arrangements of implementing the Agreement on the European Economic Area "the Community rules giving effect to the principles set out in Articles 85 and 86 [now Articles 101 and 102] of the EC Treaty [...] shall apply *mutatis mutandis*", OJ L 305, 30.11.1994, p. 6.

[52] Case C-219/95 P *Ferriere Nord v Commission*, [1997] ECR I-4411, paragraph 50.

(67) Pursuant to Article 23(3) of Regulation (EC) No 1/2003, the Commission must, in fixing the amount of fine, have regard to all relevant circumstances and particularly the gravity and the duration of the infringement, which are the two criteria explicitly referred to in the Regulation. In doing so, the Commission sets the fines at a level sufficient to ensure deterrence. Moreover, the role played by each undertaking party to an infringement is assessed on an individual basis. The fine imposed must reflect any aggravating or attenuating circumstances pertaining to each undertaking.

(68) In setting the fines to be imposed, the Commission refers to the principles laid down in its Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (hereinafter referred to as the "Guidelines on fines").[53] The Commission also applies the Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in cartel cases (hereinafter referred to as the "Settlement Notice").[54]

7.3. Calculation of the fines

(69) In applying the Guidelines on fines, the basic amount imposed on each party is determined by the addition of a variable amount and an additional amount. The variable amount constitutes a percentage of up to 30% of the value of sales of goods or services to which the infringement relates in a given year (normally, the last full business year of the infringement) multiplied by the number of years of the undertaking's participation in that infringement. The additional amount ("entry fee") is calculated as a percentage between 15% and 25% of the value of sales. The resulting basic amount can then be increased or reduced for each undertaking if aggravating or mitigating circumstances are retained.

7.3.1. The value of sales

(70) The basic amount of the fine to be imposed on the undertakings concerned is to be set by reference to the value of their sales,[55] that is the value of the sales of goods or services to which the infringement directly or indirectly related in the relevant geographic area in the EEA. In the case at hand, the relevant value of sales is the sales by the parties of spot electricity trading services in the EEA.

(71) The Commission, as a general rule, takes the sales made by the undertakings during the last full business year of their participation in the infringement.[56] In the case at hand, as the infringement lasted less than a full year, the Commission uses the sales by the parties in 2011, as the greater part of the infringement took place in that year.

(72) Accordingly, the Commission takes into account the following value of sales for each party, as specified in their settlement submissions:

(a) EPEX: EUR [30 000 000 – 40 000 000],

53 OJ C 210, 1.9.2006, p. 2.
54 OJ C 167, 2.7.2008, p. 1.
55 Point 12 of the Guidelines on fines.
56 Point 13 of the Guidelines on fines.

(b) NPS: EUR [10 000 000 – 20 000 000].

7.3.2. Determination of the basic amount

7.3.2.1. Gravity

(73) In assessing the gravity of an infringement, the Commission has regard to a number of factors, such as the nature of the infringement, the combined market share of all the undertakings concerned, the geographic scope of the infringement and whether or not the infringement has been implemented.[57]

(74) In the case at hand, the Commission takes into account that the present infringement is, by its very nature, among the most harmful restrictions of competition. Therefore, the proportion of the value of sales taken into account for such an infringement is set at the higher end of the scale of the value of sales.[58]

(75) The Commission also takes into account the fact that the infringement covered the EEA.

(76) Given the specific circumstances of this case, taking into account the nature and the geographic scope of the infringement, the proportion of the value of sales to be taken into account is set at 16%.

7.3.2.2. Duration

(77) In calculating the fine to be imposed on each of the parties, the Commission takes into consideration the duration of the infringement as described in Section 6. The factor for duration is calculated on the basis of full months.

(78) As the duration of the participation of the parties in the infringement is from 21 June 2011 to 7 February 2012, the resulting multiplier for duration is set at 0.58.

7.3.2.3. Additional amount

(79) The infringement concerns a non-competition arrangement that included an allocation of territories. The Commission therefore includes in the basic amount of each fine a sum of between 15% and 25% of the value of sales to deter undertakings from entering into such illegal practices on the basis of the criteria listed above with respect to the variable amount.[59]

(80) Taking into account the factors listed in Section 7.3.2.1 relating to the nature and geographic scope of the infringement, the percentage to be applied for the purposes of calculating the additional amount is 16%.

[57] Points 21-22 of the Guidelines on fines.
[58] Point 23 of the Guidelines on fines.
[59] Point 25 of the Guidelines on fines.

7.3.2.4. Calculations and conclusions on basic amounts

(81) Based on the criteria explained in recitals (70)-(80), the basic amount per undertaking is:

(a) EPEX: EUR [7 000 000 – 9 000 000],

(b) NPS: EUR [3 000 000 – 5 000 000].

7.3.3. Adjustment to the basic amount: aggravating or mitigating circumstances

(82) The Commission may consider aggravating or mitigating circumstances resulting in an increase and/or decrease of the basic amount.[60] These circumstances are listed in a non-exhaustive way in points 28 and 29 of the Guidelines on fines.

(83) In the case at hand, the Commission does not make any adjustment to the basic amount on the basis of aggravating or mitigating circumstances.

7.3.4. Deterrence

(84) The Commission pays particular attention to the need to ensure that fines have a sufficiently deterrent effect. To that end, the Commission may increase the fines to be imposed on undertakings that have a particularly large turnover beyond the sales of goods or services to which the infringement relates.[61]

(85) In the case at hand, the Commission does not apply any increase to the fines for the purposes of deterrence.

7.3.5. Application of the 10% turnover limit

(86) Article 23(2) of Regulation (EC) No 1/2003 provides that the fine imposed on each undertaking for each infringement shall not exceed 10% of its total turnover relating to the business year preceding the date of the Commission decision.

(87) In the case at hand, on the basis of the latest available turnover figures (mentioned in recitals (11) and (15)), the fines of both parties exceed 10% of their total turnover in 2012. Therefore, the fines for both respective parties are capped to 10% of their respective total turnover in 2012. The capped amount of the fine per undertaking is:

(a) EPEX: EUR 4 056 975,

(b) NPS: EUR 2 587 221.

7.3.6. Settlement

(88) In accordance with point 32 of the Settlement Notice, the reward for settlement is a reduction of 10% of the fine to be imposed on an undertaking after the 10% turnover cap has been applied.

[60] Points 28-29 of the Guidelines on fines.

[61] Point 30 of the Guidelines on fines.

(89) As a result of the application of the Settlement Notice, the amount of the fines to be imposed on EPEX and NPS is reduced by 10%.

7.4. Conclusion: final amount of individual fines to be imposed in this Decision

(90) The fines to be imposed pursuant to Article 23(2) of Regulation (EC) No 1/2003 are set out in the Table below.

Table: Fines

Undertaking	**Final amount of the fine (EUR)**
EPEX	3 651 000
NPS	2 328 000

HAS ADOPTED THIS DECISION:

Article 1

The following undertakings have infringed Article 101 of the Treaty and Article 53 of the EEA Agreement by participating in an agreement and/or concerted practice in the sector of spot electricity trading services that consisted of a non-competition arrangement, including an allocation of territories:

(a) EPEX (EPEX Spot): from 21 June 2011 to 7 February 2012; and

(b) NPS (Nord Pool Spot AS): from 21 June 2011 to 7 February 2012.

Article 2

For the infringement referred to in Article 1, the following fines are imposed:

(a) EPEX Spot: EUR 3 651 000,

(b) Nord Pool Spot AS: EUR 2 328 000.

The fines shall be paid in euro within three months of the date of notification of this Decision to the following account held in the name of the European Commission:

BANQUE ET CAISSE D'EPARGNE DE
L'ETAT 1-2, Place de Metz L-1930 Luxembourg

IBAN: LU02 0019 3155 9887
1000 BIC: BCEELULL
Ref.: European Commission - BUFI/AT.39952

After the expiry of that period, interest shall automatically be payable at the interest rate applied by the European Central Bank to its main refinancing operations on the first day of the month in which this Decision is adopted, plus 3.5 percentage points.

Where an undertaking referred to in Article 1 lodges an appeal, that undertaking shall cover the fine by the due date by either providing an acceptable bank guarantee or making a provisional payment of the fine in accordance with Article 90 of Commission Delegated Regulation (EU) No 1268/2012.[62]

Article 3

The undertakings listed in Article 1 shall immediately bring to an end the infringement referred to in Article 1 insofar as they have not already done so.

They shall refrain from repeating any act or conduct described in Article 1, and from any act or conduct having the same or similar object or effect.

Article 4

This Decision is addressed to

EPEX Spot, 5, Boulevard Montmartre, F-75002 Paris, France;

Nord Pool Spot AS, Vollsveien 17 B, N-1366 Lysaker, Norway.

This Decision shall be enforceable pursuant to Article 299 of the Treaty and Article 110 of the EEA Agreement.

Done at Brussels, 5.3.2014

For the Commission

Joaquín ALMUNIA
Vice-President

[62] Commission Delegated Regulation (EU) No 1268/2012 of 29 October 2012 on the rules of application of Regulation (EU, Euratom) No 966/2012 of the European Parliament and of the Council on the financial rules applicable to the general budget of the Union (OJ L 362, 31.12.2012, p. 1).