

Summary of Commission Decision
of 8 July 2009
relating to a proceeding under Article 81 of the EC Treaty
(Case COMP/39.401 — E.ON/GDF)
(notified under document C(2009) 5355 final)
(Only the French and German texts are authentic)
(2009/C 248/05)

On 8 July 2009, the Commission adopted a decision relating to a proceeding under Article 81 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's website at the following address:

<http://ec.europa.eu/competition/antitrust/cases/>

1. INTRODUCTION

- (1) The Decision finds that E.ON AG ('E.ON'), jointly and severally with its wholly owned subsidiary E.ON Ruhrgas AG ('E.ON Ruhrgas'), and GDF Suez SA ('GDF Suez') have infringed Article 81(1) of the EC Treaty by participating in an agreement and concerted practices in the natural gas sector and imposed a fine on these companies.

both Germany and France, they agreed not to enter each other's home markets through two side letters which prohibited GDF from supplying customers in Germany with the gas transported through MEGAL and Ruhrgas from transporting gas via the pipeline to France.

2. CASE DESCRIPTION

2.1. Procedure

- (2) The case arose of the surprise inspections carried out on 16th May 2006 at the premises of Ruhrgas and GDF. On 18 July 2007, the Commission initiated proceedings within the meaning of Article 11(6) of Regulation (EC) No 1/2003 and Article 2(1) of Commission Regulation (EC) No 773/2004 ⁽²⁾. On 9 June 2008, a Statement of Objections ('SO') was addressed to E.ON, E.ON Ruhrgas and GDF. The parties replied to the SO on 28 August 2008 (E.ON/E.ON Ruhrgas) and 8 September 2008 (GDF Suez). On request of both parties, an Oral Hearing was held on 14 October 2008. The Commission sent to the parties also a letter of facts on 27 March 2009, to which the parties replied on 4 and 6 May 2009. The Advisory Committee on Restrictive Practices and Dominant Positions issued favourable opinions on 26 June 2009 ⁽³⁾ and 3 July 2009 ⁽⁴⁾. The Hearing Officer formulated its final report on 29 June 2009 ⁽⁵⁾.

- (4) Until the expiry of the deadline for implementation of the First Gas Directive in 2000, GDF had a monopoly on the import of gas into France. Following the removal of the import monopoly and during the gradual liberalisation of the European gas markets, the parties continued to apply the 1975 side letters. E.ON, E.ON Ruhrgas and GDF met on a regular basis at various levels and discussed the implementation of the agreement in the newly liberalised market. The parties' contacts after 1999 confirmed the continued existence of the market-sharing agreement and the existence of a single and continuous restriction of competition by object, which violates Article 81 EC. Although the parties signed a pro forma agreement in August 2004 allegedly 'confirming' that the 1975 side letters were no longer valid, the market-sharing agreement continued to exist and produce effects from 1 January 1980 (as regards the German market) and from 10 August 2000 (as regards the French market) to at least 30 September 2005, when the parties started to take gas off the pipeline, to effect sales in the other's home market and entered into a new set of agreements regarding MEGAL.

2.2. Summary of the infringement

- (3) In 1975, when Ruhrgas and GDF decided to jointly build the MEGAL pipeline together to bring Russian gas into

2.3. Addressees

- (5) Ruhrgas, which during the determined period of infringement changed its name to E.ON Ruhrgas without however changing its legal identity, and since January 2003 E.ON exercising decisive influence and effective

⁽¹⁾ OJ L 1, 4.1.2003, p. 1.

⁽²⁾ OJ L 123, 27.4.2004, p. 18.

⁽³⁾ See page 2 of this Official Journal.

⁽⁴⁾ See page 3 of this Official Journal.

⁽⁵⁾ See page 4 of this Official Journal.

control over E.ON Ruhrgas, on the one hand and GDF, which merged in July 2008 with Suez to become GDF Suez, on the other hand, participated in the infringement found in this Decision.

2.4. Remedies

- (6) The Decision requires E.ON, E.ON Ruhrgas and GDF Suez to bring the infringement to an end to the extent that they have not already done so, to refrain from repeating any act or conduct having the same or equivalent object or effect, and imposes fines on the above undertakings.

2.4.1. Basic amount of the fine

- (7) The Decision follows the 2006 Guidelines on fines for the purpose of calculating the amount of the fines. The basic amount of the fine is determined as a proportion of the value of the sales of the relevant product made by each undertaking in the relevant geographic area during the last full business year of the infringement, multiplied by the number of years of the infringement, plus an additional amount to deter the companies from even entering into collusive practices.
- (8) The sales affected by the infringement are sales of gas transported by E.ON and GDF over the MEGAL pipeline in Germany except the sales of gas volumes under E.ON's Gas Release Programme and to eligible customers in France (estimated as a percentage of GDF's overall sales of gas transported over the MEGAL). For France, the decision exceptionally uses the average of the affected sales during the infringement instead of the last full year because the number and type of eligible customers increased significantly during the infringement as a result of the French legislation.
- (9) As regards sales in France, taking into account the duration of the infringement from August 2000 to 30 September 2005, for the individual legal entities involved, the variable amount is multiplied by 5,5. As regards Germany, only the period after April 1998, when the German legislator removed the previous de facto barriers to competition, was taken into account with regard to the fines (7,5 years). The decision applies a starting percentage of 15 % of affected sales in consideration of the nature of the infringement, a secret

market-sharing agreement covering a substantial part of the market for natural gas in Germany and France which was implemented. According to Point 25 of the 2006 Guidelines on fines, the decision imposes an additional amount of 15 % of the value of sales on the addressees.

2.4.2. Adjustments to the basic amount

- (10) No aggravating circumstances have been found. Since the parties were aware that they were infringing competition law and only the period after liberalisation was taken into account for the calculation of the fine, the draft decision does not foresee mitigating circumstances. The Decision does not apply any additional specific increase for deterrence, the fine in this specific case being in itself sufficiently deterrent.
- (11) Given that the infringement consisted in a market-sharing agreement concerning the gas transported through a pipeline jointly owned and operated by the parties and that the different degree of implementation of liberalisation in France and Germany should not influence the determination of the fine, the Commission imposed an identical fine of EUR 553 000 000 to E.ON Ruhrgas AG, jointly and severally with E.ON, and GDF.

2.4.3. Application of the 10 % turnover limit

- (12) The final amounts of the fines for both undertakings are clearly below 10 % of the worldwide turnovers of each of the undertakings concerned.

3. DECISION

- (13) E.ON Ruhrgas, E.ON and Gaz de France (now GDF Suez S.A.) have infringed Article 81(1) EC by participating in an agreement and concerted practices in the natural gas sector. The duration of the infringement was for E.ON Ruhrgas and for Gaz de France at least from 1 January 1980 until 30 September 2005, as far as the infringement in Germany is concerned, and at least from 10 August 2000 to 30 September 2005 as far as the infringement in France is concerned. The duration of the infringement for E.ON was from 31 January 2003 to 30 September 2005. For the infringement, a fine of EUR 553 000 000 is imposed on each E.ON Ruhrgas, jointly and severally with E.ON, and GDF Suez.