EUROPEAN COMMISSION

CASE AT.39727

(Only the English text is authentic)

ANTITRUST PROCEDURE
Council Regulation (EC) 1/2003

Article 9 Regulation (EC) 1/2003

Date: 10/04/2013

This text is made available for information purposes only. A summary of this decision is published in all EU languages in the Official Journal of the European Union.

Parts of this text have been edited to ensure that confidential information is not disclosed. Those parts are replaced by a non-confidential summary in square brackets or are shown as […].

EUROPEAN COMMISSION

Brussels, 10/04/2013
SG-Greffe
C(2013) 1997 FINAL

PUBLIC VERSION

COMMISSION DECISION

of 10/04/2013

addressed to:

CEZ, a.s.

relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union and Article 54 of the EEA Agreement

(AT/39727 - CEZ)

(Only the English text is authentic)

TABLE OF CONTENTS

COMMISSION DECISION

of 10/04/2013

addressed to:
CEZ, a.s.
relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union and Article 54 of the EEA Agreement

Case AT.39727 - CEZ

(Only the English text is authentic)

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] ("**Regulation (EC) No 1/2003**"), in particular Article 9(1) thereof,

Having regard to the Commission decision of 11 July 2011 to initiate proceedings in this case,

Having expressed concerns in the preliminary assessment of 26 June 2012,

Having given interested third parties the opportunity to submit their observations pursuant to Article 27(4) of Regulation (EC) No 1/2003 on the commitments offered to meet those concerns,

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

Having regard to the final report of the Hearing Officer,

Whereas:

1. SUBJECT MATTER

(1) The present Decision concerns CEZ's conduct on the market for generation and wholesale supply of electricity in the Czech Republic, in particular pre-emptive booking of capacities in the Czech electricity transmission network with the aim of hindering the entry of competitors into the market.

(2) In its preliminary assessment of 26 June 2012, the Commission came to the provisional conclusion that CEZ holds a dominant position on the market for the generation and wholesale supply of electricity in the Czech Republic and that the

[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". The terminology of the TFEU will be used throughout this Decision.

suspected conduct of making a pre-emptive reservation in the electricity transmission network raised concerns as to its compatibility with Article 102 of the Treaty.

2. THE UNDERTAKING CONCERNED

(3) The state owned[2] undertaking CEZ is the incumbent operator on the Czech electricity market. CEZ is present in a number of areas of the electricity and lignite sectors in the Czech Republic (lignite mining and trading, electricity generation, distribution, trading and supply) and several other countries in Europe. In 2011, CEZ's turnover amounted to EUR 8,530 million[3].

3. PROCEDURAL STEPS UNDER REGULATION NO 1/2003

(4) On 11 July 2011, the Commission opened proceedings with a view to adopting a decision under Chapter III of Regulation (EC) No 1/2003.

(5) On 8 August 2011, the company […] submitted to the Commission a complaint pursuant to Article 7 of Regulation (EC) No 1/2003 against CEZ.

(6) On 26 June 2012, the Commission adopted a preliminary assessment as referred to in Article 9(1) of Regulation (EC) No 1/2003 which set out the Commission's preliminary competition concerns; these related to CEZ's pre-emptive reservation made on the Czech electricity transmission network which may have prevented competitors from entering the market for generation and wholesale supply of electricity. This assessment was notified to CEZ on 28 June 2012.

(7) On 3 July 2012, CEZ submitted commitments to the Commission in response to the preliminary assessment.

(8) On 10 July 2012, a notice was published in the Official Journal of the European Union pursuant to Article 27(4) of Regulation (EC) No 1/2003[4], summarising the case and the commitments and inviting interested third parties to give their observations on the commitments within one month of publication.

(9) On 30 August, 4 September and 6 September 2012, the Commission informed CEZ of the observations received from interested third parties following the publication of the notice.

(10) On 6 March 2013, CEZ submitted an amended commitment proposal.

4. PRELIMINARY ASSESSMENT

4.1. Relevant markets

4.1.1. Product market

(11) According to the preliminary assessment the product market was considered to be generation and wholesale supply of electricity. This includes the electricity generated

---

2 Majority shareholder (69,78% as of 31 December 2010) is the State through the Ministry of Finance (69,37%) and the Ministry of Labor and Social Affairs (0.41%).

3 CEZ Group Annual Report 2011, p. 11. CEZ's consolidated turnover was converted from CZK to EUR with 2011 average exchange rate of CZK/EUR 24.590 as reported by the European Central Bank.

4 OJ C 202, 10.7.2012, p. 1–2

in and imported into the relevant geographic area through interconnectors. This is in line with the decisional practice of the Commission.[5]

4.1.2. Geographic market

(12) The preliminary assessment concluded that, for the purpose of this case, the Czech market for generation and wholesale supply of electricity is national. This was based on the different structures of the supply in the Czech Republic and in the neighbouring countries[6], the different fuel mix of the power plants in the Czech Republic and in the neighbouring countries[7] (implying different merit order curves[8] across these countries[9]) and existence of congestion at interconnection points with neighbouring Member States[10].

(13) This is consistent with the recent decision of the Czech NCA (Office for the Protection of Competition) which concluded that the Czech market for generation and wholesale supply of electricity is national[11].

---

[5] See for example the following Commission Decisions: Case No COMP/M.4180 *Gaz de France/Suez* (2006), paragraph 674; Case No COMP/M.5224 *EDF/British Energy* (2008), paragraph 10ff; Case No COMP/M.5467 *RWE/Essent* (2009), paragraph 23.

[6] In 2010, the share in the total generation of the largest operator was 73% in the Czech Republic, approx. 40% in Austria, 28% in Germany, 17% in Poland and 81% in Slovakia. For Austria, see p. 71, Verbund Annual Report 2010, and for the rest of the countries, see Eurostat, at:
http://epp.eurostat.ec.europa.eu/tgm/printTable.do?tab=table&plugin=1&language=en&pcode=tsier060&printPreview=true

[7] The generation mix in the relevant countries is summarised as follows. Regarding Germany and the Czech Republic, it is noted that the solid fuels category represents mainly lignite generation in the Czech Republic while in Germany it is divided in approximately equal parts between lignite and hard coal.
Solid fuels (hard coal and lignite): Austria 5%, Czech Rep. 55%, Germany 42%, Poland 87%, Slovakia 15%;
Nuclear: Austria 0%, Czech Rep. 33%, Germany 23%, Poland 0%, Slovakia 54%;
Renewables: Austria 67%, Czech Rep. 6%, Germany 16%, Poland 6%, Slovakia 19%;
Gas: Austria 20%, Czech Rep. 5%, Germany 14%, Poland 4%, Slovakia 9%;
Other: Austria 8%, Czech Rep. 1%, Germany 5%, Poland 3%, Slovakia 3%;
See European Commission, DG Energy, Country fiches - EU 27 Member States, at:
http://ec.europa.eu/energy/observatory/countries/countries_en htm (consulted on 11 March 2013)

[8] In power markets, the supply curve is called the "merit order curve" and goes from the least to the most expensive technology taking account only of the marginal variable costs (mostly fuel costs): wind, hydro, nuclear, lignite, coal, natural gas, and gas turbines units.

[9] This implies different production costs (and power prices) across these countries. This was also pointed out by CEZ during the proceedings: *"The Czech Republic is a net exporting country due to excess capacity and favorable variable cost. As a result, the forward price and the average spot price tend to be lower than the prices in neighboring markets."* See CEZ, reply to the request for information pursuant to Article 18 of Regulation (EC) No 1/2003, 22 August 2011 (p. 10).

[10] The only exception was the interconnection with Slovakia since the introduction of market coupling in 2009.
Nevertheless, the prices for Slovak futures products traded in 2012 on the Power Exchange Central Europe tended to be marginally higher than the prices for the equivalent Czech products. It should also be noted that the Czech Republic has been for many years a net exporter in relation to Slovakia and that the actual imports from Slovakia remained relatively limited. This provides an indication that these markets remain distinct.

[11] Decision S492/2011/KS - *CEZ/Energotrans* of 20 June 2012.

4.2. Position of the parties on the relevant market / Dominant position

(14) In the preliminary assessment, the Commission took the preliminary view that CEZ was, during the relevant period (2007 – 2012), most likely dominant on the market for the generation and wholesale supply of electricity in the Czech Republic. This view was based on *(a)* the structure of the Czech wholesale electricity market, *(b)* CEZ's vertical integration and control over certain types of electricity generation and *(c)* high barriers to entry.

(15) CEZ is the largest electricity producer in the Czech Republic in terms of effective generation[12]. Currently, CEZ has few competitors, and their shares of the market remain limited[13].

---

[12] CEZ is also the biggest electricity producer in the Czech Republic in terms of installed capacity. Its share in installed capacity in the Czech Republic was consistently above 60% over the period 2006-11.

[13] The 2010 individual shares of CEZ's largest competitors, Sokolovská Uhelná and Energetický a pr• myslový holding, were [0-5]% and [5-10]% respectively.

Table 1: Share of CEZ on the Czech generation and wholesale supply market, 2006-2011[14]

TWh		Year					
		2006	2007	2008	2009	2010	2011
CEZ	Net generation[15]	[50-60]	[60-70]	[50-60]	[50-60]	[50-60]	[50-60]
	Imports[16]	[0-5]	[0-5]	[0-5]	[0-5]	[0-5]	[0-5]
	Net generation + imports	[50-60]	[60-70]	[50-60]	[50-60]	[50-60]	[50-60]
Czech Republic	Net generation[17]	77.9	81.4	77.1	76.0	79.5	81.0
	Imports[18]	11.5	10.2	8.5	8.6	6.6	10.5
	Net generation + imports	89.3	91.6	85.6	84.6	86.1	91.5
CEZ's share (%)		[60-70]	[60-70]	[60-70]	[60-70]	[60-70]	[60-70]

(16) CEZ is a vertically integrated utility which, besides electricity generation, is present in a number of areas of the electricity and lignite sectors in the Czech Republic (lignite mining and trading, electricity distribution, trading and supply). CEZ enjoys unparalleled access to the cheapest sources of generation, nuclear and lignite: CEZ has exclusive access to nuclear power, and controls large parts[19] of available lignite deposits. The company also controls the largest distribution system operator.

(17) According to the Commission's preliminary findings, entering the Czech electricity generation and wholesale supply market remains difficult. Given the structure of the

---

14 This includes the electricity generated in and imported into the relevant geographic area through interconnectors.

15 See CEZ, reply to request for information pursuant to Article 18 of Regulation (EC) No 1/2003 of 22 August 2011 (p. 4) and CEZ, submission of 6 March 2013 (p. 1).

16 See CEZ, reply request for information pursuant to Article 18 of Regulation (EC) No 1/2003 of 22 August 2011 (p. 9) and CEZ, submission of 6 March 2013 (p. 1).

17 See 2011 annual report of the Czech Energy Regulatory Office (p. 7), at: http://www.eru.cz/user_data/files/statistika_elektro/rocni_zprava/2011/Rocni_zprava_ES_CR_FINAL.pdf

18 See 2011 annual report of the Czech Energy Regulatory Office (p. 4), 2010 annual report of the Czech Energy Regulatory Office, 2008 annual report of the Czech Energy Regulatory Office and 2006 annual report of the Czech Energy Regulatory Office, at:
http://www.eru.cz/user_data/files/statistika_elektro/rocni_zprava/2011/Rocni_zprava_ES_CR_FINAL.pdf
http://eru.cz/user_data/files/statistika_elektro/rocni_zprava/2010/rz/energie/2.htm
http://eru.cz/user_data/files/statistika_elektro/rocni_zprava/2008/energie/2.htm
http://eru.cz/user_data/files/statistika_elektro/rocni_zprava/2006/energie/2.htm

19 CEZ owns Severoceske Doly, the largest lignite producer in the country.

generation mix in the country[20], a new entrant would need cheaper generation (hydro, nuclear or coal[21]) and some other generation (typically gas) as a complement. However, there have been very few attempts for market entry since 2005, with nearly all significant generation projects (based on nuclear, lignite or gas) developed by CEZ[22].

4.3. Substantial part of the internal market

(18) In its preliminary assessment, the Commission came to the preliminary conclusion that the market for generation and wholesale supply of electricity in the Czech Republic should be considered as a substantial part of the internal market as set out in Article 102 of the Treaty.

(19) The General Court has held that if the relevant geographic market corresponds to the territory of a Member State, it constitutes a substantial part of the internal market[23].

(20) In this case, CEZ is the largest Czech electricity generating company. The affected market covers the entire territory of the Czech Republic and therefore is deemed to constitute a substantial part of the internal market[24].

4.4. Practices raising concerns

(21) In the preliminary assessment, the Commission raised the concern that CEZ may have abused its dominant position on the market for the generation and wholesale supply of electricity in the Czech Republic, thereby infringing Article 102 of the Treaty and Article 54 EEA Agreement.

(22) More specifically, in the preliminary assessment the Commission took the view that CEZ may have pursued a strategy of preventing new entry on the market for generation and wholesale supply of electricity. As part of that strategy, in January 2007, CEZ may have made a potentially pre-emptive reservation in the Czech electricity transmission system.

(23) The reservation made by CEZ referred to two alternative projects: [1,000-1,500] MW of lignite-fired or [1,000-1,500] MW of gas-fired capacity. However, according to the Commission's preliminary conclusion, this reservation did not correspond to genuine generation projects.

---

20 Nuclear- and lignite-fired power plants represent the backbone of the generation mix in the Czech Republic; hard coal, natural gas, hydro power and other renewables being the remaining sources of electricity employed by Czech electricity producers.

21 Hard coal or lignite

22 Only some minor scale projects were developed in recent years by other undertakings than CEZ. For instance, a gas-fired plant of ATEL (Alpiq) or a fuel-oil fired plant of Plzenska Energetika which are destined to supply reserve or emergency power to the transmission system operator. There was another project of a 1000MW gas-fired power plant pursued by RWE. The undertaking publicly announced its intention to construct a gas-fired power plant in November 2009. However, the project was abandoned or at least put on hold in the second half of 2011 due to various factors (such as low prices of electricity and high prices of gas).

23 See Case T-228/97 *Irish Sugar v Commission* [1999] ECR II-2969, paragraph 99.

24 In Case C-475/99 *Ambulanz Glöckner* [2001] ECR I-8089, paragraph 38, it was held that the Land of Rheinland-Pfalz (one of the German Länder) may constitute a substantial part of the common market as "*it covers a territory of almost 20 000 km² and has a high number of inhabitants, around four million, which is higher than the population of some Member States*".

(24) Regarding the lignite-fired alternative, the Commission's investigation led to the preliminary conclusion that CEZ would not have been in position to procure fuel in volumes necessary to carry out the project.

(25) Concerning the gas alternative, it was the Commission's preliminary view that the reservation was not backed by a genuine underlying project, as it *(i)* did not fit with the company's overall portfolio development strategy […], *(ii)* was made at a moment which was at odds with the company's standard practice of project development and (*iii*) had been made long before the site for the gas-fired project was eventually selected.

(26) As a result of CEZ's potentially pre-emptive reservation, the available transmission capacity which could have been otherwise used by CEZ's competitors was exhausted. Consequently, CEZ's competitors could have been prevented from access to the transmission network.

(27) The Commission took the preliminary view that the electricity transmission network constituted an indispensable input for every large scale electricity generator. Such indispensability was, according to the Commission's preliminary findings, twofold.

(28) First, producers of electricity need general access to the network since the electricity generated by large scale power plants must be injected into the transmission network.

(29) Second, every power plant needs to be connected to the transmission network through a specific connection point – network substation. The further the transmission network substation is from the power plant, the higher the investment costs to construct the requisite high voltage line. Also, electricity losses incurred on the line and maintenance costs grow with the growing distance to the network substation. In addition, the related planning risks would increase, as would the duration of the construction works.

(30) In the Czech Republic, there is only one transmission network which covers the entire territory of the country and which is operated by a sole transmission system operator ("**TSO**"). In the Commission's preliminary view, the input represented by the transmission network cannot be replaced by any alternative input.

(31) The Commission came therefore to the preliminary conclusion that access to the indispensable input in the form of access to a specific point of the transmission network could have been denied to a potential new entrant following CEZ's potentially pre-emptive reservation. The TSO refused to connect a new competing lignite-fired generation project to a specific network substation because there would not be sufficient capacity at that substation in view of the previous reservation made by CEZ.

(32) According to the Commission's preliminary finding, by preventing competitors from gaining access to the transmission network, CEZ may have effectively prevented new entry into the market for the generation and wholesale supply of electricity. In particular, CEZ may have prevented the entry of a competitor which *(i)* was pursuing a project of [1,000-1,500]MW of lignite-fired capacity ("**competing project**") to be connected to the transmission network through the substation at which CEZ had made its potentially pre-emptive reservation and *(ii)* which presumably could have, in the long run, developed a wider portfolio of generation units.

(33) Consequently, the Commission took the preliminary view that CEZ prevented, or at the very least considerably delayed, the entry of a new competitor into the market by making a potentially pre-emptive reservation in the electricity transmission network

with the aim of depriving other undertakings of the means of competing and, ultimately, of preventing them from entering the market.

4.5. Effect on trade between Member States

(34) The Court of Justice held that "*Article 82* [Art. 102 of the Treaty] *does not require it to be proved that abusive conduct has in fact appreciably affected trade between Member States, but that it is capable of having that effect*"[25]. According to settled decisional practice, an influence, direct or indirect, actual or potential, on the pattern of trade between Member States is sufficient as long as the effect is appreciable[26].

(35) Where an undertaking, which holds a dominant position covering the whole of a Member State, engages in exclusionary abuses, trade between Member States is normally capable of being affected.[27] This means trade between Member States and between EEA countries.

(36) Further, trade between Member States is most likely affected because CEZ is the dominant operator in the Czech Republic and its potentially illicit conduct could have prevented entry of new competitors in the Czech market for the generation and wholesale supply of electricity, thereby having an adverse impact on the competitive structure of the market[28].

(37) Therefore, the Commission concluded in the preliminary assessment that the potentially abusive conduct may have affected trade between Member States within the meaning of Article 102 of the Treaty.

5. PROPOSED COMMITMENTS

(38) CEZ does not agree with the Commission's findings in the preliminary assessment. It has nevertheless offered commitments pursuant to Article 9 of Regulation (EC) No 1/2003 to meet the Commission's competition concerns.

(39) The key elements of the commitments offered by CEZ on 3 July 2012 were as follows:

- CEZ will divest one of the following generation assets to a suitable purchaser to be approved by the Commission and which must not raise prima facie competition concerns:
  - Pocerady lignite-fired power plant (1 000 MW),
  - Chvaletice lignite-fired power plant (800 MW),
  - Detmarovice coal-fired power plant (800 MW),

---

[25] See Case 322/81, *Michelin v Commission* [1983] ECR 3461, paragraph 104. See also joined cases C-241/91P and C-242/91P *RTE and ITP v. Commission*, ECR I-743, paragraphs 69-70.

[26] See Commission Notice – Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty, (2004) OJ C101/07, paragraphs 23 *et seq*. and 44 *et seq*.

[27] See Commission Notice – Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty, (2004) OJ C101/07, paragraph 93.

[28] See Joined Cases T-24/93, T-25/93, T-26/93 and T-28/93 *Compagnie Maritime Belge Transports and Others v Commission*, [1996] ECR II-1201, paragraph 203. The Court of First Instance held that practices that affect the competitive structure inside the Community by eliminating a competitor are capable of affecting trade between Member States.

– Melnik III lignite-fired power plant (500 MW) and Tisova lignite-fired power plants (Tisova I – 184 MW and Tisova II – 112 MW); both power plants (Melnik III and Tisova) can be sold separately.

– CEZ may not, for a period of 10 years, acquire direct or indirect influence over the divested generation asset.

6. COMMISSION NOTICE PURSUANT TO ARTICLE 27(4)

(40) In response to the publication on 10 July 2012 of a notice pursuant to Article 27(4) of Regulation (EC) No 1/2003, the Commission received seven responses from interested third parties.

(41) Some respondents suggested that the total amount of generation capacity to be divested should be increased in order to improve the competitive structure on the Czech market for the generation and wholesale supply of electricity.

(42) These suggestions go beyond the scope of this procedure as the commitments address specific concerns of an abuse set out in the preliminary assessment and not the dominant position of the undertaking concerned.

(43) One respondent submitted that none of the proposed divestiture assets are, individually, capable of tackling the Commission's competition concerns. The respondent assessed the impact of the divestiture of each of the power plants proposed in the commitments on competition in the Czech electricity generation market and analysed the economic parameters (installed capacity, effective electricity production, fuel availability, variable costs etc.) of each of the power plants. The respondent concluded that the assets proposed for commitment are, individually, not sufficient to reduce the concentration in the Czech market to an acceptable level and to achieve a meaningful increase of competition.

(44) These arguments cannot be accepted. CEZ's dominant position is not the subject matter of this decision (see also recital (42)) but only the abuse which CEZ may have committed by making a pre-emptive reservation on the Czech transmission network in 2007. Consequently, arguments relating to the allegedly high concentration of the Czech electricity market and to the fact that divestiture of any of the individual commitment assets would not be sufficient to reduce this concentration are misplaced as they remain outside the scope of the present investigation.

(45) One respondent argued that the assets proposed by CEZ as commitments would not be comparable to the competing project allegedly blocked by CEZ's pre-emptive network capacity reservation. The respondent compared the main economic parameters (technology used, availability of fuel, installed capacity, variable costs, electricity production) of the planned competing project with those of the proposed commitment assets. While considering the Detmarovice power plant particularly unsuitable to address the identified competition concerns (for arguments concerning Detmarovice, (see recitals (52) - (55)), the respondent concluded that none of the CEZ assets would be able to exert the same level of competitive constraint on CEZ as the competing project. More specifically, the respondent submitted that:

– the Tisova and Melnik power plants have an installed capacity of only approximately 800 MW, they have comparatively high variable costs, the electricity production amounts to less than half of the intended production of the competing project, there are disputes about fuel supplies with the existing supplier and the Tisova power plant is mainly devoted to heat generation;

– the Chvaletice power plant has an installed capacity of only 800 MW[29], it has comparatively high variable costs, its recent effective production amounted to approximately one third of the production of the competing project;

– the Pocerady power plant, while being the most suitable of the proposed assets, still only has an installed capacity of 1 000 MW and its effective electricity generation is well below the planned output of the competing project.

(46) The respondent concluded that an adequate remedy matching the parameters of the competing project allegedly blocked by CEZ would be divestiture of the Pocerady power plant along with either the Chvaletice power plant or the Tisova and Melnik power plants.

(47) Concerning the argument that none of the CEZ's assets would be able to exert the same level of competitive constraint on CEZ as the competing project, it should be noted that the benchmark against which to assess the proposed commitments are not the theoretical parameters of the competing project. Rather, it must be established what project a competitor could have realistically pursued, had it not been for CEZ's pre-emptive transmission capacity reservation. In this respect, the relevant factors to be taken into account in this context are in particular fuel availability, the size of CEZ's pre-emptive reservation from January 2007 and transmission network limitations at the substation at which CEZ had made its potentially pre-emptive reservation and at which the competing project was also to be connected. It is these factors that set the limits of any project that a competitor could have pursued and the nominal size of the competing project (i.e. [1,000-1,500]MW) is relevant only insofar as it does not exceed such limits.

(48) Such analysis of the relevant factors shows that while CEZ's pre-emptive reservation from January 2007 amounted to [800-1,000] MW[30], respectively, even in the absence of CEZ's reservation there would not have been sufficient network capacity to accommodate a power plant of the size of the competing project. This is evident from the administrative procedure following CEZ's January 2007 transmission capacity reservation. While the Czech TSO agreed to connect one new block […]by the end of […], the second block, contrary to CEZ's reservation request, could only be connected, according to the TSO's binding opinion, between […] and […], depending on the completion state of necessary grid reinforcements[31]. The competing project was planned to be completed in […].

(49) In the same vein, the other factors listed by the respondent (such as the technology used, availability of fuel, estimated electricity production) as relevant in assessing whether the assets proposed by CEZ constitute a suitable remedy, do not seem to necessitate any alterations in the commitments (apart from those described in recitals (52) - (56)). The Pocerady, Chvaletice and Tisova and Melnik power plants are lignite-fired power plants, all can be operated on a long-term basis[32] and they can

29 Effectivelly 600 MW due to environmental/technical constraints

30 CEZ indicated in its request for transmission capacity reservation of 8 January 2007 that […].

31 See CEZ's request for transmission capacity reservation of 8 January 2007 and CEPS' reply of 29 January 2007.

32 The planned lifespan of the Pocerady power plant is 2027, of Chvaletice 2029, and of Tisova and Melnik 2025 and 2026, respectively.

only be divested to a suitable buyer with the ability to secure an adequate fuel supply to operate them.

(50) Concerning the arguments pointing out the technical and/or environmental limits on the operation of the Chvaletice power plant, the investment necessary to remove those constraints, as well as the related outage period of the relevant generation units, has been clearly quantified by CEZ and does not appear to hamper the suitability of the power plant as commitment.

(51) Moreover, the economics of operating a power plant as part of a wider portfolio differ from its operation as a stand-alone asset. Even if the utilization rate of a certain CEZ asset was lower in recent years (for example because it was largely used to provide ancillary services to the TSO), the new buyer is likely to choose a different strategy of running the power plant.

(52) Two respondents identified the Detmarovice coal-fired power plant as the least suitable asset to address the Commission's concerns and strongly opposed its divestiture.

(53) One of these two respondents noted that the Detmarovice power plant was one of the power plants with the highest marginal costs in the Czech Republic, and is used mainly to supply ancillary services. The high costs explained the low load factor of the power plant.

(54) Similarly, in line with the underlying argument that none of the proposed commitments would be able to exert the same level of competitive constraint on CEZ as the competing project (see recital (45)), the other respondent emphasised that the Detmarovice power plant has an installed capacity of only 800 MW[33], is a hard coal-fired power plant with comparatively high variable costs and, in the recent past, its effective electricity generation only represented approximately 30% of the intended production of the power plant under the competing project.

(55) In addition, the respondent showed that the Detmarovice power plant, due to the high cost of its fuel (hard coal), does not operate in a base-load regime, but as a peak-load plant that provides ancillary services to the TSO. According to this respondent, this was confirmed by the low actual electricity production of the plant. This respondent emphasised in particular that the Detmarovice power plant cannot be considered as a viable or competitive business.

(56) In view of the arguments in recitals (52) - (55), CEZ offered to remove the Detmarovice power plant from the commitments.

(57) Two respondents argued that implementation of the commitments, in particular divestiture of some of the proposed generation assets, could distort the upstream market of lignite supply. More specifically, they argued that if some of the generation asset were to be purchased by lignite producers, existing lignite supplies would be redirected to such newly acquired generation capacity which in turn would effectively lead to lignite market foreclosure and to driving some of the independent electricity producers out of the market. Consequently, such an outcome would not enhance competition but merely shift it to other market participants. For these reasons, the respondents suggest prohibiting CEZ from selling lignite-fired

[33] With one block of 200 MW not operational in recent past

generation assets without secured long-term lignite supplies to lignite producers or to leave out some of the lignite-fired generation assets from the list of divestiture generation assets.

(58) In reply to these arguments, it should be emphasized that while the Czech lignite market and the market for generation and wholesale supply of electricity are linked in many respects, the alleged competition issues on the lignite market appear to originate from the shortage of lignite in the Czech Republic and the commitments proposed by CEZ will have no impact on the amount of lignite available. In that respect, the situation on the lignite market does not relate to the concerns identified by the Commission in the preliminary assessment and lies outside the scope of the present proceedings. For the same reason, it would not be justified to exclude lignite producers from acquiring the generation assets proposed as commitments and/or leaving out lignite-fired power plants without long term fuel supply contracts from the list of generation assets proposed for divestiture. The argument that the commitments in the present form would only lead to shifting of competition rather than enhancing it is also misplaced. Each of the generation assets to be divested represents a viable business starting from which the purchaser could, in the long run, develop a wider portfolio of generation units thereby exerting competition constraints on CEZ.

(59) One respondent pointed out that the conditions for qualifying as a suitable buyer, in particular the requirement to be able to secure an adequate fuel supply, would effectively favour one lignite producer.

(60) This argument cannot be accepted, as the aforementioned requirement does not prevent any party from securing fuel on a contractual basis, thereby qualifying as a suitable buyer.

(61) Another comment suggested introducing a transitional period of up to two years for the duration of which CEZ would be obliged to purchase all or part of the electricity produced by the divested power plant. Such a transitional period would allow the purchaser to establish a customer base which will not necessarily be given immediately after the acquisition of the power plant.

(62) This suggestion cannot be accepted. In the Commission's view, there is no reason for imposing such an obligation on CEZ as the buyer will be able to place the generation output on the market (typically on the Power Exchange Central Europe).

(63) The remainder of the comments submitted by interested third parties concern individual generation assets and they *(i)* point out some issues which could potentially impede the operation of individual power plants and, consequently, could have a negative impact on their appropriateness as commitments or *(ii)* require certain clarifications in the commitments to ensure that the divested business would be transferred without factual defects or legal flaws.

(64) One respondent observed in relation to the Melnik and Tisova power plants that part of the lignite supplies under the related long term supply agreement ("**LTA**") are destined for another heating plant owned by CEZ and that the contractual prices under the LTA are to be renegotiated annually. The respondent emphasised that unless these points are clarified, the text of the commitments is misleading.

(65) In view of these comments, CEZ amended[34] its proposed commitments by waiving any rights under the LTA to supply its heating plant. Hence, following the divestiture of the Melnik and Tisova power plants, the entire contractual volumes under the LTA would be delivered exclusively to these two power plants.

(66) In relation to the Tisova I and Chvaletice power plants, it was further remarked that these plants supply significant amounts of district heat to the cities in their vicinity. Consequently, the commitments should also cover the relevant contracts on the supply of district heat, as well as the main relevant assets (such as the district heating networks and other infrastructure).

(67) In response to these comments, CEZ modified[35] the proposed commitments in order to *(i)* foresee the transfer of the relevant heat supply contracts to the buyer and *(ii)* provide for a standard contractual framework between the buyer, in its capacity as heat generator, and CEZ, acting as operator of the heating network. The handover point for heat delivery shall be the interface between the respective power plant and the heating distribution system located at the edge of the power plant. CEZ also explained that the price of the supplied heat (which includes the heating network costs) is controlled by the Energy Regulatory Office.

(68) One respondent pointed out that the Chvaletice power plant has been primarily used by CEZ to supply ancillary services. However, for 2013-2014, CEZ chose not to bid for ancillary services. As a result, the Chvaletice power plant is expected to produce less electricity than in previous years.

(69) In reply to this observation, CEZ explained[36] that bidding for ancillary services was not possible for the Chvaletice power plant since the power plant has not secured sufficient lignite supplies beyond the end of 2012. It will be for the buyer to secure sufficient lignite supplies. Nevertheless, given that the ancillary services are allocated by the Czech TSO in three time horizons (for two calendar years, for one calendar year, and within a year), the buyer will have the opportunity to bid for ancillary services requested by the TSO in the course of the years 2013/2014. In addition, it is likely that the Czech TSO will request such services also under the short term allocation scheme in which the buyer will be able to participate.

(70) One respondent noted that in the period 2014-2018, the Pocerady power plant may be subject to output limitations by the Czech TSO due to limited transmission capacity unless CEZ commits to correspondingly curtail the output of its other power plants connected to the same substation in the transmission network.

(71) In view of this comment, CEZ amended[37] its proposed commitments by accepting that any possible transmission network constraints should be borne only by CEZ, thereby ensuring that the Pocerady power plant can be operated without grid access limitations[38].

---

[34] See for modifications pages 25 and 29 of the commitments.

[35] See for modifications pages 21 and 25 of the commitments.

[36] See CEZ, submission of 18 September 2012 (p. 4)

[37] See for modifications page 18 of the commitments.

[38] Provided that the buyer will carry out the existing schedule of ecological upgrade of the Pocerady power plant. That schedule foresees a technological outage of 4 months for two of the generating units in Pocerady.

(72) It was further noted by one respondent that CEZ retains the control over water supply and water treatment facilities for the Pocerady power plant. The respondent suggested clarifying in the commitments that CEZ shall commit to transfer the required water supply facilities, including relevant water pipes, as well as the water treatment and processing facilities.

(73) With regard to this comment, CEZ explained that the lignite-fired and the gas-fired power plant at the Pocerady site will share the water supply and treatment facilities. CEZ modified[39] its proposed commitments to foresee that a contract would be entered into under which CEZ would retain the ownership of the water treatment facilities and the buyer of the Pocerady power plant would be entitled to source raw water in sufficient volumes for the unconstrained operation of the plant and at the price at which it is purchased from the original supplier; the water treatment and processing services would be provided on a cost plus basis.

(74) Overall, therefore, the observations received did not allow the Commission to identify new competition concerns and contained no points such as to make the Commission reconsider the concerns it expressed in the preliminary assessment. However, the replies to the market test raised some doubts as to the suitability of the Detmarovice power plant to meet the identified competition concerns. In order to take account of the results of the market test, CEZ removed the Detmarovice power plant from the list of proposed commitments.

(75) The proposed divestiture of any of the three remaining generation assets would enable a new credible market entry on the scale corresponding to the size of a project which could have been pursued by a competitor of CEZ. Hence, they represent a suitable remedy to the competition concerns identified in the preliminary assessment.

(76) The Commission therefore maintains the position that it took in the notice pursuant to Article 27(4) of Regulation (EC) No 1/2003, namely that the commitments are adequate to meet the competition concerns expressed in the preliminary assessment.

(77) CEZ submitted the final version of the commitments on 6 March 2013. In addition to removing the Detmarovice power plant (see recitals (52) - (56)), CEZ introduced additional modifications (see recitals (63) - (73)) in order to take account of the suggested partial adjustments and/or clarifications of the commitments received in accordance with the notice pursuant to Article 27(4) of Regulation (EC) No 1/2003 and accepted by the Commission (see recitals (63) - (73)).

7. PROPORTIONALITY OF THE AMENDED COMMITMENTS

(78) According to settled case law the principle of proportionality requires that the measures adopted by Community institutions must not exceed what is appropriate and necessary for attaining the objective pursued.[40] When there is a choice between several appropriate measures, recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued.[41]

---

[39] See for modifications page 18 of the commitments.

[40] Case T-260/94 *Air Inter v Commission* [1997] ECR II-997, paragraph 144, and Case T-65/98 [2003] ECR II – 4653 *Van den Bergh Foods v Commission*, paragraph 201.

[41] Case 265/87 *Schräder* [1989] ECR 2237, paragraph 21, and Case C-174/05 *Zuid-Hollandse Milieufederatie and Natuur en Milieu* [2006] ECR I – 2243, paragraph 28. For the application of the

(79) The commitments in their final form allay the Commission's competition concerns expressed in the preliminary assessment. Given that the conduct which gave rise to the Commission's concerns consisted of pre-emptive booking of transmission capacity which in turn effectively prevented new entry into the Czech electricity market, transfer of some of CEZ's generation capacity to a competitor represents a clear-cut solution to the identified competition concerns. Transfer of generation capacity is necessary in this case as no other type of remedy can address the effects of CEZ's conduct.

(80) The divestiture of approximately 800 – 1 000 MW of generation capacity constitutes a structural remedy which has been offered by CEZ on a voluntary basis in the context of a procedure according to Article 9 of Regulation (EC) No 1/2003 to address the concerns of the Commission on the Czech market for generation and wholesale supply of electricity. The public consultation according to Article 27 (4) of Regulation (EC) No 1/2003 has confirmed that the commitments offered by CEZ were sufficient to address the Commission's concerns without imposing disproportionate conditions on either CEZ or third parties.

(81) The commitments in their final form are sufficient to address the concerns identified by the Commission in its preliminary assessment without being disproportionate.

(82) The remaining elements of the commitments are transitional and ancillary to the main commitments. These include the preservation of the viability of the business to be divested, the hold-separate obligations, and the provisions on ring-fencing, non-solicitation, due diligence and reporting as well as the role conferred upon the Trustee. These provisions are necessary to ensure the implementation of the commitments offered by CEZ. They are also proportionate. Finally, they reflect the standard practice of the Commission in case of divestiture remedies in merger proceedings according to the Commission notice on remedies acceptable under Council Regulation (EEC) No 4064/89 and under Commission Regulation (EC) No 447/98.[42]

8. CONCLUSION

(83) By adopting a decision pursuant to Article 9(1) of Regulation (EC) No 1/2003, the Commission makes the commitments proposed by the undertaking concerned binding upon it. Recital 13 of the Preamble to the Regulation (EC) No 1/2003 states that such a decision should not conclude whether or not there has been or still is an infringement. The Commission's assessment of whether the commitments offered are sufficient to meet its concerns is based on its preliminary assessment, representing the preliminary view of the Commission based on the underlying investigation and analysis, and the observations received from third parties following the publication of a notice pursuant to Article 27(4) of Regulation (EC) No 1/2003.

(84) In the light of the commitments offered, the Commission considers that there are no longer grounds for action on its part and, without prejudice to Article 9(2) of

---

principle of proportionality specifically to Commission decisions adopted under Article 9 of the Regulation (EC) 1/2003, see Case C-441/07 P *European Commission v Alrosa Company Ltd* [2010] ECR I – 5949, paragraphs 38-41 and 46-50.

[42] OJ C 267, 22.10.2008, p. 1–27

Regulation (EC) No 1/2003, the proceedings in this case should therefore be brought to an end.

(85) The Commission retains full discretion to investigate and to open proceedings under Article 102 of the Treaty and Article 54 of the EEA Agreement as regards practices that are not the subject matter of this Decision.

HAS ADOPTED THIS DECISION:

Article 1

The commitments as listed in the Annex shall be binding on CEZ, a.s.

Article 2

It is hereby concluded that there are no longer grounds for action.

Article 3

This Decision is addressed to:

CEZ, a.s.
Duhová 2/1444
Praha 4
140 53
Czech Republic

Done at Brussels,

For the Commission
Joaquín ALMUNIA
Vice-President

ANNEX

THE COMMITMENTS