

THE CASE AGAINST THE SWEDISH TRANSMISSION SYSTEM OPERATOR (TSO) SVENSKA KRAFTNAT FOR ABUSE OF A DOMINANT POSITION

(Case 39351) 2009-2010

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ABSTRACT

The case initiated against Swedish transmission system operator Svenska Kraftnät by the Danish company Dansk Energy before European Commission is demonstrating the position according to which a fact that the undertaking has a great market power and a dominant position does not automatically by itself represent a violation of competition rules: However, according to a regulator and the court practice such an undertaking should have a special responsibility. The European Commission opened proceedings against SvK primarily due to suspected abuse of a dominant position of the company SvK, given its monopoly as the exclusive operator of the Swedish electricity transmission network, by limiting the transmission capacity between Swedish interconnectors and interconnectors of neighboring countries and thus preventing proper functioning of the internal electricity market.

It is to be considered that the ability to prevent the maintenance or development of competition is reflected when an undertaking with a dominant position has the ability to significantly close the access to the market to other undertakings, or the ability to determine the conditions under which it will develop market competition with competitors in horizontal market position. This case is providing with examples of typical forms of closing of the related markets by performance of the related business, rejection of business operations and deny of access to “necessary means”.

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1. INTRODUCTION

This paper provides analyze of the procedure initiated on July 20th 2006 before the European Commission (hereinafter referred to as the “Commission”) by Dansk Energi, trade and professional association of companies engaged in energy activities in Denmark (hereinafter referred to as “DaE”) against the company Svenska Kraftnät commissioned to maintain, operate and develop the national transmission grid for electric power (hereinafter referred to as “SvK”) regarding the abuse of a dominant position.¹

The institution of a dominant position² in the competition law of the European Union is not regulated by specific provision, but is defined through the practice of the European Court³. Since the provisions on abuse of a dominant position are prior to those relating to the control of concentration (Article 82 of the EC Treaty, in force since 1958), the Court’s definition of a dominant position is given in the context of the assessment of abuse of a dominant position. Nevertheless, it can be applied in the context of Article 82 and in the context of the application of rules for assessment of the concentration of undertakings. European Court rejected Commission’s suggestion to differ the institute of dominant position on the basis of the Regulation on the control of concentrations between undertakings from the institute of dominant position related to abuse.⁴

According to the case-law, an undertaking is in a dominant position⁵, if it has the ability to behave independently of its competitors, customers, suppliers

¹ The concept of a dominant position was defined in the case of the European Court United Brans v Commission of the European Communities, C-27/76 [1978] ECR 207.: „The dominant position to a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers“

² See more about dominant position in Sabolic D.: Tržišno natjecanje i regulacija u sektoru električne energije i elektroničkih komunikacija. Priručnik za studente na kolegiju Pravo konkurenčije (Market competition and regulation in the electricity and electronic communications sector. Handbook for students at the Competition Law course) Faculty of Economics in Zagreb, 2015, Zagreb.

³ See more about the development of EU competition law in Monti G. EU Competition Law, Cambridge University Press, Cambridge, 2007.

⁴ Pecotić Kaufman J., Nadzor koncentracija poduzetnika u pravu tržišnog natjecanja Europske unije – pet godina nakon reforme (Control of concentration of undertakings in the competition law of the European Union - five years after the reform), Pravo i porezi (Law and taxes), October 2009; RRIF, Zagreb, 2009.

⁵ See more in Šoljan V.; Vladajući položaj na tržištu i njegova zlouporaba u pravu tržišnog natjecanja Europske zajednice (Abuse of Dominant Position on the Market in the European Community Competition Law) Ibis grafika d.o.o. Zagreb, 2004.

and, ultimately, the final consumer⁶. Such position means that the undertaking can increase prices without being adversely affected. If an undertaking did not have such a position, competition and market conditions would result in decreasing his market share due to the increased prices and would thus reduce its profitability.

This paper shall provide analyze the manner in which the Commission has applied the competition rules in order to encourage the integration of the Nordic countries in the energy sector. This paper ignores the political debate related to this case that was led in the Nordic countries⁷.

2. CASE SVENSKA KRAFTNAT (C-39351)

2.1. GROUNDS FOR THE SUBMISSION OF COMPLAINTS TO THE EUROPEAN COMMISSION

DaE emphasized in its complaint that SvK has a policy of limiting transmission capacity through the interconnectors (transmission capacity between electric power systems of neighboring countries) through the Öresund interconnector between southern Sweden and eastern Denmark. DaE also stated in its complaint that SvK has a policy of limiting transmission capacity through the Öresund interconnector not for reasons of securing supply of electricity but for reasons of lowering costs connected to counter-trade and also in order to lower the *spot market* price in Sweden.

Further, DaE alleged that such policy of limiting transmission capacity by SvK has a damaging effect on competition and trade within the internal market of the European Union⁸, and especially to the detriment of consumers in eastern Denmark. DaE, as an association of energy companies in Denmark also alleged that DaE is directly concerned by such a policy of SvK which by using its market position⁹ and by limiting transmission capacity through the inter-

⁶ See more in Commission notice on the definition of the relevant market for the purposes of Community competition law, OJ C 372, 9.12.1997, p. 5–13.

⁷ See more in Sadowska M., Willems B: Power Markets Shaped by Antitrust, Tilburg Discussion Paper Vol 2012-043, 2012, Tilburg.

⁸ See more about the internal market of EU in Bodiroga-Vukobrat, N., Horak, H., Martonović, A.: Temeljne gospodarske slobode u Europskoj uniji, Inženjerski biro (Fundamental economic freedoms in the European Union), Inženjerski biro, Zagreb, 2011.

⁹ See more about the method of determining the market power in Sabolic D.: Tržišno natjecanje i regulacija u sektorima električne energije i elektroničkih komunikacija. Priručnik za studente na kolegiju Pravo konkurenkcije, Ekonomski fakultet u Zagrebu (Market competition and regulation in the electricity and electronic communications sector. Handbook for students

connectors caused a limited electricity export in Denmark, inflation of prices in eastern Denmark, restricting effective competition and finally harming of consumers in the area.

Accordingly, DaE requested that the Commission initiates proceedings against SvK under 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 European Commission Treaty (hereinafter referred to as “Regulation 1/2003”)¹⁰ and 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 European Commission Treaty (hereinafter referred to as “Regulation 773/2004”)¹¹ for an abuse of dominant position.

After the above complaints, the Commission used its investigative powers of Chapter V of Regulation 1/2003 and also expanded the scope of its investigation to the overall conduct of SvK regarding the interconnectors to all the Swedish borders, not just on the border with Denmark¹².

at the Competition Law course, Faculty of Economics in Zagreb), 2015, Zagreb,: “Although the concept of market power is the easiest to illustrate using the indicators of the relative difference between the sale price and marginal costs, such as the Lerner index, such a description is not entirely appropriate, since the price captures only the behavior of the undertaking towards its customers. Another aspect that is important in describing the market power is conduct of the undertaking towards its competitors on the market. It is probably not possible to define a particularly convenient synthetic indicator there. The point is, however, that the undertaking for which we can say that it enjoys a position of market power has the ability to arbitrarily and strategically impact competitors and the market as a whole. This influence does not have to be absolute. However, the market power of the undertaking increases as the undertaking gets more independent in its strategic moves. The term strategic impact includes measures of business policy that management of the undertaking implements to lead the undertaking to a better market position in the long term than its competitors, and subsequently, to lead its competitors to inferior market position.”

¹⁰ 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 establishing the European Community (Official Journal L 001/1 from 16 December 2002).

¹¹ 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 establishing the European Community Official Journal L 123 from 27 April 2004)

¹² See more about conduct and operation of SvK in Sadowska M., Willems B: Power Markets Shaped by Antitrust, Tilec Discussion Paper Vol 2012-043, 2012, Tilburg.

2.2. PROCEEDINGS BEFORE THE EUROPEAN COMMISSION

The Commission opened the formal process for potential violation of the European Union law regarding the prohibition of abuse of dominant position¹³ against the company SvK, commissioned to maintain, operate and develop the national transmission grid for electric power, which includes all the interconnectors with neighboring countries owned by the Kingdom of Sweden (interconnectors between the Kingdom of Sweden and Germany are not owned by Sweden, however SvK as the owner of the transmission grid in Sweden can influence and thereby reduce the available capacity for this interconnector as well).¹⁴

The Commission opened the respective proceedings to make a decision based on Chapter III. Regulation 1/2003, which regulates Commissions decisions in relation to the establishment and elimination of violations of the current Articles 101 and 102 of the Treaty on the Functioning of the European Union (hereinafter referred to as “TFEU”).¹⁵

Both cited articles are part of the chapter of the TFEU which incorporates competition rules applicable to undertakings. In this regard, Article 101 TFEU prohibits agreements between undertakings which are not in compliance with the internal market, i.e. those that may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market¹⁶.

¹³ See more in Šoljan V.; Vladajući položaj na tržištu i njegova zlouporaba u pravu tržišnog natjecanja Europske zajednice (Abuse of Dominant Position on the Market in the European Community Competition Law); Ibis grafika d.o.o. Zagreb, 2004.

¹⁴ See more about the fundamental economic freedoms in Bodiroga-Vukobrat, N., Horak, H., Martinović, A.: Temeljne gospodarske slobode u Europskoj uniji (Fundamental economic freedoms in the European Union), Inženjerski biro, Zagreb, 2011.

¹⁵ Treaty on the functioning of the European Union published in the Official Journal of the European Union C 202, of 7 June 2016.

¹⁶ *Article 101.TFEU (ex-Article 81 of the Treaty Establishing the European Community (TEC))*: “1. The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices 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, and in particular those which:

(a) directly or indirectly fix purchase or selling prices or any other trading conditions;
(b) limit or control production, markets, technical development, or investment;
(c) share markets or sources of supply;
(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

Article 102 TFEU prohibits any abuse of a dominant position by one or more undertakings within the internal market or in a substantial part of it as incompatible with the internal market in so far as it may affect trade between Member States.¹⁷¹⁸.

The Commission opened these proceedings against SvK primarily due to suspected abuse of a dominant position of the company SvK, given its monopoly as the exclusive operator of the Swedish electricity transmission network, by limiting the transmission capacity between Swedish interconnectors and interconnectors of neighboring countries and thus preventing proper functioning of the internal electricity market.

The Commission considered that the above stated conduct of SvK may put consumers in Sweden in a more favorable position than consumers in coun-

(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.

3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

- any agreement or category of agreements between undertakings,

- any decision or category of decisions by associations of undertakings,

- any concerted practice or category of concerted practices,

which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;

(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.”

¹⁷ See more about the abuse of the market competition in Šoljan V.; Vladajući položaj na tržištu i njegova zloupornba u pravu tržišnog natjecanja Europske zajednice (Abuse of Dominant Position on the Market in the European Community Competition Law); Ibis grafika d.o.o. Zagreb, 2004.

¹⁸ Article 102. TFEU (*ex-Article 82 of the Treaty Establishing the European Community (TEC)*) glasi: Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States.

Such abuse may, in particular, consist in:

(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;

(b) limiting production, markets or technical development to the prejudice of consumers;

(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

tries bordering with Sweden and other EU Member States, since in such a way electricity produced in Sweden was kept for domestic (Swedish) consumption and its export over Swedish borders was disabled¹⁹.

Further, in its Preliminary Assessment of 25 June 2009 (hereinafter referred to as “Preliminary Assessment”) the Commission raised concerns that SvK may have abused its dominant position by treating requests for transmission for the purpose of consumption within Sweden differently from requests for transmission for the purpose of export, thereby discriminating between different network users. In that way SvK may have artificially segmented the market and the Commission has not established an objective justification for such conduct.

SvK did not agree with the Preliminary Assessment of the Commission and pointed out in its defense that SvK limited electricity exports to avoid internal congestion and bottlenecks in the Swedish transmission system managed by SvK, which ensures stable operation of the system.²⁰

Describing the situation in the Swedish power system in the Preliminary Assessment, the Commission primarily pointed out that bottlenecks in Sweden are a result of unequal distribution of demand and supply for electricity on the Swedish territory. In fact, most of the Swedish electricity demand is located in the south of Sweden, while the generation facilities in the country are not distributed in the same way as consumption. Thus, the excess of electricity produced in the north of the country should be transferred to the south where the majority of consumption takes place.

Furthermore, the Commission, referring to the information made available, stated that the largest installed capacity for production of electricity in Sweden is provided from hydropower plants and nuclear plants, in total 25.3 GW of installed capacity i.e. 76% of total installed capacity for electricity production in Sweden. Electricity produced in that manner mostly supplies the demand for electricity in Sweden.

In addition, the Commission pointed out that the use of such technologies has lower marginal costs than thermal technologies and that in the periods when hydropower and nuclear power can serve all of demand in Sweden, the price in Sweden is directly influenced by lower marginal costs of electricity production

¹⁹ See more in Sabolić, D.: “Tržišna alokacija prekograničnih prijenosnih kapaciteta, elektronički prilog doktorskoj disertaciji “Ekonomski regulacija međuoperatorskog poravnjanja i upravljanja zagušenjima na tržištu električne energije” (Market allocation of cross-border transmission capacity, electronic appendix to the doctoral thesis “Economic Regulation of the inter-operational settlement and congestion management in the electricity market), Sveučilište u Splitu, Ekonomski fakultet 2016.

²⁰ Ibid.

from hydropower and nuclear power plants. Consequently, the prices in Sweden are lower than those of other zones where demand can rarely be met only by such cheaply generated electricity. Such situation occurs in eastern and western Denmark, which area relies on cheap imported electricity. However, the demand of such produced electricity can rarely be met, which is why the use of more expensive thermal power plants, whose marginal costs are considerably higher than the use of hydro power and nuclear power plants, is required.

The Commission also concluded that the Swedish electricity network emerges congestions and bottlenecks not only due to the imbalance between supply and demand on the north and the south of Sweden, but also because in the north of Sweden cheap electricity is imported from Norway and on the south of Sweden electricity is exported to the area of the continental Europe.²¹.

Further, the Commission stressed the fact that, in the long term, investments to expand or reinforce capacity in the network can primarily remedy the congestion in the transmission grid. Without prejudice to the investment in the network, the Commission proposed three types of measures to relieve internal network congestion in the shorter term²², namely:

- to create separate price areas on both sides of the bottleneck and hence give price signals to increase production and decrease consumption in the higher-priced side of the bottleneck;
- to pay generators or large consumers on both sides of the bottleneck to change their planned production or consumption, which effectively reduces the transmission flow on the bottleneck;
- to limit available transmission capacity for trade with another zone in Sweden, to relieve the foreseen congestion on the bottleneck within Sweden's network.

Through market mechanism, *inter alia*, congestions are managed by sending price signals to traders and other market participants about the availability of each individual limit for energy transmission through it. Keeping in mind that the limit at which the high rates of transmission capacity are consistently achieved is clearly congested, traders have a direct financial stimulus to try to find an alternative boundary (or more) over which they can transmit the energy

²¹ See more in Sabolić, D.: "Tržišna alokacija prekograničnih prijenosnih kapaciteta, elektronički prilog doktorskoj disertaciji "Ekonomski regulacijski međuoperatorski poravnanje i upravljanja zagušenjima na tržištu električne energije" (Market allocation of cross-border transmission capacity, electronic appendix to the doctoral thesis "Economic Regulation of the inter-operational settlement and congestion management in the electricity market) Sveučilište u Splitu, Ekonomski fakultet 2016.,

²² See more in Sadowska M., Willems B: Power Markets Shaped by Antitrust, Tilec Discussion Paper Vol 2012-043, 2012, Tilburg.

from its (agreed) source to its destination, thus relieving the pressure on the clearly congested border.²³

Additionally, according to the Commission's Preliminary Assessment, SvK limited electricity exports, due to internal bottlenecks, on several interconnectors in the Swedish transmission grid from January 2002 to April 2008. In relation to this, the Commission emphasized that SvK limited the transmission capacity on the interconnectors, among others, towards Denmark and Poland, while SvK almost never limited the interconnectors' export capacity towards central and northern Norway.²⁴.

Furthermore, the proportion of the capacity curtailed by SvK due to internal congestion has on average exceeded half of the overall interconnector capacity on all interconnectors in most years within the investigated period. In hours when capacity limitation and congestion on the interconnectors have occurred due to the behavior of SvK in Sweden, the average prices in the neighboring countries were significantly higher than the prices in Sweden. The Commission therefore concluded that the prices in Sweden's neighboring countries would have been lower if there were not any limitations of export capacities.

In relation to the proceedings described herein, the Commission announced in its report for the press of 6 October 2009 that it considers the respective case as contribution to strengthening the integration of the internal market of the European Union²⁵, with the aim of increasing the competitiveness leading to lower prices and higher quality of provided services as well as improvements in the security of sufficient electricity supply.

2.3. COMMITMENTS OF COMPANY SVENSKA KRAFTNAT

In accordance with Regulation 1/2003 the company SvK, although it objected Commissions allegations from the Preliminary Assessment, offered to meet certain obligations undertaking to remedy the potential negative effects of its

²³ Sabolić, D.: "Tržišna alokacija prekograničnih prijenosnih kapaciteta, elektronički prilog doktorskoj disertaciji "Ekonomski regulacijski međuoperatorski poravnanje i upravljanja zagušenjima na tržištu električne energije" (Market allocation of cross-border transmission capacity, electronic appendix to the doctoral thesis "Economic Regulation of the inter-operational settlement and congestion management in the electricity market), Sveučilište u Splitu, Ekonomski fakultet 2016.

²⁴ Ibid

²⁵ See more in Bodiroga-Vukobrat, N., Horak, H., Martinović, A.: Temeljne gospodarske slobode u Europskoj uniji (Fundamental economic freedoms in the European Union), Inženjerski biro, Zagreb, 2011.

actions stated in the Preliminary Assessment of the Commission²⁶ (hereinafter referred to as “Commitments from September 2009”). SvK subsequently supplemented the Commitments from September 2009 and provided the final commitments to the Commission from 26 January 2010 (hereinafter referred to as “Final Commitments”).

Pursuant to the Commitments from September 2009, SvK offered a commitment to subdivide the Swedish transmission system into two or more bidding zones where it is possible to geographically determine different market prices. SvK committed to operate the Swedish transmission system by subdividing it into the abovementioned bidding zones by 1 July 2011 at the latest.

In doing so, the configuration of the bidding zones would be flexible enough so that the Swedish transmission system can quickly be modified to adapt to foreseen and unforeseen changes in the future flow patterns on the transmission system. From the date the bidding zones are operative, SvK intended to manage congestions (conditions in which the transmission capacity of the transmission system on some of its parts is not sufficient to cover the demand for transmission) in the Swedish transmission system without limiting trading capacity on interconnectors²⁷.

It is important to emphasize that SvK excluded the area in the West-Coast-Corridor of Sweden from the bidding zones due to technical reasons. SvK committed to reinforce the West-Coast-Corridor section by building and operating a new 400 kV transmission line between Stenkullen and Strömma-Lindome by 30 November 2011²⁸.

SvK proposed to implement Commitments from September 2009 10 years from the date on which the Commission will decide on the acceptance of those commitments and file reports to the Commission every three months at the beginning and annually after putting the bidding zones into operation.

²⁶ In Article 9. Regulation 1/2003 undertakings were given a possibility to offer commitments to meet concerns expressed to them by the Commission in its preliminary assessment. If the Commission accepts the proposed commitments offered by undertakings, its decision obliges undertakings to adopt these commitments which will eliminate the negative effects of the undertakings conduct from the preliminary assessment of the Commission and determines that there are no longer grounds for action by the Commission.

²⁷ See more in Sabolić, D.: “Tržišna alokacija prekograničnih prijenosnih kapaciteta, elektronički prilog doktorskoj disertaciji “Ekonomска regulacija međuoperatorskog poravnjanja i upravljanja zagušenjima na tržištu električne energije” (Market allocation of cross-border transmission capacity, electronic appendix to the doctoral thesis “Economic Regulation of the inter-operational settlement and congestion management in the electricity market), Sveučilište u Splitu, Ekonomski fakultet 2016.

²⁸ Ibid.

2.4. INTERESTED THIRD PARTY OBSERVATIONS

Pursuant to Article 27 of Resolution 1/2003, the Commission published a short summary of the proceedings opened against SvK in the Official Journal of the European Union C 239/9 of 6 October 2009, as well as the basic content of the Commitments from September 2009, which document served as a public notice to all the interested third parties to submit their comments and observations on the Commitments from September 2009 (hereinafter referred to as “Public notice”).

All interested third parties were invited to provide the Commission with their comments and observations on the proposed commitments to SvK within one month from the date of publication of the Public notice in the Official Journal of the European Union. The Commission also specifically invited the interested third parties to give their observations on the SvK commitments with respect to excluding the area in the West-Coast-Corridor of Sweden from the bidding zones.²⁹

In response to the Public notice, the Commission received 27 responses from interested third parties. In order to analyze the respective case it is of importance to mention the most important observations from the interested third parties along with Commission’s statement on certain responses, highlighted in the Commission’s decision of 14 April 2010, as follows:

- 1. Observation on the adequacy of bidding zones as a remedy to tackle internal congestion in Sweden’s transmission system.*

Some respondents argued that the bidding zones are not the right remedy to tackle internal congestion in the Swedish transmission system and that network investments and counter-trade would better solve the competition concerns identified in the Commission’s Preliminary Assessment.

As subdividing the Swedish transmission system into two or more bidding zones was the principal commitment proposed by SvK, the Commission held the proposed commitment sufficient and proportionate to eliminate the above-mentioned concerns, as explained below.

- 2. Observation on the impact of bidding zones on concentration and prices in Sweden.*

Certain respondents argued that the introduction of bidding zones would lead to increased concentration on retail, wholesale and balancing markets in

²⁹ See more in Sadowska M., Willems B: Power Markets Shaped by Antitrust, Tilburg Discussion Paper Vol 2012-043, 2012, Tilburg.

Sweden. In addition, some respondents pointed to potentially higher prices in southern Sweden, due to introduction of bidding zones.

After reviewing the respective comments on the Public notice from the interested third parties, the Commission took the view that neither the comments on concentration nor the comments on higher prices require a modification of Commitments from September 2009 by SvK, due to the fact that concentration in electricity markets is a result of physical factors (such as network topology and location of production and demand in the network). Furthermore, since the concentration existed before the introduction of bidding zones, they do not have an impact on the occurrence and increase of such concentration³⁰.

In addition to the above, some respondents argued that the complexities of zones will create additional costs and risks for retailers which will deter entry in retail markets, thereby leading to more concentration on retail markets than currently. In this respect, the Commission emphasized it is correct that the subdivision into bidding zones will affect market conditions and, consequently, the risk policy of market participants³¹.

The Commission further notes that introduction of bidding zones will prevent a distortion of price signals and reflect real market conditions (prices will increase in the zones where there is a deficit of cheap generation or in zones where consumption is significant and vice versa). These price signals will give clearer indications to investors on the most relevant places to build new generation capacities³².

³⁰ During the investigation, the Commission concluded that in countries where several bidding zones are operated by transmission system operator, the retail markets remain competitive and that it is therefore clear that bidding zones, in themselves, are not an obstacle to competition. The Commission also emphasized that it was found in a survey carried out by the Nordic Council of Ministers in 2008 that the introduction of bidding zones in Sweden would be positive for the European consumers and should pave the way for more transparent energy markets for final customers in Sweden, and in the Union.

³¹ The Commission emphasized that the market participants dispose with instruments such as Contracts for Differences (“CfD contracts”) to manage the risk in the short term. In addition and in the longer term, market participants may invest in new generation capacities so that they are able to meet the demand of customers that are located in zones where generation capacities are scarce.

³² Some respondents complained that prices will increase due to the new system of zones. First, to the extent that one can anticipate how prices will change after subdivision, prices will likely not increase in all future bidding zones in Sweden. It is therefore likely in the near future that in northern Sweden, electricity prices will decrease due to excess of cheap hydro generation and lack of sufficient transmission capacity between north and south. In southern Sweden, prices will likely increase in the near future due to insufficient amount of cheap generation assets in that area and the lack of transmission capacity from northern Sweden. This is a necessary consequence of the remedy which puts an end to the alleged discrimination between Swedish and non-Swedish customers which is not compatible with Article 102 TFEU.

Some consumers in south Sweden complained that the introduction of bidding zones will affect the prices for the industry in south Sweden and that will affect their ability to compete in their own markets. Commission responded to the complaints of consumers in south Sweden that the introduction of bidding zones will affect the prices for the industry in south Sweden and that will affect their ability to compete in their own markets explaining that other European industrial customers outside Sweden faced unfair competition from Swedish industrial customers that were paying for their electricity at prices which do not reflect market conditions. The Commission also stated that bidding zones will result in prices reflecting true market conditions.

3. Observation on the deadline of introduction of bidding zones.

Some respondents to the Commission's Public notice argued that the introduction of bidding zones as early as from 1 July 2011 would jeopardize some of the financial and long-term supply contracts that have already been signed. Some energy suppliers and traders signed CfD contracts traded on Nord Pool ASA, European stock exchange for electrical energy which financial contracts expired in 2012. According to those market players, an early introduction of the bidding zones would change the value of the abovementioned financial contracts and result in some of them incurring losses. In addition, other respondents objected the introduction of bidding zones from 1 July 2011 due to the fact that they signed fixed-price long-term supply contracts with final customers.

The Commission took the view that the above stated arguments do not justify the delay of introduction of the bidding zones explaining that financial contracts bear risk factors and that indications that the bidding zones would be implemented in Sweden existed at the time of entering into those contracts, which introduction is one of many risks market players are exposed to³³.

4. Observation on the impact of bidding zones on new investment projects on renewable energies.

Some respondents argued that the introduction of bidding zones will reduce the incentives to build more generation based on renewable energy in Swedish territory. They underlined the fact that the largest potential to invest in renewable energy is located in northern Sweden. As the introduction of bidding zones may prompt a decrease in prices in northern Sweden, some respondents found it was likely that some investment projects to build more renewable in

³³ See more in Sadowska M., Willems B: Power Markets Shaped by Antitrust, Tilburg Discussion Paper Vol 2012-043, 2012, Tilburg.

northern Sweden would not be profitable any longer and would be given up. As a consequence, market players were fearing that the objective to reach an ambitious share of renewable energy in the overall electricity generation in Sweden for 2020, as laid out in Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC (Official Journal of the European Union, L 140/16 of 05 June 2009), may not be achieved.

The Commission emphasized, in response to the abovementioned argument, that the network in Sweden in this stage is not able to transport at all times all electricity from the north to the south of Sweden, where the electricity is essentially consumed. Therefore, adding more renewable generation in the north would simply increase the already existing bottlenecks in Sweden and new renewable generation could not be transmitted to the south where most of the electricity is consumed. Also, as electricity cannot be stored in large scale, investing in more renewable generation in the north cannot effectively contribute to a larger proportion of renewable generated electricity.³⁴ The Commission also noted that Sweden has a green certificate scheme aimed at promoting renewable energy sources which is independent from bidding zones.

5. Observation on the measures foreseen in the interim period until the bidding zones become operative.

In the interim period until the bidding zones become operative, SvK proposed it will introduce an increased use of counter-trade as a measure that will limit curtailments until the bidding zones are operative. In this regard, some of the interested parties expressed concern that the proposed measures were not clearly explained. Furthermore, they criticized that only resources in Sweden (production unit or unit of consumption that can increase or reduce energy or electricity production in the short term) and no foreign resources for counter-trade were considered. In accordance with aforementioned, SvK modified its Commitments from September 2009 with a revised proposal submitted in the Final Commitments in which SvK clarified the counter-trade procedure and included non-Swedish resources for counter-trade, under certain conditions.

³⁴ See more in Sabolić, D.: "Tržišna alokacija prekograničnih prijenosnih kapaciteta, elektronički prilog doktorskoj disertaciji "Ekonomска регулација међуoperatorsког поравњања и управљања загушењима на тржишту електричне енергије" (Market allocation of cross-border transmission capacity, electronic appendix to the doctoral thesis "Economic Regulation of the inter-operational settlement and congestion management in the electricity market), Sveučilište u Splitu, Ekonomski fakultet 2016.

As stated below, after the submission of responses to the Public notice, SvK supplemented the Commitments from September 2009 and provided the Final commitments to the Commission from 26 January 2010 in which SvK extended the implementation period for the introduction of bidding zones in the Swedish transmission system until 1 November 2011, specified the counter-trade procedure and included non-Swedish resources for counter-trade (production units or units of consumption that can increase or reduce energy or electricity production in the short term).

2.5. THE DECISION OF THE EUROPEAN COMMISSION

The Commission rendered a Decision on 14 April 2010 which obliges SvK to comply with the obligations from the Final Commitments and which, at the same time, terminates the proceedings opened against company SvK (hereinafter referred to as “Commission’s Decision”).

The proceedings against SvK were terminated by the Decision in accordance with the Article 9 of the Regulation 1/2003, since there were no longer grounds for action on Commission’s part taking into consideration that the Final Commitments are sufficient to meet the concerns based on the Preliminary Assessment and eliminate the negative effects of SvK’s conduct.

Taking into account the market situation and the measures that had been available to the Commission it is interesting how the Commission grounded its decision in this, technically very complex case³⁵.

In particular, explaining the suitability of measures that SvK obliged to implement in the Final Commitments in order to eliminate the negative effects from the Preliminary Assessment, the Commission stated that the abovementioned obligations of SvK are appropriate to address the concerns from the Preliminary Assessment and are in accordance with the principle of proportionality.

³⁶ As is well known, the principle of proportionality as one of the fundamental principles of the European Union obliges the EU institutions to maintain proportionality between the objectives to be achieved and the means used to achieve such objectives. Also, the principle of proportionality requires that when there is a choice between several appropriate measures recourse must be had to the least onerous one for the included obligor.

³⁵ See more in Sadowska M., Willems B: Power Markets Shaped by Antitrust, Tilec Discussion Paper Vol 2012-043, 2012, Tilburg.

³⁶ See more about the principle of proportionality in Šoljan V.; Vladajući položaj na tržištu i njegova zloupornba u pravu tržišnog natjecanja Europske zajednice (Abuse of Dominant Position on the Market in the European Community Competition Law); Ibis grafika d.o.o. Zagreb, 2004.

In relation to the abovementioned, the Commission also concluded that the exclusion of the West Coast Corridor from the commitments of bidding zones and counter-trade is a proportionate measure due to the technical reasons and that imposing such measures to SvK would not be in accordance with the principle of proportionality since the isolated topology of the West Coast Corridor contains insufficient flexible generation units that can provide electrical energy.

The Commission also emphasized that investment in the network can also be one of the measures to mitigate the problem of congestion in the Swedish national transmission system. However, while rendering the Commission's Decision, the Commission took into account that investments in the network require long leading times to be implemented (often more than ten years), and the outcome cannot be guaranteed because SvK cannot control all factors affecting the implementation of new networks.³⁷ Without prejudice to the abovementioned, the Commission pointed out that introduction of bidding zones and counter-trade do not prevent SvK from investing in new lines in Swedish transmission system.

Furthermore, the Commission concluded that SvK will not need to curtail capacity on the interconnectors on Swedish borders due to congestion in the transmission system after the introduction of two or more bidding zones. Particularly, the borders between zones will correspond to bottlenecks in the network, and the bidding zones will be separate markets in which consumers and generators will submit day-ahead bids indicating what they want to consume or produce in that bidding zone. The capacity on the links between the bidding zones will be made fully available to the market and the market will organize and automatically adjust through mechanisms which ensure sufficient transmission capacity.

With respect to the abovementioned, if congestion occurs on the links between two zones, the market-clearing mechanism, according to Commission, will automatically adjust the amounts of supply and demand cleared in each zone and set different prices for the two zones so that the amount of electricity transmitted between the zones is equal to the capacity between the zones. In this way, the market-clearing mechanism will eliminate the congestion. As a

³⁷ In its Decision the Commission stated, based on the principle of proportionality that the congestion in the West Coast Corridor will be alleviated through the only measure available to SvK, which is the building of the new 400 kV transmission line between Stenkullen and Strömma-Lindome by 30 November 2011. The Commission also emphasized that such measure is proportional having in consideration that imposing SvK commitments to introduce bidding zones or counter-trade in that area would be disproportionate due to technical condition of the electricity system in the corridor of the West Coast.

consequence, SvK will no longer need to curtail capacity on the interconnectors to other countries. Also, SvK will not need to curtail capacity due to congestion within zones because it will be able to carry out counter-trade within the zones to address such congestion.

In the Commission Decision, the Commission also addressed SvK's complaint that it cannot be considered as an undertaking within the meaning of Article 102 TFEU, since it is part of the state administration of the Kingdom of Sweden and does not have a legal personality. In this regard, the Commission concluded that SvK is within the scope of norm of the Article 102 TFEU, since it is engaged in economic activities as it provides its services on the electricity transmission market and is therefore considered to be an undertaking within the meaning of 102 Article TFEU. The Commission stated that the fact that SvK does not have a separate legal personality from that of the Kingdom of Sweden does not affect the conclusion that it is considered an undertaking within the meaning of Articles 101 and 102 TFEU, and emphasized that SvK, in matters of its competence, has a separate legal capacity³⁸.

3. CONCLUSION

This case has shown how various measures set out by the Commission (division into several zones, additional investment, counter-trade) may affect the prevention of discrimination against foreign generators and consumers of electricity in relation to domestic ones. In this manner, a greater integration of the energy market in the Nordic countries and the internal market is achieved.

The case has also demonstrated the position of the Commission according to which a mere fact that the undertaking has a great market power and a dominant position does not by itself represent a violation of competition rules: But in that case a regulator and the court practice are of the opinion that such an undertaking should have a special responsibility³⁹.

³⁸ See more in Sadowska M., Willems B: Power Markets Shaped by Antitrust, Tilec Discussion Paper Vol 2012-043, 2012, Tilburg.

³⁹ Significant consequences of the term "abuse" by applying the criteria of so called specific responsibility are evident in determining responsibility for insufficient efficiency in business management, and the use and development of production capacity and modern technology in cases Lucezeau v SACEM and Porto di Genova, computer manufacturer IBM obligation to promptly make available to its competitors all the necessary technical information necessary for the development of hardware and software compatible product upgrades - see more in Šoljan V.; Vladajući položaj na tržištu i njegova zlouporaba u pravu tržišnog natjecanja Europske zajednice (Abuse of Dominant Position on the Market in the European Community Competition Law); Ibis grafika d.o.o. Zagreb, 2004.

It is to be considered that undertaking have a dominant position when it has the ability to significantly close the access to the market to other undertakings, or the ability to determine the conditions under which it will develop market competition with competitors in horizontal market position. Typical forms of closing of the related markets are the performance of related business, rejection of business operations and deny of access to “necessary means”, while prevention of maintenance and development of market competition with competitors in horizontal market position can be manifested in the effects of implementation of agreement on the exclusive business and rejection of business operations in situations where a specific form of cooperation with a competitor is required so that a rival with a weaker position in the market could compete effectively.

Implementation of measures such as dividing the market into several zones and/or obliging the undertakings with a dominant position to make certain investments in infrastructure can stimulate a better integration of the market and its liberalization, which leads to a greater protection of consumer's interests, since ultimately they profit the most, because they have an ability to choose between different providers and lower prices of services. This method stimulates the development and integration of the European market, with the aim of optimal protection of the consumers whose interests are in the focus of the relevant bodies of the European Union.

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