General Court of the European Union
PRESS RELEASE No 93/12
Luxembourg, 29 June 2012

Press and Information

Judgment in Joined Cases T-360/09
E.ON Ruhrgas and E.ON AG and T-370/09 GDF Suez SA v Commission

The fines of €553 million imposed on GDF and E.ON for sharing the French and German markets for natural gas are reduced to €320 million for each company

The General Court confirms the main points of the decision but finds that the Commission committed an error as regards the duration of the infringement on each of the markets

By decision[1] of 8 July 2009, the Commission imposed a fine of €553 million on each of the energy companies E.ON and GDF Suez for infringing EU competition law by concluding a market-sharing agreement in respect of the French and German markets for natural gas.

That agreement was concluded in 1975 when Ruhrgas AG (now E.ON Ruhrgas, part of the E.ON group) and GDF (which is now part of GDF Suez) decided to construct together the MEGAL gas pipeline across Germany in order to import Russian gas to Germany and France. The Commission decided that, by that agreement ('the MEGAL agreement'), the undertakings agreed not to sell gas conveyed by that gas pipeline on each other's national markets.

As regards the French market, the Commission found that the infringement began on 10 August 2000, the date on which the First Gas Directive providing for the liberalisation of the gas market should have been transposed. Before that date, as a result of GDF's legal monopoly on the importation and supply of gas the conduct at issue could not have restricted competition. According to the Commission, although the First Gas Directive was not transposed in France until 2003, competition could have been restricted as from 10 August 2000, inasmuch as, as of that date, GDF's competitors could have supplied certain customers in France.

As regards the German market, the Commission used 1 January 1980, the date on which the MEGAL gas pipeline became operational, as the date when the infringement began. Contrary to the situation in France, there was no monopoly on the German market before the liberalisation of that market. The Commission thus found that GDF should have been regarded as a potential competitor of Ruhrgas' prior to liberalisation, despite the existence of certain agreements (separate from the MEGAL agreement) between energy distribution companies (demarcation agreements[2]) and between those companies and local authorities (exclusive concession agreements[3]) which were regarded as lawful until 24 April 1998 because of an exemption.

As regards the end of the infringement, despite the statement made by the two companies, in an agreement concluded on 13 August 2004, that they had long regarded the anti-competitive sections of the MEGAL agreement as 'null and void', the Commission found that that agreement had, in actual fact, continued to produce its effects until at least the end of September 2005. That date was therefore used by the Commission as the date on which the infringement ended on each of the markets.

E.ON and GDF Suez each brought an action against that decision before the General Court, seeking the annulment of that decision and a reduction in the amount of the fine which had been imposed upon them.

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[1] Decision C(2009) 5355 final relating to a proceeding under Article 81 [EC] (Case COMP/39.401 – E.ON/GDF).
[2] Under demarcation agreements, the undertakings agreed not to supply electricity or gas in each other's territories.
[3] Under exclusive concession agreements, a local authority granted an exclusive concession to a company, allowing it to use public terrain to construct and operate electricity and gas distribution networks.

In its judgments delivered today, **the General Court rejects most of the companies' arguments and confirms the main points of the Commission's Decision.**

However, as regards the duration of the infringement, the General Court holds that **the Commission made two errors.**

First, as regards the beginning of the infringement on the German market, the General Court notes that the simultaneous use of demarcation agreements and exclusive concession agreements (covered by an exemption until 24 April 1998) had the effect of establishing *de facto* a system of areas of exclusive supply, although there was no legal prohibition against other companies supplying gas. Consequently, until 24 April 1998, the date from which those agreements were no longer exempt, the German market for gas was characterised by the lawful existence of *de facto* territorial monopolies. That situation was likely to result in the absence of any competition, not only actual, but also potential, on that market and the fact that there was no legal monopoly in Germany is irrelevant. The General Court therefore holds that **the Commission has not established the existence of potential competition, between the two companies on the German market for gas from 1 January 1980 to 24 April 1998, which the MEGAL agreement could have adversely affected.** The General Court therefore annuls Article 1 of the contested decision inasmuch as it found that an infringement was committed in Germany from 1 January 1980 to 24 April 1998. It must be noted however that that period had not been taken into account for the purpose of setting the amount of the fine.

Secondly, as regards the end of the infringement on the French market, the General Court holds that **the Commission did not adduce any evidence to support the conclusion that the infringement on the French market continued following the agreement of August 2004.** By contrast, a number of documents subsequent to that agreement and GDF's conduct on the German market show that the infringement in Germany continued until September 2005. The General Court therefore annuls Article 1 of the contested decision inasmuch as it found that an infringement was committed in France from 13 August 2004 to 30 September 2005.

To take account of the partial annulment of Article 1 of the decision, the General Court holds that the amount of **the fine imposed on the two companies must be reduced.** The General Court takes the view that if it applied the method used by the Commission in setting the amount of the fine, that fine would be reduced to €267 million. Such a reduction would be disproportionate to the relative importance of the error which has been found to exist. Although that error on the part of the Commission relates only to the French market and only to 12 and a half months of the five years and one month initially established by the Commission, the application of the Commission's method would result in a reduction in the amount of the fine of more than 50%. In addition, considering that that method of calculation does not take into account all the relevant circumstances and pointing out that it is not bound by that method, the General Court holds that the final amount of the fine imposed on each company must, particularly in light of the duration and gravity of the infringement, be set at **€320 million.**

NOTE: An appeal, limited to points of law only, may be brought before the Court of Justice against the decision of the General Court within two months of notification of the decision.

NOTE: An action for annulment seeks the annulment of acts of the institutions of the European Union that are contrary to European Union law. The Member States, the European institutions and individuals may, under certain conditions, bring an action for annulment before the Court of Justice or the General Court. If the action is well founded, the act is annulled. The institution concerned must fill any legal vacuum created by the annulment of the act.

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Pictures of the delivery of the judgment are available from "Europe by Satellite" ☎ (+32) 2 2964106