

Survey

The Application of EU Competition Law in the Energy Sector

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I. Introduction

The year 2014 saw further steps towards the single European energy market, even if the stated goal of its creation by 2014 proved to be too ambitious.¹ New regulatory measures on a European and national level, increased cooperation between regulators and market players as well as competition law enforcement all played their part in advancing European energy markets towards the open and level playing field envisioned by political actors. The Commission used its competition law tools both to help break up former state monopolies as well as to ensure the free flow of energy across borders. Energy markets also remained in the focus of national competition authorities all over the continent.

In the following, we first introduce the regulatory framework of energy markets in the EU (B.) then describe the Commission's enforcement activities in 2014 (C.), before closing with an overview of national enforcement activities across Member States (D.).

II. Development of the regulatory framework of energy markets

European energy markets have undergone a liberalisation process over the last 20 years with the goal of creating a single European energy market. The removal of national monopolies and development of cross-border trade is hoped to lead to lower prices and better services for consumers—a study commissioned by the Commission expects annual net economic benefits of up to 40 billion Euros to be generated from a truly inte-

Key Points

- While the ambitious goal of completion of the single European energy market was not reached by 2014, overall European market integration has advanced further than ever, with competition law having played an important role in the process.
- National competition authorities have become the main drivers of the enforcement of competition law in the energy sector, with the Commission not opening a case for the first time since 2005—even though there are still major ongoing investigations in Brussels and the new Commissioner for Competition stating that the energy sector will remain a focus of DG Competition's work.

grated energy market.² The first liberalisation steps—a third-party access regime and protection mechanisms against discrimination by vertically integrated energy utilities—were taken in the mid to late 1990s.³ The so-called second energy package in 2003⁴ reinforced this process by imposing an obligation on Member States to fully open their electricity and gas markets by way of a regulated third-party access regime and far reaching rules on legal, operational, and informational unbundling.

Even before those measures were implemented by Member States, in 2005 the Commission launched a sector inquiry into the functioning of the European electricity and gas markets. The final report of this sector

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1 Cf. Commission (EC) 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Progress towards completing the Internal Energy Market' (13 October 2014) COM (2014) 634 final.

2 Booz & Company, 'Final Report – Benefits of an Integrated European Energy Market' prepared for Directorate-General Energy, European Commission (20 July 2013) http://ec.europa.eu/energy/infrastructure/studies/doc/20130902_energy_integration_benefits.pdf accessed 16 December 2014.

3 Council Directive (EC) 1996/92 of 19 December 1996 concerning common rules for the internal market in electricity [1997] OJ L27/20; Council Directive (EC) 1998/30 of 22 June 1998 concerning common rules for the internal market on natural gas [1998] OJ L204/1.

4 Council Directive (EC) 2003/54 of 26 June 2003 concerning common rules for the internal market in electricity and repealing Directive 96/92/EC [2003] OJ L176/37; Council Directive (EC) 2003/55 of 26 June 2003 concerning common rules for the internal market in natural gas and repealing Directive 98/30/EC [2003] OJ L176/57; Council Regulation (EC) No 1228/2003 of 26 June 2003 on conditions for access to the network for cross-border exchanges in electricity [2003] OJ L176/1; Council Regulation (EC) No 1775/2005 of 28 September 2005 on conditions for access to the natural gas transmission networks [2005] OJ L289/1.

inquiry identified several deficiencies then remaining in European energy markets, principally:⁵

- High market concentration, especially at the whole-sale level;
- Vertical foreclosure resulting from an insufficient level of unbundling between network operation on the one side and supply and/or generation activities on the other side;
- Insufficient cross-border capacities and different market designs constituting an obstacle to further market integration;
- Lack of efficient and transparent price formation as well as information asymmetry between incumbents and market entrants;
- Long contract duration and restrictive practices in relation to the operation of supply contracts resulting in the foreclosure of downstream markets; and
- In balancing markets, the existing balancing regimes were often found to favour incumbents and create obstacles for new market entrants.

To address the concerns identified in the sector inquiry, the Commission not only used its powers under the competition rules but also proposed further regulatory and structural measures leading to the third energy package, adopted in July 2009.⁶ The Regulations forming part of the third energy package entered into force on 3 March 2011, and most Member States had implemented the Directives by 2014, albeit with some delay.⁷ The third energy package introduced stricter rules on unbundling, a better coordination of the operation and development of networks across borders and the introduction of a new European Agency for Cooperation of Energy Regulators (ACER).⁸ ACER, together with the European Networks of Transmission System Operators

(ENTSO)⁹ has been active in developing common standards in order to facilitate cross-border energy supplies and network development plans. ACER will also play a central role in the application of the 'Regulation on Wholesale Energy Market Integrity and Transparency'¹⁰ (REMIT), which was passed in late 2011 to close perceived gaps in the regulation of trade in energy markets and prevent insider trading and market manipulation. The comprehensive reporting obligations foreseen are expected to come into force in 2015 and 2016, after the European Council's responsible Committee voted favourably on the Commission's draft implementing act in October 2014.¹¹

Aligning the rules for balancing services, capacity allocation etc. will only make sense if there is actually the physical possibility to deliver gas or electricity from one country to the next. As energy networks were usually developed within the individual Member States, in most cases only a limited number of interconnectors between the different national grids exist. Also, networks were developed according to historical use patterns. In the case of electricity, decentralised and unsteady renewable electricity production is growing while at the same time production in big centralised power plants is decreasing. In the case of gas, networks built according to the historical flow of gas from the East to the West (Russian production) and the North to the South (Norwegian and Dutch production) may still work well under normal circumstances but do not allow in all cases gas flows in the reverse direction in case of emergencies, such as the closure of the transit pipelines through the Ukraine (as experienced in 2006 and 2009), or to make use of arbitrage possibilities. To better address these points, the EU revised its policy on the promotion of energy infrastructure and passed a new Regulation on Guidelines for trans-European energy infrastructure in 2013.¹² Under

5 Commission (EC), 'Communication from the Commission – Inquiry Pursuant to Article 17 of Regulation (EC) No 1/2003 into the European Gas and Electricity Sectors (Final Report)' (10 January 2007) COM (2006) 851 final.

6 Council Regulation (EC) No 713/2009 of 13 July 2009 establishing an Agency for the Cooperation of Energy Regulators [2009] OJ L211/1; Council Regulation (EC) No 714/2009 of 13 July 2009 on conditions for access to the network for cross-border exchanges in electricity and repealing Regulation (EC) No 1228/2003 [2009] OJ L211/15 (Electricity Regulation); Council Regulation (EC) No 715/2009 of 13 July 2009 on conditions for access to the natural gas transmission networks and repealing Regulation (EC) No 1775/2005 [2009] OJ L211/36 (Gas Regulation); Council Directive (EC) 2009/72 of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC [2009] OJ L211/55 (Electricity Directive); Council Directive (EC) 2009/73 of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC [2009] OJ L211/94 (Gas Directive).

7 Cf. Commission (EC) 'Table of Infringement Procedures Open for Non-Communication of National Transposition Measures (Situation 10/07/

2014)'; only Ireland and Romania still have to implement parts of the 3rd energy package, http://ec.europa.eu/energy/infringements/doc/infringements_energy.pdf accessed 11 December 2014.

8 Cf. Regulation (EC) No 713/2009; for an in-depth overview of ACER cf. Ermacora, 'The Agency for the Cooperation of Energy Regulators' in C Jones (ed), *EU Energy Law, Volume I: The Internal Energy Market—The Third Liberalisation Package* (Claeys & Casteels, Leuven 2010).

9 Electricity Regulation (EC) No 714/2009 art. 5(2); Gas Regulation (EC) No 715/2009 art. 5(2).

10 Regulation (EU) No 1227/2011 of 25 October 2011 on Wholesale Energy Market Integrity and Transparency, [2011] L 326/1.

11 Cf. Commission (EC) 'Summary Record of the REMIT Committee meeting on 3rd October 2014' (3 October 2014) <http://ec.europa.eu/transparency/regcomitology/index.cfm?do=search.documentdetail&cv9jjZLVE/cCaSie5I31IAAK7kq9hUFmLMPEDBn+wuUXV3U4/r7rgJvJWdYwELHg> accessed 16 December 2014.

12 Regulation (EU) No 347/2013 of the European Parliament and the Council of 17 April 2013 on guidelines for trans-European energy infrastructure and repealing Decision No 1364/2006/EC and amending

this regulation, 'Projects of Common Interest' in 12 energy infrastructure priority corridors and areas will receive special funding and benefit from a 'priority status' in permission procedures.¹³ The Commission hopes to leverage private investments through 5.85 billion Euros of European funds in the 'Connecting Europe Facility'¹⁴ and estimates the total investment need for energy infrastructure of European relevance will be around 200 billion Euros until 2020.

One example for such a Project of Common Interest and problems which can arise is the planned *GIPL*-Pipeline between the Polish and the Lithuanian gas grids. So far, the Baltic countries are 100% dependent on Russian gas and their gas grids are not directly connected to the European gas grid. To give the Baltic countries an alternative path of supply, the *GIPL*-Pipeline was proposed. Commercially, it is not expected to be viable, as anticipated 'normal' capacity bookings will only use about 20% of the planned capacity. At the same time, the Lithuanian government pushed hard for an alternative diversification project, a LNG-Terminal in *Klaipėda*, to come on stream at the end of 2014. The two projects address the same issue and—if indeed both are realised—make each other even less viable commercially. This shows a typical difficulty with these large infrastructure projects: They are proposed and planned independent from each other but are interdependent commercially. Another typical problem also arose with *GIPL*, that of cross-border cost allocation. The costs for *GIPL* will mainly arise in Poland, where the main part of the pipeline will have to be constructed. Poland will, however, only benefit marginally from the pipeline, whereas Latvia and Estonia will not have to bear any costs but profit from the possibility of diversifying their gas supply. The regulatory authorities of Poland, Lithuania, Latvia, and Estonia could not agree on how to allocate the costs. Accordingly, in August 2014, ACER—as an impartial authority—took its first decision under Art. 12 (6) Reg.

347/2013 on the cost allocation for cross-border infrastructure.¹⁵ ACER analysed how the expected 'positive externalities' associated with the project would be distributed amongst the four affected countries. As in Poland the costs clearly outweigh the benefits, the Polish TSO will receive compensatory payments from its Lithuanian, Latvian, and Estonian counterparts, whose countries will reap net benefits from the pipeline. The methodology used in this decision could serve as a blueprint for future projects that take their justification from security of supply considerations rather than expected commercial viability.

Energy policy will be one of the priorities of the *Juncker* Commission.¹⁶ While most of the concepts put forward in Commission President *Juncker's* political guidelines in the field of energy policy build upon existing tools and policies, there are also new proposals to further strengthen the 'Energy Union', first of which is the appointment of a Vice-President who will take the lead on the 'Energy Union' within the College of Commissioners. One novel idea to counteract the dependency of Europe on external energy supplies is the pooling of demand and joint negotiation with foreign energy suppliers as suggested in Commission President *Juncker's* mission letter to the Energy Union-Vice-President, *Maroš Šefčovič*.¹⁷ It will be interesting to see how such a proposal will be aligned with the competition and internal market rules as well as trade law and in which other ways the new Commission will have an impact on European energy policy.

III. European enforcement activities

The year 2014 was the first year since 2005 that the European Commission did not start a new investigation into possible anticompetitive behaviour in the energy sector. It concluded investigations into the provision of energy spot market services and traction current while continuing with probes into oil and biofuel indexing as well as

Regulations (EC) No 713/2009, (EC) No 714/2009 and (EC) No 715/2009 [2013] OJ L115/39.

- 13 The first list of 'Projects of Common Interest' was adopted in 2013; cf. Commission delegated Regulation (EU) No 1391/2013 of 14 October 2013 amending Regulation (EU) No 347/2013 of the European Parliament and of the Council on guidelines for trans-European energy infrastructure as regards the Union list of projects of common interest [2013] OJ L349/28; an overview of the status of these projects can be found in Commission (EC) 'Staff working document—Implementation of TEN-E, EEP and PCI Projects Accompanying the document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Progress towards completing the Internal Energy Market' (13 October 2014) SWD (2014) 314 final.
- 14 Regulation (EU) No 1316/2013 of the European Parliament and the Council of 11 December 2013 establishing the Connecting Europe Facility, amending Regulation (EU) No 913/2010 and repealing Regulations (EC) No 680/2007 and (EC) No 67/2010 [2013] OJ L348/129.

- 15 ACER, Decision No 01/2014 of 11 August 2014 'On the Investment Request Including Cross-Border Cost Allocation for the Gas Interconnection Poland-Lithuania Project of Common Interest No 8.5' http://www.acer.europa.eu/Official_documents/Acts_of_the_Agency/Individual%20decisions/ACER%20Individual%20Decision%2001-2014.pdf accessed 16 December 2014.
- 16 Cf. Juncker 'A New Start for Europe: My Agenda for Jobs, Growth, Fairness and Democratic Change', Political Guidelines for the next European Commission, Opening Statement in the European Parliament Plenary Session by Jean-Claude Juncker, Candidate for President of the European Commission (15 July 2014) http://ec.europa.eu/priorities/docs/pg_en.pdf#page=6 accessed 16 December 2014.
- 17 Cf. Commission (EC) 'Jean-Claude Juncker, President of the European Commission, Mission Letter to Maroš Šefčovič, Vice-President for Energy Union' (1 November 2014) http://ec.europa.eu/commission/sites/cwt/files/commissioner_mission_letters/sefcovic_en.pdf accessed 16 December 2014.

gas markets in Eastern Europe. The ‘biggest’ ongoing case is undoubtedly the investigation of *Gazprom*—where the turmoil in the Ukraine added another political dimension to an already highly sensitive case.

A. Article 101 TFEU

Compared to the overall number of Art. 101 TFEU cases, there have not been many cases in the energy sector. Currently, the Commission is investigating one case of a possible infringement of Art. 101 TFEU after settling its investigation into two operators of electricity spot markets.

While some of the Commission’s investigations into the manipulation of indices in the financial sector came to an end in 2014, its probe into oil and biofuel indexing continued with requests for information being sent to market players and further inspections in October 2014.¹⁸ The Commission suspects possible collusion on prices reported to *Platts*, a major index provider on the oil and biofuels market.¹⁹ Besides the suspicion of this market manipulation, the undertakings under investigation may also have prevented others from participating in the price assessment process. The suspected practices may reach back to 2002.²⁰

In March 2014, the Commission settled its investigation into *EPEX Spot* and *Nordpool Spot*, fining the operators of the two largest power exchanges in Europe. The fine was set at 9% of annual turnover for both undertakings, after applying the 10% turnover cap and granting a 10% discount for settling.²¹ The Commission held that the two operators had agreed to divide markets, with European countries to the north of Poland (including Poland) falling into *Nordpool*’s area and countries to the south into that of *EPEX*. The infringement, which lasted less than a year, had started in the context of a cooperation between *Nordpool* and *EPEX* in which the undertakings had tried to set out a joint approach regarding the technical systems to be used for cross-border electricity trade and suitable for the developing Internal Energy Market. The Commission found the exchange operators to have strayed from this legitimate cooperation purpose to discussing which of them would submit offers in tender procedures, which would acquire certain activities of com-

petitors and which would provide technical know-how to interested third parties. The decision highlights the need to have rules and procedures in place to prevent discussions exceeding the legitimate scope of a cooperation with competitors.

B. Article 102 TFEU

Due to the industry’s structure, Art. 102 TFEU has played the more important part in the Commission’s focus on the energy sector and still produces the larger number of cases. There are currently two ongoing investigations in the gas sector while the Commission issued Decisions in two investigations in the electricity sector, where one ongoing case remains. Finally, the Court of Justice ruled on the prerequisites for an infringement of Art. 106 TFEU in conjunction with Art. 102 TFEU in a case concerning the Greek electricity market.

In the end of 2013, the Commission accepted commitments by *Deutsche Bahn* to close its investigation into the pricing of traction current—energy for locomotives.²² The Commission had come to the preliminary assessment that the rebate system operated by *DB Energie*, the *de facto* sole supplier of traction current, benefitted only other subsidiaries of *Deutsche Bahn* and led to higher costs for competitors on the rail freight and passenger markets. As, in the Commission’s view, this did not leave competitors enough margin to compete properly with *Deutsche Bahn*, the practice could have amounted to an abusive margin squeeze. Under the commitments, *Deutsche Bahn* will have to offer separate prices for traction current and for access to its transmission grid to ease third-party entry into the market for traction current. Also, *Deutsche Bahn* will have to introduce accounting and information unbundling of its traction current and its electricity grid branch. The prices offered by *DB Energie* may not contain volume or duration rebates so they do not automatically lead to lower prices for other *Deutsche Bahn* companies which still provide the majority of rail services in Germany. Also, existing customers received a 4% payback for their traction current bill in the year leading up to the Commission’s decision. Independent of the decision in the case itself, *Deutsche Bahn* is still fighting the legality of the inspections at the beginning of the Commission’s in-

18 Sebag/White/Hoffman, ‘Ethanol Companies Raided in EU Benchmarks Antitrust Case’ *Bloomberg* (New York, 10 October 2014) <http://www.bloomberg.com/news/2014-10-09/ethanol-companies-raided-in-eu-benchmarks-antitrust-case.html> accessed 16 December 2014.

19 Commission (EC), MEMO/13/435, 14 May 2013 ‘Antitrust: Commission Confirms Unannounced Inspections in Oil and Biofuels Sectors’.

20 Kwiatkowski/Zhu, ‘EU Oil Manipulation Probe Shines Light on Platts Pricing’ *Bloomberg* (New York, 15 May 2013) <http://www.bloomberg.com/>

[news/2013-05-15/eu-oil-manipulation-probe-shines-light-on-platts-pricing-window.html](http://www.bloomberg.com/news/2013-05-15/eu-oil-manipulation-probe-shines-light-on-platts-pricing-window.html) accessed 7 November 2013.

21 Power Exchanges (Case AT/39.952) Commission Decision of 5 March 2014 [2014] OJ C 334/5.

22 *Deutsche Bahn I/II* (Case AT.39678/AT.39731) Commission Decision of 18 December 2013 [2014] OJ C 86/4; for an in-depth analysis, cf. Steinworth, ‘Cases 39.678 *Deutsche Bahn I*, 39.731 *Deutsche Bahn II* and 39.915 *Deutsche Bahn III* *Deutsche Bahn*: Commitments End Margin Squeeze Investigation’ [2014] 5 JECLAP 628.

vestigation. The rail operator appealed a General Court judgment²³ which had confirmed the rightfulness of the Commission's actions.²⁴

In March 2014, the Commission fined the operator of Romania's power exchange, *OPCOM*, just over 1 million Euros for a discriminatory abuse of its dominant position.²⁵ *OPCOM* was found to have required undertakings wishing to trade electricity on its platform to be established in Romania and have a Romanian VAT number. In the Commission's view, this led to higher costs for foreign traders compared to their Romanian competitors, inhibiting the further development of the single market.

In August 2014, the Commission issued a statement of objections against Bulgaria's incumbent energy company *BEH*.²⁶ The Commission is concerned that the majority of *BEH*'s electricity supply contracts contain territorial restrictions amounting to an abuse of a dominant position under Art. 102 TFEU. Apparently, the contracts contain provisions under which 'electricity supplied by *BEH* may only be resold within Bulgaria or may only be exported. The contracts also contain control and sanctioning mechanisms which allow *BEH* to monitor and punish customers who fail to comply with these territorial restrictions.'²⁷ A separate investigation against *BEH*'s gas subsidiary for a potential market foreclosure is still ongoing.²⁸

No further official steps were taken in the EU's investigation into a possible abuse of dominance by *Gazprom* in the gas markets in Central and Eastern Europe. After inspections in ten Member States in September 2011²⁹ and the formal opening of proceedings in August 2012,³⁰ it appeared that *Gazprom* might try to settle the probe and offer commitments to the Commission at the beginning of 2014. However, talks with the Commission nether

advanced far enough for *Gazprom* to actually make a proposal on what such commitments might look like. According to reports, the biggest difference in position between *Gazprom* and the Commission remained the question of gas pricing.³¹ The crisis in the Ukraine then stopped discussions on a possible settlement.³² Commissioner Almunia stated on several occasions that a statement of objections was being prepared without giving a clear indication on timing. The Commission was originally investigating three suspected anticompetitive practices:³³

- The division of gas markets by hindering the free flow of gas across Member States;
- Foreclosure by prevention of diversification of the supply of gas; and
- Unfair pricing by way of linking the price of gas to oil prices.

With regard to the last point, the Commission seems to have moved away from seeing oil-indexation as such as abusive but rather the way in which oil-indexation is used to 'set . . . abusive prices without connection to economic fundamentals.'³⁴ Incoming Commissioner Vestager underlined the importance of the probe for the EU's political agenda on energy security and economic recovery,³⁵ but given the delicate political situation it remains to be seen how and when this probe will continue.

In another long-running case, *Greek Lignite*, the Court of Justice set aside the judgment of the General Court³⁶ and referred the case back.³⁷ The case centres on exploration and exploitation rights regarding the Greek lignite reserves. The Greek government had granted these rights to incumbent electricity producer *DEI* almost exclusively, allowing it to produce electricity at prices significantly below those of its competitors, thus

23 Joined Cases T-289/11, T-290/11, T-521/11 *Deutsche Bahn AG and Others v European Commission* (GC 6 September 2013).

24 Case C-583/13 P.

25 Commission (EC) Decision of 5 March 2014, CASE AT.39984.

26 Commission (EC), IP/14/922, 12 August 2014 'Antitrust: Commission Sends Statement of Objections to Bulgarian Energy Holding for Suspected Abuse of Dominance on Bulgarian Wholesale Electricity Market'.

27 Ibid.

28 Ibid.

29 Commission (EC), MEMO/11/641, 27 September 2011 'Antitrust: Commission Confirms Unannounced Inspections in the Natural Gas Sector'.

30 Commission (EC), IP/12/937, 4 September 2012 'Antitrust: Commission Opens Proceedings Against *Gazprom*'.

31 Chazan/Barker, 'Gazprom Faces EU Antitrust Charge Threat' *Financial Times* (London and Brussels, 7 February 2014) <http://www.ft.com/intl/cms/s/0/e42946bc-8fed-11e3-ace9-00144feab7de.html#axzz3LVbnQBPE> accessed 16 December 2014.

32 PaRR Special Report 'Live Coverage of the Georgetown Law School Global Antitrust Enforcement Symposium' (10 September 2014) <http://www.law.georgetown.edu/continuing-legal-education/news/upload/Georgetown-Antitrust-PaRR-Special-Report.pdf> accessed 16 December 2014.

33 For an in-depth analysis, see Scholz/Purps, 'The Application of EU Competition Law in the Energy Sector' [2013] 4 JECLAP 63.

34 J Almunia, as cited in Chazan/Barker 'Gazprom Faces EU Antitrust Charge Threat' *Financial Times* (London, 7 February 2014) <http://www.ft.com/intl/cms/s/0/e42946bc-8fed-11e3-ace9-00144feab7de.html#axzz3M5Gtc7e7> accessed 16 December 2014.

35 The Committee on Economic and Monetary Affairs, 'Hearing of Margrethe Vestager, Commissioner-Designate (Competition)' (2 October 2014) <http://www.elections2014.eu/resources/library/media/20141022RES75845/20141022RES75845.pdf> accessed 16 December 2014.

36 Case T-421/09 *Dimosia Epicheirisi Ilektrismou AE (DEI) v European Commission* (GC 20 September 2012); Case T-169/08 *Dimosia Epicheirisi Ilektrismou AE (DEI) v European Commission* (GC, 20 September 2012).

37 Case C-553/12 P *European Commission v Dimosia Epicheirisi Ilektrismou AE (DEI)* (GC 17 July 2014), see also the critical review of Marixenia Davilla, 'Commission v DEI: The Law on Public Companies or Companies with Special or Exclusive Rights That Are Led to Abuse Their Dominant Position' [2015] 6 JECLAP XXXXX.

giving it a competitive advantage. The Commission had originally classified this as an infringement of Art. 106 (1) TFEU in combination with Art. 102 TFEU. The General Court had then held that it was not sufficient for an infringement that the state measure had caused inequality of opportunity between competitors but that it was necessary to prove that the state measure had directly caused, or else enabled, the undertaking in question to commit abuse. As no specific abuse by *DEI* had been found, the General Court annulled the Commission decision. The Court of Justice, however, held that the General Court had erred when requiring actual abusive behaviour. Rather, a potential anticompetitive consequence from the state measure is sufficient: '[An] infringement of Article 86 (1) EC in conjunction with Article 82 EC may be established irrespective of whether any abuse actually exists. All that is necessary is for the Commission to identify a potential or actual anti-competitive consequence liable to result from the State measure at issue. Such an infringement may thus be established where the State measures at issue affect the structure of the market by creating unequal conditions of competition between companies, by allowing the public undertaking or the undertaking which was granted special or exclusive rights to maintain (for example by hindering new entrants to the market), strengthen or extend its dominant position over another market, thereby restricting competition, without it being necessary to prove the existence of actual abuse.'³⁸

IV. National enforcement activities

National competition authorities maintained their focus on the energy sector, as energy and fuel prices continued to rise—having a direct impact on consumers.

A. Germany

In the fuel sector the German *Bundeskartellamt* reviewed the working of the newly established 'market transparency unit' after one year and came to a positive conclusion.³⁹ The collection of fuel prices in real time and their publication by third-party service providers allowed consumers to save about 5–10%. The *Bundeskartellamt* is also using the collected data to closely monitor the mechanics of the fuel market. District heating remained in the focus of the German competition authorities as both the *Bundeskartellamt* continued proceedings against a number of providers⁴⁰ and the competition authorities of several German states started or continued market inquiries.⁴¹ A sector inquiry concluded by the *Bundeskartellamt* in 2012 had shown vast differences between the prices charged by different providers who will now have to demonstrate that the higher prices are justified.⁴² Regarding concessions for local gas or electricity networks, the Federal Court of Justice clarified that these have to be tendered in a transparent and non-discriminatory way.⁴³ If tenders do not meet these requirements they can be void under the rules against the abuse of dominance, even if this means that the incumbent remains in control of the network until a proper procedure has been conducted.

B. United Kingdom

In the UK, the newly established *Competition and Markets Authority* started an in-depth probe of the wholesale and household retail energy markets in the summer of 2014 which is expected to be finalised by December 2015. After an initial review of the markets, in a joint state of the market assessment⁴⁴ by the *OFT/CMA* and *OFGEM*, the agencies stated their belief that there is

38 Ibid. para 46.

39 *Bundeskartellamt*, 'One Year of Market Transparency Unit for Fuels' (Bonn, 27 November 2014) http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2014/27_11_2014_MTS-K.html accessed 9 December 2014; *Bundeskartellamt* 'Ein Jahr Markttransparenzstelle für Kraftstoffe (MTS-K): Eine erste Zwischenbilanz' (Bonn, November 2014) http://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Berichte/Ein_Jahr_MTS-K.pdf?__blob=publicationFile&v=4 accessed 9 December 2014.

40 *Bundeskartellamt*, 'Bundeskartellamt Examines Excessive District Heating Prices' (Bonn, 7 March 2013) http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2013/07_03_2013_Fernw%C3%A4rmepreise.html accessed 9 December 2014.

41 Cf., amongst others: Thüringer Ministerium für Wirtschaft, Wissenschaft und digitale Gesellschaft, 'Medieninformation' (Erfurt, 12 September 2014) <http://www.thueringen.de/th6/tmwat/service/pressemitteilungen/81488/> accessed 9 December 2014; Sachsen.de, 'Mitteilung der Landeskartellbehörde: Ergebnisse zur Sektoruntersuchung Fernwärme liegen vor' (Dresden, 23 December 2013) <http://www.medien-service.sachsen.de/medien/news/189129> accessed 9 December 2014; Niedersächsisches Ministerium für Wirtschaft Arbeit und Verkehr 'Landeskartellbehörde startet Sektoruntersuchung zum "Fernwärmemarkt Niedersachsen" und ermittelt Preis- und Strukturdaten

von rund 60 Versorgungsunternehmen' (Hannover, 19 August 2014) http://www.mw.niedersachsen.de/portal/live.php?navigation_id=5459&article_id=127231&psmand=18 accessed 9 December 2014; Ministerium für Wirtschaft und Europaangelegenheiten Brandenburg, 'Landesweite Sektoruntersuchung zur Fernwärme – Landeskartellbehörde kontrolliert Fernwärmepreise von 53 brandenburgischen Unternehmen' (Potsdam, 8 October 2013) <http://www.mwe.brandenburg.de/sixcms/detail.php/bb1.c.342702.de> accessed 9 December 2014; Sachsen.de 'Wirtschaftsministerium prüft Fernwärmepreise in Sachsen' (Dresden, 7 March 2013) <http://www.medien-service.sachsen.de/medien/news/182907> accessed 9 December 2014.

42 *Bundeskartellamt*, 'Competition Deficits in District Heating Markets—Bundeskartellamt Reports on Findings of Sector Inquiry into District Heating' (Bonn, 23 August 2012) http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2012/23_08_2012_SU-Fernw%C3%A4rme.html accessed 9 December 2014.

43 BGH, 17 December 2013, KZR 66/12 <http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&Datum=2013-12-17&nr=67072&pos=17&anz=23> accessed 9 December 2014.

44 OFGEM/OFT/CMA 'State of the Market Assessment' (London, 27 March 2014) <https://www.ofgem.gov.uk/ofgem-publications/86804/assessmentdocumentpublished.pdf> accessed 16 December 2014.

weak competition between the incumbent electricity and gas suppliers, as prices charged to end consumers rose significantly between 2009 and 2013. This preliminary review stated market segmentation and possible tacit coordination, barriers to entry and expansion (including vertical integration) as well as weak customer pressure are possible reasons for the perceived lack of competition. The CMA will now perform an in-depth review of the market and initially has focused on four theories of harm:⁴⁵

- Existence of barriers to entry because of intransparent prices and low liquidity on wholesale electricity markets.
- Vertically integrated incumbents discriminate against non-integrated competitors.
- Market power in electricity generation leads to higher prices.
- Inactive customers, supplier behaviour and/or regulatory interventions reduce the incentive for intense competition.

C. Italy

The *Autorità Garante della Concorrenza e del Mercato* (AGCM) published the results of its sector inquiry in the district heating market in March 2014.⁴⁶ It did not identify signs of abusive behaviour as prices for district heating were in line with both prices for district heating in other countries as well as prices for other forms of heating in Italy. Also, margins for district heating companies averaged under 20%, deemed too low for an abuse to exist. AGCM focused both on the *ex ante* competition between different heating systems as well as the *ex post* situation after a consumer has decided to connect to a district heating system. It credited both significant *ex ante* competition as well as functioning local regulation with preventing excessive pricing by district heating system operators. AGCM suggested harmonising different local forms of regulation and showed a preference for a light touch regulatory approach with price limits determined by prices of competing energies. Only in cases where households had only limited possibilities to

change their heating systems did AGCM see room for a more complicated, cost plus price regulation.

D. Spain

In Spain, the competition authority was merged with the sectoral regulators for energy, postal services, rail services and airports, telecommunication and audiovisual industry in the autumn of 2013. The newly formed *Comisión Nacional de los Mercados y la Competencia* (CNMC) issued one antitrust decision in the energy sector in 2014: *Endesa* was fined just over 1 million Euros for an abuse of its dominant position as distribution system operator. The CNMC held that *Endesa* had charged consumers for grid extensions or improvements the cost of which *Endesa* should have borne itself.⁴⁷ *Endesa* announced that it would challenge the ruling as, in its view, it was justified to charge the consumers directly benefitting from the measures rather than adding the costs to the network charges to be borne by all consumers.

Regarding the fuel sector, the CNMC extended its proceedings against *REPSOL*, *CEPSA*, *DISA*, *MEROIL*, and *GALP* for coordination of prices, customers and trading conditions, and the exchange of sensitive commercial information to also include *BP*.⁴⁸ In a separate probe against *REPSOL*, *CEPSA*, and *BP* for possible anti-competitive conduct relating to coordination of prices between each of the companies and independent traders operating in their respective automotive fuel distribution networks the CNMC also extended its investigation to include a number of operators of filling stations.⁴⁹ Finally, the CNMC opened new proceedings against *REPSOL*, *CEPSA*, and *BP* for possibly failing to comply with a 2009 decision in which the CNMC's predecessor had fined the three companies over 9 million Euros for indirect price-fixing and ordered them to abstain from using contractual clauses and business practices facilitating such indirect price-fixing.⁵⁰

E. France

The French *Autorité de la Concurrence* tried to promote competition on the French energy markets both by influencing regulation and by addressing perceived

45 CMA 'Energy Market Investigation—Statement of Issues' (London, 27 July 2014) https://assets.digital.cabinet-office.gov.uk/media/53cfc72640f0b60b9f000003/Energy_Issues_Statement.pdf accessed 16 December 2014.

46 AGCM 'Conclusa l'indagine conoscitiva sul teleriscaldamento. Il testo dell'indagine' (Rome, 07 March 2014) <http://www.agcm.it/stampa/news/6807-conclusa-lindagine-conoscitiva-sul-teleriscaldamento-il-testo-dellindagine.html> accessed 09 December 2012.

47 *El País* 'Competencia multa con 1,18 millones a Endesa por abuso de posición dominante' (Madrid 21 July 2014) http://economia.elpais.com/economia/2014/07/21/actualidad/1405927899_758148.html accessed 09 December 2014.

48 CNMC 'La CNMC amplía la incoación del expediente sancionador contra BP España por posibles prácticas restrictivas de la competencia' (Madrid, 7 April 2014) http://www.cnmc.es/Portals/0/Ficheros/Home/novedades/competencia/2014/20140407_ampliacionC3%B3n_BP.pdf accessed 16 December 2014.

49 CNMC 'La CNMC amplía la incoación de expediente sancionador contra varios gestores de Estaciones de Servicio' (Madrid, 21 April 2014) http://www.cnmc.es/Portals/0/Ficheros/notasdeprensa/2014/20140421_NP_Ampliacion484.pdf accessed 16 December 2014.

50 *Mundi Petrol* 'La CNMC incoa nuevo expediente sancionador a Repsol, Cepsa y BP' (Madrid, 14 July 2014) http://www.mundi-petrol.com/noticia_elegida.php?id=793 accessed 09 December 2014.

anticompetitive behaviour of market actors. It expressed doubts on the suitability of a planned regulatory intervention subsidising electricity undertakings who agree with private customers to cut their consumption in times of peak demand. In case such subsidies should indeed be granted, the *Autorité* feared that incumbent *EdF* would have an advantageous position due to the historic knowledge of customers in France. The *Autorité* suggested that *EdF* should grant access to certain customer data in order to allow other operators to also identify customers with whom to agree on a cut of consumption, thus enabling all market players to receive the proposed subsidy.⁵¹ *EdF*'s position also is at the centre of other proposed measures in France, both regarding regulated tariffs as well as the rates at which third-party electricity suppliers can procure electricity from *EdF*'s legacy atomic base. For regulated tariffs, the *Autorité* opined that while *EdF* should be able to recover its costs, regulated prices should not be so low as to exclude other market participants from competing on the market for regulated electricity.⁵² Regarding the pricing for atomic base load, the *Autorité* questioned whether including an amount to allow *EdF* to build up resources for the construction of new power plants was in line with the measures' original goal of strengthening independent market actors and allowing them to invest in own generation capacities in order to create a functioning electricity wholesale market. It suggested starting slowly phasing out the measure, which had been intended to be a temporary solution until 2025.⁵³ Likewise, the *Autorité* issued recommendations aimed at opening up the sector for the distribution of bulk propane to households' tanks and, in particular, recommended that consumers should no longer be obliged to obtain supplies exclusively from the propane company that installed and maintains the storage tank.⁵⁴

The decisions taken by the *Autorité* included a fine on *EdF* of 13.5 million Euros for abusive behaviour. It held that *EdF* had unjustly favoured its own solar power subsidiary by firstly allowing it to use its well-known brand name and logo, thus creating confusion amongst custo-

mers, and secondly by giving its own solar power subsidiary access to its customer database to market its services.⁵⁵ According to the *Autorité*, both the well-known brand as well as the customer data base had come to *EdF* through its position as former monopolist and their use in a new market open to competition constituted an abuse. Going even further, in an interim measure the *Autorité* ordered *GdF Suez* to grant competitors access to its data base of customers in the regulated tariff in order to allow competitors to offer these customers contracts at market prices.⁵⁶ Apparently, *GdF Suez* had used this information to offer regulated customers its own non-regulated tariffs, which appears to constitute an abuse under the aforementioned principle. Confronted with this development, *EdF* apparently also has shown a willingness to grant access to its customer database for regulated electricity tariffs.

F. Bulgaria

In Bulgaria, the *Commission for Protection of Competition* issued several decisions regarding anticompetitive behaviour in the energy market in 2014 and is continuing investigations in further cases. For one, network operator *Energo Pro* received two separate fines totalling over 600 thousand Euros for abusively denying and delaying the access of third-party renewable energy generation to its network.⁵⁷ The biggest splash, however, was made by the 12 million Euro fine against Bulgargaz for abusive behaviour, the highest fine ever issued by the *CPC*.⁵⁸ According to the authority, customers had to accept the terms and conditions Bulgargaz imposed, including one-sided amendments thereof, for the lack of alternative suppliers, even when trying to extend contracts. Bulgargaz further imposed minimum-offtake requirements and fixed packages for selling gas which did not adequately reflect customer needs.

The *CPC* also addressed two sets of statements of objections to the vertically integrated electricity companies *CEZ*, *Energo-Pro* and *EVN*. Firstly, it raised concerns that

51 *Autorité de la Concurrence* 'Electricity Consumption Demand Response Market' (Paris, 13 January 2014) http://www.autoritedelaconcurrence.fr/user/standard.php?id_rub=592&id_article=2369 accessed 09 December 2014.

52 *Autorité de la Concurrence* 'Regulated Electricity Tariffs' (Paris, 15 October 2014) http://www.autoritedelaconcurrence.fr/user/standard.php?id_rub=592&id_article=2439 accessed 09 December 2014.

53 *Autorité de la Concurrence* 'Accès régulé à l'électricité nucléaire historique (ARENH)' (Paris, 20 October 2014) http://www.autoritedelaconcurrence.fr/user/standard.php?id_rub=591&id_article=2440 accessed 09 December 2014.

54 *Autorité de la Concurrence* 'Bulk propane gas' (Paris, 14 January 2014) http://www.autoritedelaconcurrence.fr/user/standard.php?id_rub=592&id_article=2370 accessed 09 December 2014.

55 *Autorité de la Concurrence* 'Photovoltaic Solar Power—Individual Consumers' Market' (Paris, 17 December 2013) http://www.autoritedelaconcurrence.fr/user/standard.php?id_rub=483&id_article=2321 accessed 09 December 2014.

56 *Autorité de la Concurrence* 'Gas Market' (Paris, 9 September 2014) http://www.autoritedelaconcurrence.fr/user/standard.php?id_rub=592&id_article=2420 accessed 09 December 2014.

57 *CPC* 'CPC Sanctions Energo Pro for Abuse of Dominance' (Sofia, 28 November 2013); 'КЗК САНКЦИОНИРА "ЕНЕРГО—ПРО МРЕЖИ" АД ЗА ЗЛОУПОТРЕБА С ГОСПОДСТВАЩО ПОЛОЖЕНИЕ' (Sofia 27 January 2014) <http://www.cpc.bg/default.aspx> accessed 16 December 2014.

58 *CPC* 'КЗК санкционира БУЛГАРГАЗ с 23 377 600 лв. за злоупотреба с господстващо положение' (Sofia, 30 July 2014) <http://www.cpc.bg/default.aspx> accessed 16 December 2014.

the undertakings had abusively used information from their regulated electricity supply business to gain advantages with customers able to switch to a freely negotiated contract, thereby hindering competitors from gaining access to such customers. Additionally, in a market ancillary to electricity distribution, the CPC issued a statement of objections against three operators of electricity distribution grids.⁵⁹ It suspects that the operators may have abusively denied third parties from building up telecommunication and broadcasting infrastructure based on the electricity distribution grid, which it deemed to constitute an essential facility as this provided the only viable basis for the construction of such infrastructure.

G. Greece

In Greece, the *Hellenic Competition Commission* revised its commitment decision against *DEPA*, Greece's incumbent gas company.⁶⁰ The *HCC* had taken measures against *DEPA* to address a perceived market foreclosure.⁶¹ It had ordered the unbundling of the gas grid as well as the reduction of *DEPA*'s bookings of entry capacity into the Greek transmission grid over time from about 95% to 55%. Furthermore, *DEPA* has to auction off part of its supplies. After the original auction process had not delivered the desired results, the *HCC* now changed the design of the auction in order to offer more marketable products. It also reserved the right to further tweak the system if this could lead to more desirable results.

H. Poland

Poland's *Urzedu Ochrony Konkurencji i Konsumentow* is further pursuing its liberalisation of the energy market agenda. In December 2013, it made commitments by incumbent gas company *PGNiG* binding to address concerns of abusive contract terms used by *PGNiG* with customers who resell gas they buy from *PGNiG*.⁶² These clauses prevented customers from decreasing the amount they sourced from *PGNiG*, limited their ability to resell

gas without consent from *PGNiG* and some further limitations which restricted the growth of third-party gas companies on the wholesale and retail markets for gas. *PGNiG* will have to revoke those provisions in its existing contracts and abstain from using them in future contracts. Already in October 2014, *UOKiK* decided to probe whether the *PGNiG* has properly implemented the prescribed measures and changed its practice accordingly.⁶³ *UOKiK* also started a study of the coal supply chain in Poland to get a better understanding of the general competitive situation there with a focus on the distribution of coal within the country.⁶⁴

I. Belgium

In July 2014 the *Autorité Belge de la concurrence* held that *Electrabel* had abused its dominant position in the Belgian market for generation, wholesale, and trading of electricity.⁶⁵ It charged the company with a fine of 2 million Euros—equal to about 40% of the relevant turnover of under 5 million Euros—for artificially raising prices on the *Belpex power exchange* by adopting and applying for sales of parts of the reserved capacity, a price scale including an excessive margin of 60 Euros/MWh from 2007 until early 2010. The authority dropped allegations that *Electrabel* had artificially withheld capacities from the market as well as manipulated the market for tertiary reserve from 2006 to 2007.

J. The Netherlands

In the Netherlands, the *Autoriteit Consument en Markt* started an investigation into companies organising energy auctions for consumers.⁶⁶ The Netherlands have amongst the highest switching rates of consumers in Europe. Many consumers join together, organised by consumer-clubs, newspapers or magazines, and invite energy suppliers to make offers to the group, providing a convenient way to switch suppliers. However, according to news reports, the specialised companies running such auctions and energy suppliers may have agreed on fixed discount

59 CPC 'КЗК предяви твърдения за извършено нарушение на "ЧЕЗ разпределение България" АД, "ЕВН България електроразпределение" ЕАД и "Енерго-про мрежи" АД' (Sofia, 13 May 2014) <http://www.cpc.bg/default.aspx> accessed 16 December 2014.

60 HCC 'Amendment of Commitments Adopted with Decision 551/VII/2012 of the HCC Concerning the Supply of Natural Gas Through Electronic Auctions (Optimisation of Gas Release Programmes)' (Athens, 21 July 2014) http://www.epant.gr/img/x2/news/news663_1_1406027294.pdf accessed 16 December 2014.

61 OECD 'Annual Report on Competition Policy Developments in Greece' 10 June 2013, p 8 [http://search.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/AR\(2013\)3&docLanguage=En](http://search.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/AR(2013)3&docLanguage=En) accessed 16 December 2014.

62 UOKiK 'PGNiG—UOKiK's Decision' (Warsaw, 24 January 2014) http://www.uokik.gov.pl/news.php?news_id=10825 accessed 16 December 2014.

63 UOKiK 'PGNiG Under OCCP'S Scrutiny' (Warsaw, 24 October 2014) http://www.uokik.gov.pl/news.php?news_id=11265 accessed 09 December 2014.

64 UOKiK 'The Situation on the Coal Market—Explanatory Proceedings' (Warsaw, 27 May 2014) http://www.uokik.gov.pl/news.php?news_id=11021&news_page=1 accessed 09 December 2014.

65 *Autorité Belge de la concurrence* Décision n° ABC-2014-I/O-15, 18 July 2014 http://economie.fgov.be/fr/binaries/ABC-2014-IO-15_Electrabel%20PUB_tcm326-253790.pdf accessed 16 December 2014.

66 ACM 'ACM Launches Investigations into Energy Auctions' (The Hague, 31 July 2014) <https://www.acm.nl/en/publications/publication/13274/ACM-launches-investigations-into-energy-auctions/> accessed 16 December 2014.

rates or target prices beforehand, amounting to a price floor.⁶⁷

K. Slovenia

In Slovenia, the *Competition Protection Agency* dropped a gas cartel investigation but issued a fine for an abuse of dominance against incumbent *Geoplin*. The agency had suspected 16 gas companies and their trade association to have colluded or at least exchanged information on pricing as their household gas prices seemed to fluctuate in unison. However, dawn raids and further investigations did not uncover evidence of collusive behaviour but rather showed that symmetric developments on the input side had led to the price changes.⁶⁸ *Geoplin* as supplier of the undertakings in question also was in the focus of the *CPA* because of the long-term gas supply contracts it concluded with its customers, which allegedly hindered its customers to change suppliers through take-or-pay obligations, exclusivity clauses or one-off rebates for the conclusion of new contracts, thereby foreclosing the market for third parties.⁶⁹ After alleged obstruction during dawn raids in July 2013 had led to a fine of nearly 1 million Euros, 0.2% of *Geoplin's* turnover,⁷⁰ the *CPA* market tested commitments by *Geoplin* to end the investigation. For a period of five years, *Geoplin* would not be allowed to conclude new contracts with a duration of more than three years; limits on take-or-pay-provisions would apply to new and existing contracts and the take-or-pay-quantities in existing contracts would have to be reduced to 55% of the original amount by 2017.

V. Conclusion

The internal energy market is well under way, even if it has not been accomplished by 2014 as planned. That the Commission did not start new competition proceedings in the energy sector does not mean that it has stopped closely monitoring the sector. Rather, a more stringent enforcement of competition rules by national competition authorities has allowed the Commission, together with regulators and market players, to focus on the better alignment of market rules to create a more level playing field. It also has taken a closer look at energy prices throughout Europe and noted that the regulated part of prices (eg distribution network charges) as well as taxes and levies are the main culprits for rising energy prices.⁷¹ While the competitive conditions in European energy markets may be far from perfect and will require continued monitoring by competition and regulatory authorities, the common song of politicians all over the continent blaming the big energy companies for abusing their power rings hollow against the findings of the Commission. Competition law has played an important role in opening up European energy markets, but it appears that state intervention may be keeping the resulting benefits from consumers. It will be interesting to see whether, and in which way, the Commission will address this issue while it does not seem doubtful that competition authorities will keep a close watch on energy markets.

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67 'Inval kartelpolitie bij energieveilers' (RTL Nieuws, 31 July 2014) <http://www.rtlnieuws.nl/nieuws/binnenland/inval-kartelpolitie-bij-energieveilers> accessed 16 December 2014.

68 *CPA*, SKLEP96 (Ljubljana, 15 September 2014) http://www.varstvo-konkurence.si/si/zakonodaja_in_dokumenti/ostali_dokumenti/arhiv_sklepov/sklep96/ accessed 16 December 2014.

69 *CPA* 'Prošnja za odziv in morebitne komentarje k predlogu zavez podjetja GEOPLIN' (Ljubljana 12 June 2014) http://www.varstvo-konkurence.si/nc/si/medijsko_sredisce/novica/article/12087/5341/ accessed 16 December 2014.

70 Upheld by the administrative court, cf. Anžlovar, 'Milijonska kazen Geoplinu zaradi oviranja preiskave' (*Radio Televizija Slovenija*, 12 July 2014) <http://www.rtvsllo.si/gospodarstvo/milijonska-kazen-geoplinu-zaradi-oviranja-preiskave/341805> accessed 16 December 2014.

71 Commission (EC), 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Energy Prices and Costs in Europe' (29 January 2014) COM(2014) 21/2.