

Survey

The Application of EC Competition Law in the Energy Sector

Ulrich Scholz and Stephan Purps*

Introduction

The year 2009 has seen another step in the process of liberalisation of the European energy markets. This process began in the 1990s, when the European Community decided to open up Europe's gas and electricity markets to competition and to create an integrated European energy market across Member States, resulting in the abolition of national monopolies and the removal of barriers to cross-border trade. This EC-policy has been implemented through sector-specific legislation and by means of an increasingly intensified application and enforcement of the EC competition rules.

In 2009, there were major developments in both of these fields. After intense debate, the 'third liberalisation package' was adopted by the Council, tightening the regulatory grip on the energy sector with stricter rules on unbundling, the establishment of new and strengthening of existing authorities, and generally adjusting recent legislation to adapt to current developments and past experience. At the same time, the Commission has pushed forward on various investigations of breaches of EC competition law, resulting in substantive fines and several commitment Decisions in which the Commission imposed extensive remedies on the undertakings concerned.

This article provides a brief summary of the regulatory framework of energy markets followed by an overview of the major findings of the Commission's sector inquiry, which remains a point of reference for many current developments in the energy sector. The following section outlines the regulatory amendments contained in the third liberalisation package. The next section deals with the Commission's enforcement activities in 2009, taking into account investigations into alleged breaches of Art. 82 and 81 EC, followed by

Key points

- This article describes the main developments in the application of EC competition law in the energy sector in the past year.
- The authors provide an overview of the major European cases, as well as national enforcement practices and regulatory developments.
- The article includes observations regarding certain recurring themes in the Commission's enforcement practice.

a brief summary of national enforcement activities across Member States. In the final section, observations are made on the Commission's enforcement practice, focusing on network foreclosure allegedly resulting from a lack of investment into transportation infrastructure or the duration of transportation contracts, before briefly analysing the use of commitment procedures including structural remedies under Art. 9 Reg. 1/2003¹.

Development of the regulatory framework of energy markets

After the EC had made its first move towards the liberalisation of the energy market by adopting two regulations aimed at fostering transparency of gas and electricity prices charged to industrial customers and establishing rules for the transit of electricity through transmission grids, a substantial change to the existing market framework was introduced by the adoption of the first electricity and gas directives.² The directives were intended to remove national monopolies and to

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1 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 [2003] OJ L1/1.

2 Council Directive (EC) 1996/92 of 19 December 1996 concerning common rules for the internal market in electricity [1997] OJ L27/20; Council

stimulate cross-border trade by introducing a third party access regime and establishing some protection mechanisms to ensure that vertically integrated energy utilities would not discriminate against other market participants. The liberalisation process was reinforced by the launch of the so-called second energy package in June 2003. Part of the package involved the replacement of the existing directives with new electricity and gas directives (the so-called acceleration directives),³ which obliged Member States to fully open the electricity and gas markets by introducing a regulated third party access regime, to introduce far-reaching rules on legal, operational, and informational unbundling and to set up national regulators for the energy sector within the given timeframe. Conditions for access to the network for cross-border exchanges in electricity and for access to the natural gas transmission network were introduced to encourage cross-border competition.⁴

The Commission's inquiry into the energy sector

Only two years after the legislative package was introduced, the Commission launched sector inquiries into the functioning of the European electricity and gas markets, investigating potential shortcomings of the liberalisation process. After 18 months of investigation, the Commission published the final report on the sector inquiry on 10 January 2007,⁵ which identified the following deficiencies:

- At the wholesale level in particular, market concentration was found to be high. The electricity market was characterized by a significant level of concentration in generation allowing power generators to exercise market power by raising prices. Wholesale gas trade was regarded by the Commission as developing slowly with incumbents remaining dominant in their traditional markets.
- An insufficient level of unbundling between network operation on the one side and supply and/or generation activities on the other side resulted in vertical foreclosure preventing potential competitors from

entering the market and threatening security of supply.

- Insufficient cross-border capacities and different market designs constituted an obstacle to further market integration. Existing network capacities were found to be largely controlled by incumbent companies which supposedly had only slight incentives to expand their network capacity for the benefit of their competitors.
- Market entry of new competitors was further hampered by information asymmetry between incumbents and market entrants.
- The lack of efficient and transparent price formation was regarded as the key reason why the opening of the energy market had failed to result in benefits for consumers.
- Long contract durations, the lack of competitive offers from non-incumbent suppliers and restrictive practices in relation to the operation of supply contracts had resulted in the foreclosure of downstream markets.
- As regards balancing markets, existing balancing regimes were often found to favour incumbents and create obstacles for newcomers. Whereas markets for balancing and reserve energy in the electricity sector were deemed to be highly concentrated, which allowed power generators to exercise market power, the balancing areas in the gas sector were regarded as too small and complex, thus discouraging new suppliers to enter the market.

Recent regulatory measures to enhance competition

To address the identified malfunctioning of the energy markets as defined in the final report, the Commission proposed to make full use of its powers under the anti-trust and state aid rules. The Commission, however, acknowledged that regulatory/structural measures were necessary for tackling fundamental deficiencies in the competitive structure of the energy market, such as insufficient unbundling of networks, gaps in the regulatory environment regarding cross-border trade, the

Directive (EC) 1998/30 of 22 June 1998 concerning common rules for the internal market on natural gas [1998] OJ L204/1.

3 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.

4 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.

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.

lack of liquidity in electricity and gas wholesale markets, and the general lack of transparency in market operations. Responding to these findings, the Commission issued a far-reaching proposal⁶ for the so-called third legislative package, which, after lengthy discussions has finally been adopted in 2009.⁷ At the heart of the package are the formation of a European Network of Transmission System Operators (ENTSO)⁸ for electricity and gas, which implements common standards in order to facilitate cross-border energy supplies, the establishment of an agency as a new body to coordinate the actions of the national regulatory authorities⁹ and, most important, the implementation of more stringent unbundling rules designed to ensure effective independence of the network business from the rest of the vertically integrated energy utilities.

Under the new EU-legislation, Member States may choose between three unbundling regimes which are labelled Full Ownership Unbundling, Independent System Operator (ISO) and Independent Transmission Operator (ITO).¹⁰ The Commission clearly preferred Full Ownership Unbundling¹¹ as the standard model for guaranteeing the independence of network operators. Any controlling interest in the production of a supply company, or the power to exercise any voting rights or to appoint members of any bodies legally representing the production or supply company, would conflict with having control in the transmission business. As a second option, the new legislative package allows a vertically integrated energy company to retain ownership of the transmission network assets, provided that the operation of the network will be assigned to a third party operator, i.e. the ISO.¹² The

ISO must have at its disposal all the requisite financial, technical, and human resources to carry out the task of a transmission business and must commit to comply with a ten-year network development plan. It is evident that, under this model, the asset holder loses most of its entrepreneurial rights. The inclusion of the ITO¹³ as an alternative model was prompted by a joint proposal of eight Member States which sought to maintain existing ownership structures and, at the same time, guarantee the factual independence of the transmission business. Under this alternative model, transmission system operators may remain part of a vertically-integrated energy group, provided that they are equipped with all necessary assets, equipment and staff, have effective decision-making rights without being influenced by other parts of the vertically-integrated company, have an independent management and staff and adhere to a compliance programme to prevent discriminatory conduct. With the exception of the rules on unbundling of transmission networks, which must be transposed within 30 months after the entry into force of the new electricity and gas directives, the package shall be implemented by the Member States within 18 months.

The commission's enforcement activities

The proposal of new legislation was one of the consequences of the findings of the sector inquiry. Additionally, as the Commission stated in the annex to the final report of the sector inquiry¹⁴ and as Commission officials repeatedly pointed out later, the Commission intended to use 'the full gamut of competition enforcement tools at [its] disposal to pursue individual cases that could significantly improve the level of competition in the market.'¹⁵

6 Commission (EC), 'Proposal for a regulation of the European Parliament and Council amending Directive 2003/54/EC concerning common rules for the internal market in electricity' (19 September 2007) COM (2007) 528 final; Commission (EC), 'Proposal for a regulation of the European Parliament and Council amending Directive 2003/55/EC concerning common rules for the internal market in natural gas' (19 September 2007) COM (2007) 529 final; Commission EC, 'Proposal for a regulation of the European Parliament and Council establishing an Agency for the Cooperation of Energy Regulators' (19 September 2007) COM (2007) 530 final; Commission (EC), 'Proposal for a regulation of the European Parliament and Council amending Regulation (EC) No 1228/2003 on conditions for access to the network for cross-border exchanges in electricity' (19 September 2007) COM (2007) 531 final; Commission (EC), 'Proposal for a regulation of the European Parliament and Council amending Regulation (EC) No 1775/2005 on conditions for access to the natural gas transmission networks' (19 September 2007) COM (2007) 532 final.

7 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; 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; 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; 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.

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

9 Regulation (EC) No 713/2009.

10 Schmidt-Preuß, 'OU-ISO-ITO: Die Unbundling-Optionen des 3. EU-Liberalisierungspakets' (2009) 9 *Energiewirtschaftliche Tagesfragen* 82 provides an overview of the options and implications.

11 Electricity Directive 2009/72/EC art. 9; Gas Directive 2009/73/EC art. 9.

12 Electricity Directive 2009/72/EC art. 13, 14; Gas Directive 2009/73/EC art. 14, 15.

13 Electricity Directive 2009/72/EC art. 17–23; Gas Directive 2009/73/EC art. 17–23.

14 Commission (EC), 'DG Competition Report on Energy Sector inquiry' (10 January 2007) COMP SEC (2006) 1724, 12.

15 Philip Lowe (Director General, DG Competition), 'Can EU competition policy create competition in the energy sector?', (Speech, The Beesley Lectures, London 6 Nov. 2008) <http://ec.europa.eu/competition/speeches/text/sp2008_09_en.pdf>, accessed 8 October 2009.

Prior to the publishing of the final report of the sector inquiry, the Commission initiated individual investigations against several incumbent undertakings in the energy sector, especially in Germany, France, Belgium, and Italy.¹⁶ These investigations have progressed to different stages.

Alleged infringements of Article 82 EC

One main focus of the European Commission has been to remedy abuses of market dominance under Art. 82 EC via exclusionary or exploitative conduct, thereby addressing the findings in the sector inquiry alleging high market concentration and vertical foreclosure of energy markets. Investigated potential breaches of Art. 82 EC include supposed long-term market foreclosure via long-term downstream supply contracts and the limitation of transport capacities via the infrastructure necessary to transport energy.

Long-term supply contracts

The Commission's practice as to the compatibility of long-term contracts with competition law has recently become visible in the *Distrigaz* case in 2007.¹⁷ The Decision was issued after the sector inquiry had been published but investigations predated the sector inquiry. In a preliminary assessment in 2005¹⁸ and a subsequent statement of objections in 2006,¹⁹ the Commission voiced concerns that *Distrigaz* was foreclosing the downstream gas markets in Belgium via long-term supply contracts concluded with a large number of customers who mostly sourced all their gas from *Distrigaz*. As the total demand of these customers was withheld from the market only a small share of the total market was open to competition, thereby preventing competitors from entering the market. To remedy the Commission's concerns, *Distrigaz* offered commitments pursuant to Art. 9 Reg. 1/2003 limiting the number of long-term contracts it was allowed to conclude.²⁰ The commitments were slightly adapted after market testing and declared binding with the Commission's Decision.

In its Decision, the Commission identified five elements to be considered when determining whether long-term contracts are to be considered illegal under competition rules.²¹ These are

- the market position of the supplier,
- the share of the customer's demand tied under the contracts,
- the duration of the contracts,
- the overall share of the market covered by contracts containing such ties,
- efficiencies.

In the case at hand, the Commission took the preliminary view that *Distrigaz* held a dominant position in the Belgian market for the sale of high calorific gas (H-Gas) to large customers with a demand in excess of 1 million m³/a of gas. In this context, the Commission stressed *Distrigaz*' market share; existing barriers to entry (e.g. congestion on the entry points into the Belgian gas transport network, the lack of liquidity of the Zeebrugge hub, and the balancing regime on the transport network), and *Distrigaz*' affiliation with the vertically integrated *Suez Group*.²²

With regard to the share of the customer's demand under the contracts held by *Distrigaz*, the Commission reached the preliminary conclusion that in most cases *Distrigaz* covered the total demand of its customers. The latter were usually required to offtake a certain minimum amount from *Distrigaz*, this contractual obligation was usually paired with the customers' right to source all their gas (up to a maximum amount set above the expected maximum demand) from *Distrigaz*, allegedly leading to the effect that most customers did in fact source all their gas from *Distrigaz* rather than look for supply alternatives for at least part of their demand.²³

As to the duration of the contracts, the Commission found in its preliminary assessment that about 60 per cent of *Distrigaz*' contracts ran for at least a year and more than 30 per cent of its contracts ran for over three years.²⁴ Consequently, about 35–45 per cent of

16 Inspections were carried out on 16 May 2007 at the premises of gas companies in Germany, Italy, France, Belgium, and Austria (cf. Commission (EC), 'Competition: Commission has carried out inspections in the EU gas sector in five Member States' MEMO/06/205, 17 May 2006), on 29–30 May 2007 at the premises of energy companies in Germany (cf. Commission (EC), 'Competition: Commission confirms inspections in the energy sector' MEMO/06/220, 30 May 2006) and on 12 December at the premises of electricity companies in Germany (cf. Commission (EC), 'Competition: Commission has carried out inspections in the German electricity sector' MEMO/06/483, 12 December 2007).

17 *Distrigaz* (Case COMP/37.966) Commission Decision of 11 October 2007 [2007] OJ C9/5.

18 Ibid, para 4.

19 Commission (EC), 'Competition: Commission confirms sending Statement of Objections to *Distrigaz* concerning Belgian gas supply market' MEMO/06/197, 16 May 2006.

20 Commission (EC), 'Notice published pursuant to Article 27(4) of Council Regulation (EC) No 1/2003 in Case COMP/B-1/37966—*Distrigaz*' [2007] OJ C77/14.

21 Commission (EC), 'Antitrust: Commission increases competition in the Belgian gas market – frequently asked questions' MEMO/07/407, 11 October 2007.

22 *Distrigaz* (n 17), paras 13–16.

23 *Distrigaz* (n 17), paras 19–20.

24 *Distrigaz* (n 17), paras 21–22.

the market were tied to *Distrigaz* for more than a year.²⁵

On the other hand, the Commission acknowledged that long-term contracts may be justified if they generate efficiencies that outweigh their negative effects. Under the commitment Decision, gas supplies to new gas fired electricity generation facilities exceeding 10 MW shall not be subject to limitations, since long-term supply agreements facilitate or may even be indispensable for efficiency enhancing investments being made. In essence, the approval follows previous Commission Decisions²⁶ and the Commission Guidelines on Vertical Restraints,²⁷ recognising the potential need for long-term agreements in the context of major investments.

In reaction to the Commission's assessment, *Distrigaz* committed itself to ensure that about 70 per cent of the gas volumes that it supplied re-enter the market each and every year. Furthermore, *Distrigaz* undertook to refrain from concluding contracts with industrial users or electricity producers for longer than five years (with the aforementioned efficiency-exception for certain new investments). In relation to existing agreements with a duration exceeding five years, *Distrigaz* committed itself to grant unilateral termination rights to its customers. The maximum duration of contracts concluded between *Distrigaz* and resellers was limited to two years. The commitments are binding until the end of 2010. Following the approval of these commitments in the Commission's Decision, *Distrigaz* is in effect only allowed to tie 20 per cent of the total market (or 30 per cent of its own sales portfolio) for more than one year ahead. Unlike the *E.ON Ruhrgas* case, decided by the German *Bundeskartellamt* and finally upheld by the *Bundesgerichtshof*,²⁸ the Commission did not primarily focus on imposing a fixed maximum contract duration but instead introduced a model according to which a certain part of the overall demand in the market concerned is subject to competition.

Currently, there are two ongoing Commission investigations concerning long-term downstream contracts, both in the electricity sector, concerning potential abuses by *EdF*²⁹ on the French and by *Electrabel*³⁰ on

the Belgian market for industrial electricity customers. Both proceedings were opened in July 2007³¹ and the Commission issued a Statement of Objections against *EdF* on 28 December 2008.³²

The Commission expressed concerns that the contracts concluded by *EdF* with industrial consumers in France may prevent customers from switching to other suppliers thereby leading to market foreclosure. The Commission seems to be applying the test developed in the *Distrigaz* case. Regarding the market position of the supplier, *EdF* is by far the largest producer on the French market for electricity. The contracts concerned are described as being of an 'exclusive nature',³³ so the share of the customer's demand that is tied is very high, and of a long duration, apparently covering a significant share of the market. Moreover, under the same contracts, the resale of electricity appears to be restricted. These practices may have made it difficult for suppliers to enter and expand in the French electricity markets and may have limited liquidity on the wholesale market for electricity.

In reaction to the Statement of Objections, *EdF* offered commitments to the Commission on 4 November 2009 which are somewhat similar to those in *Distrigaz*, allowing 65% of its supplies to re-enter the market every year and limiting contract duration to a maximum of five years.³⁴

Details on the investigation against *Electrabel* are not yet available, but presumably the Commission will also apply the criteria developed in the *Distrigaz* Case.

Market foreclosure via restriction of access to transportation networks

The Commission's enforcement of competition law in the energy sector also focused on remedies for foreclosure which allegedly resulted from a lack of access to transportation infrastructure.

Following on-site inspections carried out in 2006 on the premises of several gas wholesale and gas transmission companies, the Commission opened antitrust proceedings against *RWE*, alleging that the *RWE* transmission system operator had erected artificial obstacles

25 *Distrigaz* (n 17), para 23.

26 E.g. *Scottish Nuclear* (Case IV/33.473) Commission Decision of 30 April 1991 [1991] OJ L178/31, para 40.

27 Commission (EC), 'Guidelines on Vertical Restraints' [2000] OJ C291/1 n 116, para 4.

28 *E.ON Ruhrgas* (B8-113/03) *Bundeskartellamt* Decision of 13 January 2006, <<http://www.bundeskartellamt.de/wDeutsch/download/pdf/Kartell/Kartell06/B8-113-03.pdf?navid=41>> accessed 8 October 2009, upheld by the *Bundesgerichtshof*, KVR 67/07 Decision of 10 February 2009, WuW/E, DE-R 2679.

29 *Long-term electricity contracts in France* (Case COMP/39.386).

30 *Long-term electricity contracts in Belgium* (Case COMP/39.387).

31 Commission (EC), 'Antitrust: Commission initiates formal proceedings against Electrabel and EdF for suspected foreclosure of the Belgian and French electricity markets' MEMO/07/313, 26 July 2007.

32 Commission (EC), 'Antitrust: Commission confirms sending Statement of Objections to EdF on French electricity market' MEMO/08/809, 29 December 2008.

33 *Ibid.*

34 Commission (EC), 'Notice published pursuant to Article 27(4) of Council Regulation (EC) No 1/2003 in case COMP/B-1/39.386 - Long-term contracts France' [2007] OJ C262/32.

for other gas companies to access its gas transport network.

The competition concerns identified by the Commission were that *RWE* may have refused access to its gas transmission network, pursuing a strategy aimed at systematically keeping the transport capacity for itself. The *RWE* transmission system operator may have understated the capacity of its network, thereby enabling *RWE* to use capacity which was not accessible to third parties. Additionally, the capacity allocation mechanisms may have been inefficient, as congestions were found to be resolved in a way favouring the *RWE* supply business. The Commission further alleged that *RWE* may have set its transmission tariffs at an artificially high level in order to squeeze competitors' margins. Such a 'margin squeeze' was found to prevent even competitors as efficient as *RWE* from competing effectively on the downstream gas supply markets, or limiting competitors' or potential entrants' ability to remain in or enter the market.³⁵

In the light of these concerns *RWE* committed itself to sell its gas transmission network to a suitable purchaser who does not give rise to *prima facie* competition concerns. Furthermore, *RWE* is obliged to provide certain services to the purchaser for a transitory period on an arm's length-basis. The commitments are supposed to remove the 'underlying incentives of *RWE* to engage in the alleged anti-competitive conduct'³⁶, supposedly resulting from the vertical integration of gas transport and supply activities.

On 18 March 2009, the Commission declared the proposed commitments to be binding upon *RWE* under Art. 9 Reg. 1/2003.³⁷

The Commission had already issued a commitment Decision imposing massive structural remedies in the energy sector on 26 November 2008,³⁸ in which the Commission rendered legally binding commitments offered by *E.ON* to remedy the Commission's concerns that it had abused its allegedly dominant position on the German electricity wholesale market. *E.ON* committed itself to divest about one-fifth of its generation capacity in Germany (from different types of technology and fuels) as well as to divest its extra-high voltage

network for the transport of electricity. In its preliminary assessment, the Commission voiced concerns that *E.ON* had withheld available and profitable generation capacity from the German electricity wholesale market, thus raising prices above competitive levels. The Commission's further allegation was that *E.ON* TSO had purchased secondary balancing power rather than tertiary balancing power, thereby favouring its own generation affiliate, which was found to be the main provider of secondary balancing power. Furthermore, it was alleged that *E.ON* TSO may have prevented new market entry for such balancing services, thereby also causing prices for balancing power to rise above competitive levels.

In June 2009, the Commission received commitments by *GDF Suez* to settle an ongoing investigation pursuant to Art. 9 Reg. 1/2003.³⁹ The Commission was concerned that *GDF Suez* might have abused its dominant market position in the gas sector by foreclosing competitors from gas import capacity in France. The alleged foreclosure was found to result from strategic underinvestment (limiting investments in the development of LNG-Terminals) and, mainly, long-term capacity reservations for most of France's gas import capacity. The capacity reservations of *GDF Suez* encompass most of the total gas import capacity into France for some length of time, thereby hindering competitors' entry into the market and the development of competition on the downstream French gas market. The Commission's communications do not shed light on whether the Commission's concerns focus on alleged foreclosure effects resulting from the duration of the contracts *per se* as in *Distrigaz*, or on a possible hoarding of capacities by *GDF Suez*, which would consist of under-usage of booked capacities in spite of significant demand for them (which in principle should be prevented by use-it-or-lose-it-provisions in national regulation).

To offset the Commission's concerns *GDF Suez* proposed to release a large share of its long-term reservations of gas import capacity into France by decreasing its long-term reservations to under 50 per cent of the total French import capacity by 2014.

35 *RWE gas foreclosure* (Case COMP/39.402) Commission Decision of 18 March 2009, para 30 <<http://ec.europa.eu/competition/antitrust/cases/decisions/39402/en.pdf>> accessed 8 October 2009.

36 *Ibid*, para 50. *RWE gas foreclosure* (n 35), para 50.

37 *RWE gas foreclosure* (Case COMP/39.402) Commission Decision of 18 March 2009 [2009] OJ C133/8.

38 *German electricity wholesale market* (Case COMP 30.388) and *German electricity balancing market* (Case 39.389) Commission decision of 26 November 2008 [2009] OJ C36/8; Commission (EC), 'Antitrust: Commission opens German electricity market to competition' IP/08/1774

26 November 2008; a detailed, if somewhat one-sided description of this case is given by Chauve *et al.*, 'The E.ON electricity cases: an antitrust decision with structural remedies' [2009] Competition Policy Newsletter 2009–1 <http://ec.europa.eu/competition/publications/cpn/2009_1_13.pdf> accessed 8 October 2009.

39 *GDF foreclosure* (Case COMP 39.316); Commission (EC), 'Notice published pursuant to Article 27(4) of Council Regulation (EC) No 1/2003 in Case COMP/B-1/39.316—Gaz de France (gas market foreclosure)' [2009] OJ C156/14.

Under the proposed commitments, *GDF Suez* would not be restricted to book interruptible or short-term transport capacity. The commitments extend until 2029 and in the Commission's view 'could have a major structural impact on the possibility for other companies to compete on the French market, to the benefit of domestic and industrial gas consumers.'⁴⁰ The consultation period on the commitments ran until 9 September 2009.

Investigations of the Commission in relation to foreclosure practices in the transportation sector have also been directed against the Italian gas incumbent, *ENI*,⁴¹ a Statement of Objections was issued on 6 March 2009.⁴² The Commission found *ENI* to harm consumers by hindering the development of effective competition in the downstream market through capacity hoarding (refusal to grant access to unused capacity available on the network), capacity degradation (granting access in a less useful manner, e.g. with interruptible instead of firm capacity), and strategic underinvestment in *ENI*'s international transmission pipelines. The alleged behaviour supposedly created a bottleneck in import capacity to Italy which led to the rebuttal of a very high level of short- and long-term demand from third party shippers. The Commission envisages the possible imposition upon *ENI* of structural remedies and a fine. *ENI* has announced that it will investigate whether to offer commitments pursuant to Art. 9 Reg. 1/2003.⁴³

In April 2009, the Commission commenced proceedings against the Swedish electricity TSO, *Svenska Kraftnät* (*SvK*), voicing concerns that *SvK* might be limiting export transmission capacity on Swedish interconnectors to neighbouring countries, thereby favouring consumers in Sweden over consumers in neighbouring EU and EEA Member States by reserving domestically produced electricity for domestic consumption.⁴⁴ The alleged practice was found to contradict the Commission's objective of establishing an integrated European electricity market. *SvK* argues that the export restraints were necessary to alleviate internal congestion in its electricity distribution network.⁴⁵ The

case demonstrates an inherent of the Commission's intentions to open network-bound markets to competition and the factual circumstances existing in European energy markets. Most networks were developed to cover the need of a vertically integrated utility within a given supply area. Naturally, in the past these networks did not expand over national borders, except for relatively few interconnectors. Thus the practice of *SvK* to alleviate internal congestion by limiting interconnector capacity may be regarded as essential to safeguard the functioning of its transportation system and as a consequence, to maintain security of supply. In this particular case, however, the Commission claims to have information on alternative means of managing these congestion problems which would not favour consumers in Sweden over consumers in neighbouring EU and EEA Member States. *SvK* has offered commitments pursuant to Art. 9 Reg. 1/2003, undertaking to divide the Swedish transmission system into at least two separate bidding zones to manage congestion in its transmission system without limiting trading capacity on interconnectors and to invest in a new transmission line.⁴⁶

Alleged infringements of Article 81 EC

In parallel to its investigations of harmful unilateral behaviour under Art. 82 EC, the Commission also applied Art. 81 EC to an alleged market sharing agreement between two incumbents on the European Gas market.⁴⁷

On 8 July 2009, the Commission imposed a fine of €553 million each on *E.ON Ruhrgas* and *GDF Suez*, alleging an infringement of Art. 81 EC.⁴⁸ The Commission found *Ruhrgas* and *GDF* to have agreed on a market sharing agreement in 1975 on the occasion of the construction of the Megal pipeline. This pipeline constitutes a backbone for transporting Russian gas to Western Europe including Germany and France. Supposedly, *Ruhrgas* and *GDF* agreed not to sell gas transported via said pipeline into each other's home market. Whereas at the time of concluding the agreement, the practice was in line with applicable legal provisions, the

40 Commission (EC), 'Antitrust: Commission market tests commitments by *GDF Suez* to boost competition in French gas market' IP/09/1097, 8 July 2009.

41 *ENI foreclosure* (Case COMP 39.315).

42 Commission (EC), 'Antitrust: Commission confirms sending Statement of Objections to *ENI* concerning the Italian gas market' MEMO/09/120, 19 March 2009.

43 *ENI*, Interim Consolidated Report as of June 30, 2009 (Rome, 30 July 2009) 108 <http://www.eni.it/en_IT/attachments/publications/reports/reports-2009/INTERIM-CONSOLIDATED-REPORT-2009.pdf> last accessed 8 October 2009.

44 *Svenska Kraftnät* (Case COMP 39.351); Commission (EC), 'Antitrust: Commission opens proceedings against Swedish electricity Transmission System Operator concerning limiting interconnector capacity for electricity exports', MEMO/09/191, 23 April 2009.

45 *Ibid.*

46 Commission (EC), 'Notice published pursuant to Article 27(4) of Council Regulation (EC) No 1/2003 in Case COMP/B-1/39.351—Swedish Interconnectors' [2009] OJ C239/4.

47 *E.ON—GdF collusion* (Case COMP/39.401).

48 Commission (EC), 'Antitrust: Commission fines *E.ON* and *GDF Suez* €553 million each for market-sharing in French and German gas markets', IP/09/1099, 8 July 2009.

Commission accuses *E.ON Ruhrgas* and *GDF* of upholding their market sharing agreement until at least 30 September 2005. An agreement between *E.ON Ruhrgas* and *GDF* of August 2004, in which the undertakings 'confirmed' that the market sharing agreement had never been enforced and become meaningless, was found by the Commission to have had no effect on the parties actual behaviour. Interestingly, two months after this agreement of August 2004, the Commission reprimanded *ENI*, *ENEL*, and *GDF* for similar contracts in which *ENI* and *ENEL* had agreed with *GDF* to use gas transported through France for them by *GDF* not on the French but only on the Italian market.⁴⁹ No fines were issued, as '[a]mong other factors, [the Commission] has borne in mind that this stage of the liberalisation process, which ended with the entry into force of the Second Gas Directive in August 2004, has involved a profound change in the commercial practices of the operators present on the market.'⁵⁰

National enforcement action in 2009

The year 2009 has also seen significant activities of national competition authorities in the energy sector including the carrying out of sector inquiries as well as proceedings against individual market participants.

In the first half of 2009, the German *Bundeskartellamt* launched sector inquiries into the gas and electricity markets, with first results expected to be published in October or November.⁵¹ Whereas the purpose of the sector inquiry into the electricity market is to investigate pricing behaviour on the wholesale level due to concerns that electricity prices at the Power Exchange *EEX* might have been artificially kept high by *RWE*, *Vattenfall*, *E.ON*, and *EnBW*, the sector inquiry into the gas market focuses on potential foreclosure effects resulting from long-term

transportation agreements and capacity booking practices. A further sector inquiry concerning district heating was initiated by the *Bundeskartellamt* in September.⁵² In Germany, roughly five million households are supplied with district heating, accounting for almost 13 per cent of the overall heating market. The *Bundeskartellamt* regards the monopoly position of district heating suppliers to create some scope for supra-competitive prices without leaving any choice for the district heating customers bound to the distribution networks of switching to alternative supply sources. The aim of the investigation into the district heating markets is to increase transparency in price setting within this market. Finally, in July 2009, the *Bundeskartellamt* published an interim report in the ongoing investigation in the fuel sector.⁵³ The authority characterises the sector as being highly concentrated with market participants other than the members of the alleged market-leading oligopoly of five companies having only limited possibilities to compete. Prices on the market are found to be highly transparent which mainly benefits the dominant suppliers as they are able to control prices on a continuous basis. These findings have already led the authority to prohibit the planned acquisition of 59 petrol stations in the Federal States of Sachsen and Thüringen by *Total*.⁵⁴ The planned acquisition was found to lead to the strengthening of the dominant market position of the oligopoly in the local markets for sale of petrol and diesel fuel to end consumers. The *Bundeskartellamt* has declared that further mergers involving the five leading companies will, in principle, not be cleared.⁵⁵ The authority also continued its investigation of an alleged cartel in the LPG Market, fining two undertakings a total of over €41 million for engaging in 'customer protection agreements and accompanying price agreements, at least from 1997 until a search in May 2005'.⁵⁶ In 2007 and

49 *ENI/ENEL/GDF* (Case COMP/38.662) Commission decisions of 26 October 2004.

50 Commission (EC), 'Commission confirms that territorial restriction clauses in the gas sector restrict competition', IP/04/1310, 26 October 2004.

51 Regarding the gas market: 'Bundeskartellamt führt Sektorenuntersuchung im Gasmarkt durch' energate online (20 February 2009) <http://www.energate.de/news/99494?Energate_Session=25948c4b56a90272d67ad19e8cb00ba7> accessed 8 October 2009; regarding the electricity market: Michael Gassmann, 'Angriff auf Stromkonzerne' *Financial Times Deutschland* (Düsseldorf, 16 April 2009) <<http://www.ftd.de/unternehmen/handel-dienstleister/erste-sektoruntersuchung-angriff-auf-stromkonzerne/501402.html>> accessed 8 October 2009.

52 *Bundeskartellamt*, 'Bundeskartellamt examines district heating sector', 14 September 2009 <http://www.bundeskartellamt.de/wEnglisch/News/press/2009_09_14.php> accessed 8 October 2009.

53 *Bundeskartellamt*, 'Bundeskartellamt publishes Interim Report on Fuel Sector Inquiry', 2 July 2009 <http://www.bundeskartellamt.de/wEnglisch/News/press/2009_07_02_II.php> accessed 8 October 2009;

Bundeskartellamt, 'Sektoruntersuchung Kraftstoffe—Zwischenbericht Juni 2009' <http://www.bundeskartellamt.de/wDeutsch/download/pdf/2009-07-02%20Zwischenbericht_SU_Kraftstoffe.pdf> accessed 8 October 2009.

54 *Total Deutschland GmbH / OMV Deutschland GmbH* (B 8 – 175/08) *Bundeskartellamt*, Decision of 29 April 2009 <<http://www.bundeskartellamt.de/wDeutsch/download/pdf/Fusion/Fusion09/B8-175-08.pdf?navid=46>> accessed 8 October 2009.

55 *Bundeskartellamt*, 'Sektoruntersuchung Kraftstoffe—Zwischenbericht Juni 2009', 4 <http://www.bundeskartellamt.de/wDeutsch/download/pdf/2009-07-02%20Zwischenbericht_SU_Kraftstoffe.pdf> accessed 8 October 2009.

56 *Bundeskartellamt*, 'Bundeskartellamt imposes multi-million fines against further liquefied gas suppliers', 15 April 2009 <http://www.bundeskartellamt.de/wEnglisch/download/pdf/Presse/150408_Fluessiggas_final_engl.pdf> accessed 8 October 2009.

2008, the *Bundeskartellamt* had already imposed fines on a number of LPG suppliers totalling over €200 million.

In June 2009, the Spanish *Comisión Nacional de la Competencia* launched an investigation concerning possible anti-competitive behaviour of electricity companies including *Endesa*, *Iberdrola*, *Hidrocontrabrico*, *Unión Fenosa*, and *E.ON*,⁵⁷ adopting interim measures shortly thereafter.⁵⁸ The authority articulated concerns that the undertakings withheld necessary information required by competitors to enable customers to switch their supplier. Similar behaviour had already led to fines of €35 million in total being issued in April 2009, *inter alia* to some of the undertakings mentioned.⁵⁹ The results of a fuel sector inquiry were published in September,⁶⁰ stating that high levels of concentration, vertical integration and high barriers to entry led to a low level of competition and high prices on the Spanish markets. Earlier in the year, the CNC had already levied fines totalling nearly €8 million on *Repsol*, *Cepsai*, and *BP* for indirectly fixing retail prices of independent petrol stations supplied by them.⁶¹

On 29 April 2009, the Italian *Autorità Garante della Concorrenza e del Mercato* launched preliminary investigations into the Italian gas and electricity retail markets.⁶² Similar to the situation in Spain, allegedly dominant utilities were found to apply commercial practices making it difficult for retail customers to

change their supplier and, as a result, promote a cementation of the dominant firm's market shares and market foreclosure. In June 2009, the Authority published the report of the 'fact-finding investigation by the AGCM and the Italian Electricity and Gas Authority into storage activities in the natural gas industry in Italy' that had started in 2007.⁶³ Both authorities recommend that *ENI* should sell part of its storage capacity in order to enable other market participants to compete more effectively on the market for the supply of gas. Furthermore, the authorities found the scarce storage capacity was currently not being used in a way suited to guarantee security of supply. Finally, the AGCM is investigating an alleged arrangement for the joint determination of retail list prices for bulk LPG and bottled LPG throughout Italy by *Butan Gas*, *ENI*, and *Liquigas*. The agreement was allegedly reached by way of meetings of top-level management and covered at least the years from 1994 to 2005, having consequences in subsequent years as well.⁶⁴

On 21 April 2009, the Portuguese *Autoridade da Concorrência* published its 'Final Report on the In-depth Analysis of the Liquid Fuel and Bottled Gas Sectors'.⁶⁵ The authority found these sectors to be characterised by high market concentration and vertical integration, leading to a lack of competition on different market levels. Another report was published in May, on wholesale electricity prices in Portugal in the

57 CNC, 'CNC opens new proceedings against electric companies and considers adopting interim measures', 25 June 2009 <http://www.cncompetencia.es/Administracion/GestionDocumental/tabid/76/Default.aspx?EntryId=30638&Command=Core_Download&Method=attachment> accessed on 8 October 2009.

58 CNC, 'CNC adopts Interim Measures in the Proceedings brought against five Electric Companies', 3 July 2009 <http://www.cncompetencia.es/Administracion/GestionDocumental/tabid/76/Default.aspx?EntryId=30058&Command=Core_Download&Method=attachment> accessed on 8 October 2009.

59 CNC, 'CNC sanctions Electricity Distributors for Abuse of dominant Position', 6 April 2009 <http://www.cncompetencia.es/Administracion/GestionDocumental/tabid/76/Default.aspx?EntryId=29786&Command=Core_Download&Method=attachment> accessed on 8 October 2009; CNC, 'CNC sanctions fifth largest Electricity Distributor for Abuse of dominant Position', 27 April 2009 <http://www.cncompetencia.es/Administracion/GestionDocumental/tabid/76/Default.aspx?EntryId=30105&Command=Core_Download&Method=attachment> accessed on 8 October 2009.

60 CNC, 'Informe sobre la competencia en el sector de carburantes de automoción', July 2009 <http://www.cncompetencia.es/Administracion/GestionDocumental/tabid/76/Default.aspx?EntryId=31343&Command=Core_Download&Method=attachment> accessed on 8 October 2009.

61 CNC, 'CNC fines Repsol, Cepsa and BP for indirectly fixing retail Fuel Prices and announces Publication of its Report on the Sector', 30 July 2009 <http://www.cncompetencia.es/Administracion/GestionDocumental/tabid/76/Default.aspx?EntryId=31159&Command=Core_Download&Method=attachment> accessed on 8 October 2009.

62 AGCM, 'Electricity and Gas: Antitrust Authority launches three investigations into A2A, ACEA, and ITALGAS over possible abuse of a

dominant position', 6 May 2009 <http://www.agcm.it/agcm_eng/COSTAMPA/E_PRESS.NSF/0af75e5319fead23c12564ce00458021/c4e5e32e47fbfec12575bc002e7f6b?OpenDocument> accessed 23 September 2009; AGCM, 'Electricity and Gas: Antitrust authority launches investigations into Iride Group and Hera Group over possible abuse of a dominant position', 12 May 2009 <http://www.agcm.it/agcm_eng/COSTAMPA/E_PRESS.NSF/0af75e5319fead23c12564ce00458021/6534c28a2ba5b842c12575bc002e9bfc?OpenDocument> accessed 23 September 2009.

63 AGCM, 'Gas: Antitrust and Energy Authority recommend Sale of part of Eni's stocks', 3 June 2009 <http://www.agcm.it/agcm_eng/COSTAMPA/E_PRESS.NSF/0af75e5319fead23c12564ce00458021/827b11a6f31ea35fc12575cf002f9e2d?OpenDocument> accessed 23 September 2009; AGCM/AEEG, 'Indagine Conoscitiva Sull 'Attività di Stoccaggio di Gas Naturale', 28 May 2008 <<http://www.autorita.energia.it/docs/09/051-09visall.pdf>> accessed 8 October 2009.

64 AGCM, 'Energy: Antitrust Authority extends investigation into anti-competitive arrangements in the LPG sector in Sardinia to the whole industry', 3 February 2009 <http://www.agcm.it/agcm_eng/Costampa/e_Press.NSF/0af75e5319fead23c12564ce00458021/90801c37eed0230fc125755003f4936?OpenDocument> accessed 23 September 2009.

65 AdC, 'Final Report on the In-depth Analysis of the Liquid Fuel and Bottled Gas Sectors', 31 March 2009 <http://www.concorrenca.pt/download/pressrelease2009_06.pdf> accessed 23 September 2009; AdC, 'Análise Aprofundada sobre os Sectores dos Combustíveis Líquidos e do Gás Engarrafado em Portugal Relatório Final', 31 March 2009 <http://www.concorrenca.pt/download/AdC_Relatorio_Combustiveis_Liquidos_Gas_Engarrafado_em_Portugal_Marco2009.pdf> accessed 8 October 2009.

second half of 2007.⁶⁶ The authority stressed that due to higher generation costs and a different supply structure as well as limited interconnector capacity, wholesale prices were about 23 per cent higher than in Spain. While the authority expects lower prices through investments in generation capacity and interconnectors, it suggests additionally deregulating sales prices to end consumers to promote competition.

On 30 January 2009, the *Nederlandse Mededingingsautoriteit* published a Monitor on the Dutch Electricity and Natural Gas Markets for small-scale Users (July 2007–July 2008).⁶⁷ Here, there appears to be active competition, even though the markets are still characterised by three large incumbents (*Essent*, *Eneco*, and *Nuon*). Albeit slightly decreasing, the combined market share of these leading players is still around 80 per cent.

In October 2008, British Ofgem published a report on the energy supply markets.⁶⁸ The main point of criticism within a generally positive outlook was the lack of liquidity especially on wholesale electricity markets. This circumstance was identified as the main barrier to entry for newcomers, hindering these from adding a 'competitive fringe' to a market which, according to the authority, is currently dominated by the 'Big 6' (*Centrica*, *EDF Energy*, *E.ON UK*, *RWE npower*, *Scottish and Southern Energy*, and *Scottish Power*).

On 30 March 2009, Ofgem published initial policy proposals as to how to deal with market power concerns in the British electricity wholesale sector and opened a consultation to this question.⁶⁹ The three approaches initially proposed by Ofgem are:

- changes to existing market arrangements, for example by amending the price setting method used

on the balancing market or by better aligning the incentives of system operators and transmission owners to minimise transmission constraints;

- changes to existing assets and/or ownership of assets, for example by promoting investments in transmission capacity, by introducing physical or virtual divestment obligations of generation capacity in certain highly concentrated sub-markets or by the unbundling of the Scottish transmission networks; and
- specific mechanisms for addressing market power concerns such as introducing *ex ante* price control or a market power licence condition strengthening Ofgem's *ex post* investigation powers.

A 2008 Ofgem decision imposing fines of £41 million on National Grid for abusing its dominant position on the metering market by concluding long-term contracts with energy suppliers, which prevented/limited, through high penalties, the replacing of meters by competitors, was upheld in principle by the CAT.⁷⁰ Despite the fine being lowered to £30 million, this remains the highest fine yet issued for an abuse of dominance in the UK.⁷¹

The *Autorité de la Concurrence* in France also issued a fine (of €320,000) in an abuse of dominance case in 2009.⁷² It found that the incumbent gas and electricity supplier in Grenoble had issued defamatory press releases to weaken a competitor in 2005.

On 22 September 2009, the Belgian *Direction Générale de la Concurrence* conducted dawn raids on the premises of several companies active in the wholesale of electricity in Belgium.⁷³ Possible infringements of competition law under investigation include restrictive

66 AdC, 'Competition Authority concludes Report on Wholesale Electricity Prices', 15 May 2009 <http://www.concorrenca.pt/download/pressrelease2009_09.pdf> accessed 8 October 2009; AdC, 'Relatório sobre a formação dos preços grossistas da energia eléctrica em Portugal no segundo semestre de 2007' May 2009 <http://www.concorrenca.pt/download/AdC_Relatorio_Grossistas_Energia_Eletrica_2007.pdf> accessed 8 October 2009.

67 NMa, 'Dutch consumer energy market is improving, but NMa is not yet satisfied' 09–02 30 January 2009, <http://www.nmanet.nl/engels/home/News_and_publications/News_and_press_releases/Press_2009/09-02-Dutch_consumer_energy_market_is_improving_but_NMa_is_not_yet_satisfied.asp> accessed 8 October 2009; NMa, 'Marktmonitor Nederlandse kleinverbruikersmarkt voor elektriciteit en gas, juli 2007–juni 2008', January 2009 <http://www.energiekamer.nl/images/Marktmonitor_kleinverbruikersmarkt_2008_Def_tcm7-123016.pdf> accessed 8 October 2009.

68 Ofgem, 'Energy Supply Probe—Initial Findings Report', 6 October 2008 <<http://www.ofgem.gov.uk/Markets/RetMkts/ensuppro/Documents/1/Energy%20Supply%20Probe%20-%20Initial%20Findings%20Report.pdf>> accessed 8 October 2009.

69 Ofgem, 'Addressing Market Power Concerns in the Electricity Wholesale Sector—Initial Policy Proposals', 30 March 2009 <<http://www.ofgem.gov>

<http://www.ofgem.gov.uk/Markets/WhlMkts/ComandEff/Documents/1/Market%20Power%20Concerns-%20Initial%20Policy%20Proposals.pdf>> accessed 8 October 2009.

70 *National Grid v Gas and Electricity Markets Authority* [2009] CAT 14.

71 Ofgem, 'Competition Appeal Tribunal Upholds Ofgem's Decision Against National Grid In Metering Competition Case', 29 April 2009 <<http://www.ofgem.gov.uk/Media/PressRel/Documents/1/R20nationalgridmetering.pdf>> accessed 8 October 2009.

72 *Autorité de la Concurrence*, 'The Autorité de la concurrence fines Gaz and Electricité de Grenoble for abusing its dominant position in the market for the supply of electricity to small businesses', 25 March 2009 <http://www.autoritedelaconcurrence.fr/user/standard.php?id_rub=316&id_article=1115> accessed 8 October 2009.

73 *L'Auditorat du Conseil de la concurrence*, 'Perquisitions au sein d'entreprises actives dans le secteur de la vente en gros d'électricité en Belgique', 22 September 2009 <http://economie.fgov.be/fr/binaries/Communiqu%C3%A9%20de%20presse%20Autorit%C3%A9%20belge%20de%20la%20concurrence%2022%202009%209_tcm326-74612.pdf> accessed 8 October 2009.

practices and/or the abuse of a dominant position, in particular capacity withdrawal and price formation.

Apparently, national competition authorities are by no means taking a back seat to the Commission in investigating the functioning of energy markets. It will be interesting to see whether the sector inquiries by the authorities will lead to a similar fallout of individual investigations as the Commission's sector inquiry did. If this is the case a further point worth observing might be potential conflicts between competition authorities as to which is best suited to take on a specific case.

Observations

The concept of strategic underinvestment

Both the sector inquiry and the regulatory measures as stipulated in the third legislative package acknowledge that the access to electricity and gas networks on transparent and non-discriminatory conditions is indispensable for entering the downstream energy supply markets and, as a consequence, to open up European electricity and gas markets. It is thus not surprising that the Commission and national competition authorities have concentrated a substantial part of their enforcement activities on investigating potential infrastructure foreclosure. Whereas it was common ground that preventing competitors from having access to infrastructure necessary for competing in upstream or downstream markets may be qualified as an infringement of Art. 82 EC, the recent enforcement practice suggests that the Commission has somewhat moved away from the principles developed under the concept of 'essential facilities' by basing its accusations of market foreclosure on 'strategic underinvestment'.⁷⁴ The details of this approach are still rather unclear, as the prevailing view so far was that while a dominant

undertaking might have to grant access to an essential facility owned by it, Art. 82 EC could not oblige this undertaking to significantly expand existing facilities or construct new ones in order to further facilitate market entry.⁷⁵

In line with this view, the Commission has yet to use its competition law powers to oblige an undertaking to invest in capacity enhancements of its infrastructure, which is relevant for the market participants to enter downstream markets.⁷⁶ In previous 'essential facility' Decisions the Commission found that the existing capacities had not been used efficiently, leading to an artificial congestion, which could have been avoided by organisational measures requiring, if any, only marginal costs.⁷⁷ The Commission Guidance Paper on Art. 82 EC does not touch on the topic other than stating that the disincentive to invest inherently connected to obligations to supply⁷⁸ would not be considered in cases in which owners of essential facilities had benefited from special rights or state financing when developing the essential facility or where the obligation to supply has been imposed by regulatory measures.⁷⁹

On a national level, the Italian competition authority ruled in 2006 that *ENI* had abused its dominant position by instructing a wholly-owned subsidiary operating a gas import pipeline in Tunisia not to expand import capacities after the subsidiary had signed profitable ship-or-pay agreements with potential customers.⁸⁰ *ENI* was found to have made the decision to discontinue the investment with a view to preventing its wholesale business from being adversely affected by a perceived threat of a 'gas bubble', the fear of oversupply on the Italian market.⁸¹ It is doubtful whether this case establishes a precedent in the sense that the owner of an essential facility is obliged to invest in capacity enhancements. In fact, the authority expressly states that the decision is not based on the supposed breach

74 *ENI foreclosure* (Case COMP 39.315) (n 40); *GDF foreclosure* (Case COMP 39.316) (n 38).

75 European Commission, 'DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses' [2005] [234] <<http://ec.europa.eu/competition/antitrust/art82/discpaper2005.pdf>> accessed 8 October 2009; Statement of the Commission in OECD *Policy Roundtables—The Essential Facilities Concept* [1996] 99; O'Donoghue/Padilla, *The Law and Economics of Article 82 EC* (Hart Publishing, Oxford 2006) 450; Doherty, 'Just what are essential facilities?' CMLR 38 [2001] 397, 431; Haus, *Zugang zu Netzen und Infrastruktureinrichtungen* (Carl Heymanns Verlag, Köln 2002) 129; B9-63220-T-199/97 and T-16/98 *Puttgarden* (Bundeskartellamt decision of 21 December 1999) WuW/E, DE-V 253, 258.

76 Richard Whish, *Competition Law* (6th edn, Oxford University Press, Oxford 2008) 697.

77 E.g. *Frankfurt Airport* Commission Decision 98/190/EC, [1998] OJ L72/30, paras 86–88; *Port of Rødby* Commission Decision 94/119/EC, [1994] OJ L55/52, para 15.

78 cf. Damien Geradin 'Limiting the Scope of Article 82 EC: What can the EU learn from the U.S. Supreme Court's Judgement in *Trinko* in the Wake of *Microsoft*, *IMS*, and *Deutsche Telekom*?' [2004] 41 CMLRev 1519, 1539–40.

79 Commission (EC), 'Communication from the Commission: Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings', COM (2008) 9 February 2009 C(2009) 864 final, para 82.

80 Decision of 15 February 2006 of the *Autorità Garante della Concorrenza e del Mercato*, Bolletino de l'AGCM no. 5/2006, A358; upheld in principle by the Decision of 29 November 2006 of the *Tribunale Amministrativo Regionale del Lazio*, case no. 3582/2006—*ENI Trans Tunisian Pipeline*, appeal still pending at the time of writing.

81 Decision of 15 February 2006 of the *Autorità Garante della Concorrenza e del Mercato*, Bolletino de l'AGCM no. 5/2006, A358, para 184.

of an obligation of that kind.⁸² Rather, the decision was based on *ENI*'s dominant position in the wholesale market for the supply of gas⁸³ and its contradictory behaviour, with *ENI* actively intervening after its subsidiary had already concluded profitable contracts.

Details of the Commission's new stance on strategic underinvestment have not yet been made public. In the cases against *ENI* and *GDF Suez*, the Commission claims that neither undertaking expanded gas import facilities (pipelines/LNG-terminals) to fully meet demand. The Commission is apparently demanding that an undertaking not only grant access to existing infrastructure but actually provide additional financial resources for expansion to adapt a given infrastructure to the actual demands.

It appears questionable whether Art. 82 EC suffices as an adequate tool for competition authorities to establish and enforce investment obligations. Following this route would mean that competition authorities use competition law to take entrepreneurial decisions with long-term effects. Investment decisions have to be taken *ex ante* when future developments of supply and demand as well as competitor's market strategies and regulatory developments are unclear. Reasonable market participants will often disagree on what the right investment decision would be, including expert regulators.⁸⁴ In the abovementioned *ENI Trans Tunisian Pipeline* case, for example, *ENI* argued that other projected entrance capacity enhancements into the Italian market would possibly make the enhancement of the Tunisian pipeline superfluous.⁸⁵

Investment decisions form the basis of changes to a given market structure; investment obligations levied upon undertakings do thus concern the restructuring of the platform on which market participants operate rather than setting standards for acceptable market behaviour within an existing market environment. The expansion of an existing infrastructure does not

belong to the tasks of the Commission under EC competition law regardless of its relevance for the competitive situation in upstream or downstream markets. The setting of standards for investments into infrastructure assets should be subject to sector specific legislation. This is all the more true, since regulatory incentives should be more effective in raising levels of investment⁸⁶ and could be brought in line with other regulatory demands and procedures more easily. A regulatory approach would provide a level of predictability and legal certainty more likely to foster investment than an *ex post* review under Art. 82 EC.

An obligation to expand existing infrastructure and to invest the required capital is furthermore also debateable under the property rights guaranteed by Art. 295 EC, since it does not only require the non-discriminatory use of existing assets but curtails the owner's discretion as to how and to what extent investments shall be made.⁸⁷ Such an obligation would limit the property owner's negative freedom not to invest and goes well beyond the obligation to operate and market existing property in a non-discriminatory manner. Such a step cannot be taken by executive action but needs legislative approval.

Finally, it should be concluded that the establishing of investment obligations under Art. 82 EC will be a disincentive to third parties to invest and attack the dominant position of the owner of the essential facility by offering alternative means for other market participants to enter downstream supply markets.⁸⁸ Thus, antitrust enforcement may cement this dominant position.⁸⁹

Transportation capacity contracts

After downstream supply contracts have been challenged by competition law enforcement on the grounds of alleged foreclosure effects,⁹⁰ both the Commission, and national competition authorities have now moved

82 Ibid, para 187

83 Ibid, para 167.

84 cf. Ofgem, 'St Fergus and Bacton Investigation', 16 December 1999: the British monopoly gas transporter, Transco, always had a statutory duty to develop and maintain the transmission system. When insufficient capacities in its network were discovered in 1998, Ofgem conducted an investigation into whether Transco had breached its investment duties. Ofgem found that despite tight regulatory controls of forward investment plans and industry consultations Transco (as well as the other players) had not anticipated market developments correctly, leading to a lack of capacity. No breach of the investment duties was found. <<http://www.ofgem.gov.uk/Markets/WhlMkts/CustandIndustry/DemSideWG/Archive/1314-fergdec.pdf>> accessed 8 October 2009.

85 (n 80) [117].

86 Petit, 'The Proliferation of National Regulatory Authorities alongside Competition Authorities: A Source of Jurisdictional Confusion?' [2005] 11 <<http://ssrn.com/abstract=527403>> accessed on 8 October 2009.

87 Hohmann, *Die essential facility doctrine im Recht der Wettbewerbsbeschränkungen* (Nomos, Baden-Baden 2001) 292; de Bronett in Wiedemann (ed.), *Handbuch des Kartellrechts* (2nd edn, C.H. Beck, München 2008) § 22, para 58; Scholz, *ibid*, § 34, para 64 with regard to actions taken by the national regulator.

88 Doherty, (n 74) 431; Haus, (n 74) 130; Whilst the development of large networks might be unrealistic nowadays—although the development of WinGas in Germany over the last 20 years shows that it was possible not too long ago—several smaller projects could probably be developed by newcomers.

89 Temple Lang, 'Defining Legitimate Competition: Companies' Duties to supply Competitors and Access to Essential Facilities' (1994) in Hawk (ed.) *Annual Proceedings of the Fordham Corporate Law Institute* (Juris Publishing 1995) ch 12, 245, 277.

90 *Distrigaz* (Case COMP/37.966) (n 17); *E.ON Ruhrgas (Bundeskartellamt, B8-113/03)* (n 28).

on to scrutinise transport agreements for similar reasons. The availability of free transport capacity is undoubtedly a key element for entrance into new markets to become possible. As the commitments offered by *GDF Suez* suggest, the Commission seems to apply the *Distrigaz*-model not only when reviewing downstream supply contracts under EC-competition law but also when evaluating infrastructure markets, requesting that the capacities reserved for an incumbent entity shall not trespass a certain threshold. If and to what extent the application of standards developed for the assessment of downstream supply contracts can be applied to transportation (capacity) contracts requires further review.

Since the second liberalisation package has been implemented by Member States, transportation contracts, contrary to supply contracts, are subject to sector specific regulation. National regulators ensure that transportation contracts are in line with the strict rules on network access including use-it-or-lose-it-provisions and congestion procedures that have furthered the development of competition. The current legislation neither touches upon the admissible term of transportation contracts nor the status of contracts predating the implementation of the regulations. This will not change with the third liberalisation package. The Commission did not propose regulatory measures regarding long-term contracts but rather decided to push forward using its enforcement powers under Art. 81 and Art. 82 EC. Whilst the CFI has decided that the application of EC competition law is not precluded if the relevant behaviour is in line with national regulation which implements European directives,⁹¹ one can question whether a regulatory approach (for which the Commission would have needed support from Member States) might have been more suitable.

Even if long-term transportation contracts concern large parts of the available import capacity, it is clear from the Commission's practice itself as outlined recently in *Distrigaz*, that long-term contracts are not opposed to competition *per se*.⁹² When evaluating long-term capacity contracts, a basic structural difference between downstream supply contracts and capacity contracts has to be taken into account. Not

only does regulatory law provide safeguards in a number of circumstances against hoarding of transport capacity and market foreclosure; long-term capacity contracts are also complimentary to long-term gas import agreements, thereby contributing to security of energy supply across EU Member States. In relation to the long-term nature of most gas import contracts, which regularly include take-or-pay-clauses (i.e. that the buyer has to pay a certain amount even if he does not off-take certain minimum quantities of gas), it is paramount that the buyers hold corresponding import capacities enabling them to fulfil their contractual obligations. This is recognised by the former⁹³ as well as the new⁹⁴ Gas Directives, providing that economic difficulties in connection with take-or-pay-provisions in import contracts can be a justification for denying network access to third parties. The Commission furthermore expressly supports the existence of long-term upstream contracts as a means of safeguarding security of supply.⁹⁵ The inherent connection of capacity reservations with long-term contracts thus has to be taken into account as an efficiency consideration, which may justify long-term capacity reservations under the test developed in the *Distrigaz* case.

As one proceeding in which the Commission scrutinises long-term capacity reservations⁹⁶ will probably be settled under Art. 9 Reg. 1/2003, it remains to be seen if further clarification by the European Courts can be expected.

Structural remedies under Article 9 Regulation 1/2003

The recent practice of the Commission in the energy sector underlines the increasing popularity of commitment Decisions under Art. 9 Reg. 1/2003. Whereas in the first years after its introduction in Reg. 1/2003, the commitment Decision procedure did not seem to play a major role in competition law enforcement, with only very few cases being decided on the basis of commitments, the aforementioned cases in the energy sector clearly change the picture. Particularly in relation to the relatively low number of proceedings under Art. 82 EC, the increasing relevance of commitment Decisions is noticeable.⁹⁷ Due to this evolution of the Commission's

91 Case T-271/03 *Deutsche Telekom AG v Commission* [2008] ECR II-477.

92 *Distrigaz* (Case COMP/37.966) (n 17).

93 Art. 27 Dir. 2003/55/EC (n 7).

94 Art. 48 Dir. 2009/73/EC (n 7).

95 Commission, 'Commission Staff working document: Accompanying document to the Proposal for a Regulation of the European Parliament and of the council concerning measures to safeguard security of gas

supply and repealing Directive 2004/67/EC in security of gas supply' COM(2009) 363, 16 July 2009 SEC(2009) 978 final, 27–28.

96 *GDF foreclosure* (Case COMP 39.316) (n 38).

97 Schweitzer, 'Commitment Decisions under Art. 9 of Regulation 1/2003: The Developing EC Practice and Case Law' [2008] EUI Working Papers LAW No. 2008/22 9 <<http://ssrn.com/abstract=1306245>> accessed 8 October 2009.

enforcement practice the pressing question remains, whether statutory requirements on safeguarding the procedural rights of the undertakings concerned are satisfied in the application of the commitment procedure laid down in Art. 9 Reg. 1/2003.

The aforementioned enforcement activities of competition authorities in relation to the energy sector are a further demonstration that the European rules on the abuse of a dominant position are still unclear in many aspects. The recent Guidance Paper of the Commission⁹⁸ might have brought some light—albeit probably not enough—to guarantee a sufficient degree of reliability and clarity with regard to the application of Art. 82 EC.⁹⁹ Fears have been voiced that the legal uncertainty as to the principles and the concept underlying Art. 82 EC might tempt Commission officials to settle abuse of dominance cases where there is neither sufficient factual evidence nor a convincing economic theory to pass judicial control.¹⁰⁰

Furthermore, the general concern has been articulated that the Commission may use the tool of Art. 9 Reg. 1/2003 to impose commitments that go beyond remedies which could have been imposed under Art. 7 Reg. 1/2003 and which are not just designed to remedy a specific infringement of EU competition rules but rather to restructure markets according to its own competition goals and regulatory strategies.¹⁰¹ Competition law enforcement would thus be the back-up solution for legislative measures which can only be put in effect after lengthy and often controversial political debate.

The undertakings concerned may feel tempted to accept the Commission's proposal as they feel threatened by the high level of fines, which might be levied

by the Commission if no settlement pursuant to Art. 9 Reg. 1/2003 is reached. This may lead an undertaking to offer (disproportionate) commitments even if it does not agree with the Commission's assessment of the case.¹⁰² On the other hand, the fact that there is no formal finding of an infringement in commitment Decisions and thus follow-on damage claims will become less likely to succeed because the Decision cannot be used as *prima facie* evidence of an infringement,¹⁰³ may also play an important part in the decision making.

Judicial review is unlikely in commitment Decisions as undertakings voluntarily offering commitments will usually not appeal against them. Thus, concerns have been raised that legal certainty and control of the European executive may take a serious hit if the Commission's tendency of imposing commitment Decisions will gain momentum.¹⁰⁴ Much will depend on whether the ECJ will uphold the CFI's judgment in *Alrosa*,¹⁰⁵ in which the CFI had for the first time stressed the Commission's obligation to observe fundamental due process requirements in the commitment Decision procedure.¹⁰⁶

With a view to the cases in the energy sector, the relevance of the concerns voiced in relation to the commitment procedure receives further illustration. First of all, it is doubtful whether the recent structural remedies such as the divestiture of generation capacity or of transmission networks meet the proportionality test.¹⁰⁷ Meeting this test would be necessary to impose such a remedy under Art. 7 Reg. 1/2003, and the Commission has so far not used its powers under Art. 7 Reg. 1/2003 to impose structural remedies.¹⁰⁸ This may also

98 Commission (EC), 'Communication from the Commission—Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings' [2009] OJ C 45/2.

99 Centre for European Policy Studies, 'Treatment of exclusionary Abuses under Article 82 of the EC Treaty—Comments on the European Commission's Guidance Paper', Final Report of a CEPS Task Force 1 <<http://www.ceps.be/files/book/2009/09/1907.pdf>> accessed 8 October 2009; Temple Lang 'Article 82 EC—The Problems and the Solution' (September 3, 2009). FEEM Working Paper No. 65 [2009] 6–8 <<http://ssrn.com/abstract=1467747>> accessed 8 October 2009; Geradin/Henry 'Abuse of Dominance in the Postal Sector—The Contribution of the Guidance Paper on Article 82 EC' [2009] 1–2 <<http://ssrn.com/abstract=1435362>> accessed 8 October 2009.

100 Temple Lang, 'Commitment Decisions and Settlements with Antitrust Authorities and Private Parties under European Antitrust Law' in Hawk (ed.), *International Antitrust Law & Policy: Fordham Corporate Law 2005* (Juris Publishing 2006) ch 13, 265, 316 ff.

101 Ibid; *Monopolkommission*, 54. Sondergutachten der Monopolkommission gemäß § 62 EnWG, Bonn, 4 August 2009, paras 495, 499 <http://www.monopolkommission.de/sg_54/s54_volltext.pdf> accessed 8 October 2009; G. Monti, 'Managing the Intersection of Utilities Regulation and EC Competition Law' 4 [2008] *CompLRev* 123, 140.

102 Temple Lang, (n 99), 319; Wils 'Settlements of EU Antitrust Investigations: Commitment Decisions under Art. 9 of Regulation No 1/2003' [2006] 29 *World Competition* 345, 355.

103 Georgiev, 'Contagious Efficiency: The Growing Reliance on U.S.-Style Antitrust Settlements in EU Law' [2007] *Utah Law Review* 4 971, 1005.

104 *Monopolkommission* (n 100), para 499.

105 Case T-170/06 *Commission of the European Communities v Alrosa Company Ltd.* [2007] ECR II-2601.

106 cf. Opinion of AG Kokott in Case C-441/07 P *Commission of the European Communities v Alrosa Company Ltd.*, delivered 17 September 2009, in which AG Kokott was rather critical of the CFI's judgment, stressing that commitment decisions are characterised by a concern for procedural economy and thus do not require the same detailed test of proportionality as decisions pursuant to Art. 7 Reg. 1/2003.

107 Opinion of the Advisory Committee on restrictive agreements and dominant position given at its meeting of 3 November 2008 regarding a draft decision relating to Cases COMP/39.388—German Electricity Wholesale Market and COMP/39.389—German Electricity Balancing Market, Rapporteur: The Netherlands [2009] OJ C36/06, para 4; *Monopolkommission* (n 100), paras 497–499.

108 Gippini-Fournier, 'The Modernisation of European Competition Law: First Experiences with Regulation 1/2003' 17 <<http://ssrn.com/abstract=1139776>> accessed 8 October 2009.

support the view that the Commission tries to remedy supposed shortcomings in the process of liberalisation of energy markets by means of competition law, even if legislative steps would be more adequate measures.¹⁰⁹

E.ON's commitments regarding the sale of generation capacity have been called ill-suited to remedy the Commission's concerns.¹¹⁰ The sale of generation capacity is likely to lead to a weakening of *E.ON's* position on the wholesale market for electricity; however, as the generation capacity allegedly withheld by *E.ON* was that of the marginal power plants, it is doubtful whether there was any need to have *E.ON* sell its base load generation capacity. Additionally, the sale of the transmission network as a structural remedy could also be criticised for not being proportionate, as behavioural commitments are *prima facie* considered less restrictive but can be as sufficient and suitable as structural measures.¹¹¹ The Commission's reasoning in its commitment Decision on the divestment of *E.ON's* transmission network is rather brief in its discussion of the proportionality of the measures.¹¹² Following the Decision, Commission officials have stated that only the full ownership unbundling of the transmission system is effective enough to deal with the Commission's concerns.¹¹³ Considering that the alleged abuse did not consist of denying third parties access to the network as such but only of the preferential treatment of *E.ON's* electricity generation with regard to balancing energy, less invasive behavioural remedies come to mind, for example auctioning procedures for said balancing energy.

In a number of circumstances, commitment Decisions may prove to be an efficient tool to remedy

suspected infringements of competition law outside lengthy judicial proceedings without damaging the undertaking's reputation on the market. On the other hand, a considerable risk prevails that the Commission may feel encouraged to use its bargaining power to reach goals which are beyond its mandate to enforce EC competition law. Further clarification as to the procedural rights and the rules to be observed in commitment proceedings, as initiated by the CFI's judgment in *Alrosa*, appears indispensable.

Conclusion

The energy sector has seen important regulatory developments as well as very self-confident Commission enforcement activities in 2009. After nearly two years of debate, the third liberalisation package was adopted, bringing stricter rules on the unbundling of network operators and the enforcement of intra-European cooperation. Whilst these measures will need some time to fully display all desired effects in the market, the Commission is in parallel making use of Art. 81 and 82 EC to immediately tackle alleged deficiencies in the attempt to create a single European energy market. In 2010, most of the procedures mentioned should be brought to an end, having direct effects on undertakings' commercial practices. Competition on energy markets will continue to be closely monitored by the Commission and as proceedings initiated only recently demonstrate, also by national competition authorities.

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109 *Monopolkommission* (n 100), para 489; in contrast to later practice, Philip Lowe wrote in 2007: 'Consequently, competition policy—in its case-based approach—is not an effective method for delivering ownership unbundling across the board.' Philip Lowe *et al.* 'Effective unbundling of energy transmission networks: lessons from the Energy Sector Inquiry', Competition Policy Newsletter 1 [2007] 23, 33.

110 *Monopolkommission* (n 100), para 497.

111 Art. 7 (1) Reg. 1/2003; Klees/Hausner, 'Eigentumsrechtliche Entflechtung in der Energiewirtschaft als strukturelle Maßnahme i. S. des Art. 7 Abs. 1 Satz 2 VO 1/2003?' [2007] WuW 596, 602.

112 *German electricity wholesale market* (Case COMP 30.388) and *German electricity balancing market* (Case 39.389) Commission decision of 26 November 2008 [86–88] <<http://ec.europa.eu/competition/antitrust/cases/decisions/39388/en.pdf>> accessed 8 October 2009.

113 Chauve *et al.*, (n 37); von Koppenfels, 'Bericht aus Brüssel: Beilegung von Wettbewerbsverfahren der Kommission im Wege von strukturellen Zusagen im deutschen Strom- und Gasmarkt' *Netzwirtschaften & Recht* [2009] 60, 61.