Competition in the EU Energy Sector – An Overview of Developments in 2009 and 2010

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1 Introduction

2009 and 2010 were rather eventful years for both EU competition law as well as the application of the competition rules to the energy sector. Concerning the former, the entry into force of the Treaty of Lisbon marked some constitutional changes to EU competition law of which the most prominent example must be the disappearance of the 'competition principle' enshrined in Article 3(1(g) TEC. As regards the latter, numerous cases followed the Energy Sector Inquiry. Amongst these, however the *RWE Gas* and *E.On Electricity* Cases, were certainly the most high-profile if only because they resulted in what can be called unbundling through competition law. Despite their prominence, these cases certainly were not the only cases where the antitrust provisions of EU competition law were applied to companies in the EU energy sector. Moreover, the Court of Justice handed down an important and long-awaited judgment in the *Deutsche Telekom* case concerning margin squeeze as an abuse under Article 102 TFEU. Furthermore, 2009 and 2010 saw a continuation of the consolidation in the energy sector, with the takeover of Dutch energy company Essent by RWE as one of the biggest cases. The decision in *RWE / Essent* shows the increased sophistication of the Commission's competition analysis in the energy sector. Finally, concerning the competition rules addressed to the member states, the entry into force of the Treaty of Lisbon is considered by many to have an effect on the rules for services of general economic interest. In addition, there have been a number of state aid cases in the energy sector. Most interesting in this regard, however, is the development of the corpus of EU climate law, as this clearly bears the signature of a desire to have a market mechanism for climate change protection in the energy sector.

This article will review these developments. It will start with an overview of the constitutional changes to competition law and then review the practice concerning the application of Article 101 and 102 TFEU in the energy sector. It will then examine some the merger cases in the energy sector as well as the rules on government interference in the energy sector. This article concerns developments between – roughly - December 2009 and December 2010.

2 Constitutional Changes to EU Competition Law

The entry into force on 1 December 2009 of the Treaty of Lisbon marks another step in the gradual process of European integration and, as with most of these steps, it is certainly not revolutionary. It does, however, introduce a Title on Energy into the Treaty on the Functioning of the European

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Union.[2] This Energy Title consolidates the pre-existing efforts concerning energy policy at the EU level and clearly put this policy in the framework of the internal market. As such, one of the objectives of EU energy policy shall be 'to ensure the functioning of the energy market'.[3] Inherent in this objective is the notion that there is a market in the first place and markets presume competition between the entities active on that market. On a more general note the Treaties presume competition as a cornerstone of the internal market.[4] This general policy is implemented by Articles 101 – 109 TFEU. The rather implicit role of the competition provisions thus identified can be contrasted with the explicit removal of the 'competition principle' enshrined in former Article 3(1)(g) EC. This removal which is often referred to as the '*Coup de Sarkozy*', is said to reflect the dissatisfaction of the *Herren der Verträge*, the Member States, with the interventionist application of these competition rules.[5] As a result, the advent of the Treaty of Lisbon or Reform Treaty sparked a still unfinished debate about whether or not this would affect EU competition policy.

Is further complicated by the introduction of Article 14 TFEU[6] and the insertion of Protocol No. 26 on Services of General Interest, which is held by many scholars to also form part of a general tendency on the part of the Member States to tone down the interventionist application of EU competition law whilst ascertaining more leeway for national policy to protect services of general (economic) interest. In the context of EU energy law this is relevant primarily in relation to the objective – also mentioned in Article 194(1)(b) TFEU – of ascertaining security of supply.

On the whole the Treaty of Lisbon can be said to, at the least, put EU competition policy in a more elaborate framework intended to increase the influence of the Member States on the administration of this policy. This, of course, sits rather uneasy with the pivotal role for the Commission and EU Courts in implementing this policy.[7] The essential question therefore is whether EU competition policy is still defined at the EU level, by the Commission and EU Courts, or rather more at the national level. This question is particularly relevant where it concerns the application of the competition rules in highly politicised sectors of the economy, such as the energy sector. Here we find national policies designed to ensure the creation of 'national champions'. Such policies may well be incompatible with the internal market provisions in the Treaties whereas they are clearly at odds with a European perspective on energy markets.[8]

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2 Title XXI, Article 194 TFEU. This treaty more or less equates to the 'old' EC Treaty.

3 Article 194(1)(a) TFEU.

4 Article 3(2) TEU in connection with Article 3(1)(b) TFEU and Protocol No. 27 on the internal market and competition.

5 *Cf*. A. Riley, The EU Reform Treaty and the Competition Protocol: undermining EC competition law, 2007, 28(12) *European Competition Law Review*, pp. 703-707. See further H.H.B. Vedder, 'The Constitutionality of Competition', in F. Amtenbrink and P. van den Berg (eds), The Constitutional Integrity of the European Union, The Hague, Asser Press 2010, pp. 201 – 234.

6 Article 14 TFEU strongly resembles Article 16 EC. However, it includes a legal basis for EU action to establish a framework for such services. See further *infra* paragraph 6.

7 See further H.H.B. Vedder, 'Of Jurisdiction and Justification. Why Competition is Good for 'Non-Economic' Goals, But May Need to be Restricted', 2009 *Competition Law Review*, pp. 51 – 75.

8 *Cf*. A.M. Matteus, 'Ensuring a more level playing field in competition enforcement throughout the European Union' 2010, 31(12) *European Competition Law Review*, pp. 514-529; D.H. Ginsburg, 'Synthetic Competition', in: F. Lévêque and H. Shelanski (eds.), *Antitrust and Regulation in the EU and US, Cheltenham*, Edward Elgar 2009, at p. 7 and R. Gilbert and D. Newberry, 'Market Power in US and

Whatever may be of these constitutional developments, the Commission's enforcement of the EU competition rules clearly reflects a desire to create and protect a functioning energy market. We see this in the Energy Sector Inquiry, as well as the cases that were started in the wake of the inquiry.[9]

3 Cracking Down on Cartels: Article 101 TFEU and the Energy Sector

Article 101 TFEU, the prohibition on cartels, has long been the most prominent provision in EU antitrust law, if only because of it's frequent enforcement. It is more recently applied to the energy sector, with the decision concerning the *E.On / GDF Market Sharing Cartel* as the most recent and visible result. 16 October 2009 saw the publication of the summary decision in the OJ, as well as the publication of the full text of the decision on the D-G Comp website.[10] In a nutshell this case concerns the market sharing between E.On and GDF in the wake of the construction of the MEGAL pipeline as well as the liberalisation of the natural gas market. This case clearly shows how the Commission intends to crack down on market sharing cartels as such cartels run counter to the very core of the internal energy market.[11] We see this where the decision frequently connects the liberalisation and concomitant opening of markets to the market sharing between the parties.[12] On 18 September 2009 both E.On and GDF brought an appeal against the Commission decision, which is still pending at the moment of writing this contribution.[13]

In more than one way, the *E.On / GDF Market Sharing Cartel* is an odd one out in view of the Commission's recent practice in the application of the antitrust provisions in the TFEU. For one, it concerns a so-called hard core restriction in a horizontal agreement. This makes it a traditional cartel and an in many ways a traditional response by the industry to the opening up of markets and thus increased competition. Moreover, it does not appear to be case with a particular connection to the Energy Sector Inquiry in that the knowledge of the sector gained in that Inquiry was fundamental or even helpful for this case. Rather, it appears to fit in better in a line of cases concerning territorial restrictions and destination clauses that was started in early 2003 and ended with a decision in 2004.[14] Finally, this case stands out because it ended with a prohibition decision and the imposition

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EU Electricity Generation', in: F. Lévêque and H. Shelanski (eds.), *Antitrust and Regulation in the EU and US, Cheltenham*, Edward Elgar 2009, at p. 172 *et seq*.

9 COM (2006) 851 and SEC (2006) 1724. Both documents as well as other related documents are available from: http://ec.europa.eu/competition/sectors/energy/inquiry/index.html.

10 OJ 2009 C 248/5. The full text decision is available from: http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_39401.

11 This case has been discussed more extensively in M. Slotboom, 'Recent Developments of Competition Law and the Impact of the Sector Inquiry' in the previous edition of this Report at p. 102.

12 Decision in case COMP/39/401, E.On / GDF, paras. 230 and 263.

13 The E.On appeal was filed under case T-360/09, OJ 2009 C 282/50. GDF's appeal was filed under Case T-370/09, OJ 2009 C 282/54.

14 Case COMP/38.662, *GDF / ENI and GDF / ENEL*. Available from http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_38662

of a fine.[15] Other energy cases suggest an increased use of commitment decisions to end proceedings.

One case worth mentioning here is the investigation started by the Commission into possible restrictions of competition between Siemens and Areva concerning the market for civil nuclear technology.[16]

4 Liberalisation Through Antitrust: Article 102 TFEU and the Energy Sector

4.1 Introductory remarks

The other half of the antitrust diptych in the TFEU, Article 102, has historically been applied much less frequently. Interestingly, the last few years have seen an increased enforcement of Article 102 in the energy sector. This is interesting if only because the overwhelming majority of these cases concerns exclusionary abuse, *i.e.* behaviour by a dominant undertaking that aims at excluding (potential) competitors from the market, and the Commission has adopted a notice on its enforcement priorities in this regard.[17] This Guidance is generally seen to restrict the application of Article 102 TFEU by means of the adoption of an effects-based approach to the enforcement of this provision as opposed to a rule-based approach.[18] The Article 102-decisions in the energy sector, however, show little reticence on the part of the Commission.

An analysis of these cases reveals that only one, the *E.On Capacity Withdrawal* case, deals with an exploitative form of abuse. The other cases, of which the *E.On Balancing*, *RWE Gas Foreclosure*, *GDF Foreclosure* and *EDF Foreclosure* are the most interesting, deal with exclusionary types of abuse. As these and other cases have been dealt with in the previous edition of this Report, this contribution will not go into any of the details.[19] Instead, we will look at the *Swedish Interconnectors* and *ENI Capacity Hoarding* cases. Furthermore, we will also pay some attention to the Court judgement in the *Deutsche Telekom* case concerning margin squeezing as a form of network-related abuse. Finally, we note that all cases concern vertically integrated energy companies that are active both on the market for the transmission and/or distribution of energy as well as the sale and supply of energy. The outcome of some of these cases, as was already noted in the introduction, comes close to unbundling through antitrust and in many respects goes beyond the unbundling rules provided for in

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15 On a bit of side note we may also refer to the fact that E.On was fined € 38 milion for breach of a seal that had been affixed during an inspection by the Commission. This fine was upheld in Case T-141/08, *E.On / Commission*, judgment of 15 December 2010, n.y.r.

16 See Commission press release IP/10/655. Also available as Case COMP/B-1/39736, *Siemens / Areva*.

17 Commission Guidance on the enforcement priorities in applying Article 82 of the EC Treaty [now Article 102 TFEU] to abusive exclusionary conduct by dominant undertakings, OJ 2009 C 45/7.

18 Various contributions to A. Ezrachi (ed.), *Article 82 EC – Reflections on its Recent Evolution*, Oxford: Hart Publishing 2009, deal with this.

19 M. Slotboom, 'Recent Developments of Competition Law and the Impact of the Sector Inquiry' in the previous edition of this Report at p. 106 *et seq*. It may be noted that in some cases the final commitment decisions have been published more recently. These final commitments and the corresponding decisions can be found in the D-G Competition case database available from: http://ec.europa.eu/competition/elojade/isef/index.cfm.

the Third Package. As this is closely related to the increased use of commitment decisions in general we will deal with this issue below on paragraph 5.

4.2 *Swedish Interconnectors*: reducing interconnection capacity

Swedish Interconnectors is an Article 102 case concerning Svenska Kraftnät, the state-owned central administrative authority that functions as the Swedish electricity TSO. To the uninitiated it may seem somewhat surprising that a public authority is the subject of competition law addressed to undertakings. However, in view of the fact that EU competition law employs a functional definition of an undertaking that encompasses any entity engaged in an economic activity[20] and taking into account that the operation of transmission and distribution networks qualifies as an economic activity, this is hardly surprising from a competition law perspective.[21] From this conclusion on, the application of Article 102 TFEU is fairly straightforward. Svenska Kraftnät's exclusive concession to operate the transmission grid effectively gives it a monopoly position for the provision of transmission services. In the light of other competition cases involving TSOs, the equation of this monopoly position to a dominant position within the meaning of Article 102 TFEU is again predictable. As this monopoly concerns the entire territory of one Member State, a substantial part of the internal market is involved.

The next step in the analysis concerns the possible abuse of the dominant position. In this regard the commitment decision in Svenska Kraftnät is remarkably elaborate compared to other cases involving abusive behaviour by TSOs. These competition concerns were first raised by Dansk Energi, a commercial organisation of Danish energy companies. This complaint related to a possible restriction of transmission capacity on the Öresund connector between Sweden en Denmark for reasons other than security of supply. One of the reasons suggested by Dansk Energi was the desire to reduce costs arising from counter-trade. This, Dansk Energi argued, amongst others would lower spot prices in Sweden whilst consumers in eastern Denmark would be deprived of imports of relatively cheap Swedish electricity.[22] The Commission comes to a preliminary assessment that this amounts to abuse of dominance in the form of discrimination between network users because transmission requests for consumption in Sweden are treated differently from transmission requests intended for export. The Commission also indicates that mere fact that a dominant undertaking uses its market power on one market (transmission services in Sweden) whereas the effects take place on another market (retail and wholesale of electricity in Sweden) does not stand in the way of this finding.[23]

This preliminary finding is substantiated by an analysis of the Swedish electricity market. This reveals that the northern part of Sweden has excess generation capacity whereas the southern part consumes more electricity than locally installed capacity. Power flows are thus essentially from the

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20 Case C-41/90 *Höfner & Elser* [1991] ECR I-1979, para. 21.

21 Decision in Case COMP/39.351, para. 23.

22 Decision in Case COMP/39.351, para. 7.

23 Decision in Case COMP/39.351, para. 27. The Commission refers to the Judgment in *Tetra Pak* which is slightly odd because that case involved a company itself active on two neighbouring markets (packaging machines and the carton that goes into these machines) whereas the Svenska Kraftnät is not active outside the market for transmission services. The extension of dominance rationale that uderlies *Tetra Pak*, therefore does not seem to apply.

north to the south.[24] This, however, is hampered by four bottlenecks (referred to as 'cuts' in the decision), one of which is in the West Coast Corridor close to the Öresund interconnector. In order to cope with the congestion at these cuts, Svenska Kraftnät has essentially three options according to the Commission. It could create price signals through the creation of separate price areas to coincide with the cuts.[25] Secondly, it could pay producers and large consumers to shift their production or consumption patterns (counter-trade) and thus reduce power flows. Finally, it could reduce transmission capacity on interconnectors.

According to the Commission Svenska Kraftnät opted for the third possibility and reduced transmission capacity primarily on the interconnectors between Sweden and the continent.[26] This is reflected in higher prices in Denmark.[27]

The Commission, having thus established that Svenska Kraftnät artificially reduced interconnection capacity puts this behaviour in the framework of the internal energy market characterised by a ban on discrimination as well as a prohibition of all measures that partition markets.[28] The latter point is awkward in view of the fact that the Court has not accepted that Article 34 and 35 TFEU also apply to entities other than the Member State.[29] Finally, the Commission comes to a preliminary finding that Svenska Kraftnät's behaviour is not objectively justified. The fact that this is only a preliminary conclusion is somewhat problematic as one of the alternatives the Commission identified for Svenska Kraftnät in view of the congestion at the West Coast Corridor was to engage in counter-trade. This would, however, have increased the operating costs and as such it would be interesting to see to what extent higher operating costs for a TSO can be justified in order to alleviate congestion that ultimately affects interconnection capacity. To put it bluntly: how much counter-trade costs should the Swedish TSO be willing to accept in order to satisfy the competition complaint by Dansk Energi?

At the end of the day many of the details underlying *Swedish Interconnectors* will never be explored in more detail as the case ended with a commitment decision. Svenska Kraftnät's proposed commitment to divide the Swedish transmission system into several bidding zones, thereby creating price signals within Sweden. The West Coast Corridor, however, will not be subject to this, but here Svenska Kraftnät commits to upgrading the network by building and operating a new transmission line before 30 November 2011. During the period between the commitment decision and the time at which the new bidding zones become operational, Svenska Kraftnät commits itself to taking into

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24 The Commission further adds that the import of cheap Norwegion hydroelectricity occurs mostly in the north whereas export to the rest of Europe takes place from the south, thus exacerbating the imbalance between production and consumption and consequently increasing power flows.

25 Sweden, however, has only one bidding zone that is part of Nord pool.

26 In this regard the Commission points to the fact that interconnection capacity between Norway and Sweden was almost never reduced whereas interconnection capacity on the continent-bound interconnectors was reduced between 26% and 34% of all hours, see para. 38. Moreover, the amount of interconnector capacity thus reduced amounts to more than half of overall interconnection capacity, para 40.

27 In this regard the Commission acknowledges that the behaviour of Danish operators may have exacerbated these price effects. The Elsam case before the Danish Competition Authority reflects this, see http://www.konkurrencestyrelsen.dk/en/competition/decisions/decisions-2008-and-earlier/national-decisions-2007/konkurrenceraadets-moede-den-20-juni-2007/elsam/

28 Decision in Case COMP/39.351, para. 43.

29 It may be recalled that the Commission first qualified Svenska Kraftnät as an undertaking. This

account the resources for counter-trade.[30] In the appraisal of the proposed commitments the Commission discusses the arguments put forward by interested parties (such as Dansk Energi and Swedish Energy Consumers organisations) which has resulted in amended commitments. Interestingly, one of the arguments forwarded was that the prices – notably in the South of Sweden – will increase as a result of the introduction of multiple bidding zones. This argument is rejected by the Commission on the basis that the multiple bidding zones essentially ensure competitive prices thus reducing the unfair competitive advantage for Swedish industry. Similarly, the argument that the bidding zones would lead to lower prices in the north of Sweden, and thus reduced incentives for investment in renewable energy production capacity is rejected. In ruling on the proportionality of the commitments proposed by Svenska Kraftnät, the Commission indicates, inter alia, that the costs for counter-trade that must be borne by network users do not render this commitment disproportionate.[31] This, however, still leaves unanswered the question mentioned above: just how much costs can a TSO be required to bear in order for interconnection capacity to increase? The fact that the Commission explicitly mentions that counter-trade is only used as an additional measure and that internal congestion is expected to be reduced as a result of the multiple bidding zones indicate that only minor cost increases are acceptable.

In conclusion, *Swedish Interconnectors* is a highly interesting case in view of the complaint underlying it as well as the relatively extensively reasoning concerning the abuse and the commitments. In many respects, the degree of sophistication in the Commission's reasoning and understanding of the electricity market reflects the (steep) learning curve that results from the Sector Inquiry.

4.3 ENI Capacity Hoarding

The *ENI Capacity Hoarding* case was already mentioned in the previous version of this report.[32] This case fits in very well in the portfolio of Article 102-cases that the Commission is building in the aftermath of the Sector Inquiry.[33] It concerns a vertically integrated energy company that is active in the transmission as well as supply of natural gas in Italy. As a result of the vertical integration ENI has an incentive to reduce transmission capacity available to third parties in order to protect its downstream supply business. In the meantime, a final decision has been adopted in the form a commitment decision according to which ENI commits to divest its transmission network infrastructure. This is yet another example of unbundling through antitrust where the Commission's preliminary findings result in a voluntary commitment on the part of the undertaking to divest the transmission business.[34] We will get back to the legal framework and institutional dynamics underlying such commitment decisions further below at paragraph 5 of this chapter.

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30 Decision in Case COMP/39.351, paras. 47 – 50.

31 Decision in Case COMP/39.351, para. 89.

32 M. Slotboom, 'Recent Developments of Competition Law and the Impact of the Sector Inquiry' in the previous edition of this Report at p. 108.

33 Case COMP/39.315

34 It may be recalled that RWE commited to divest its German high-pressure gas transmission network, whereas E.On commited to divest its extra high voltage transmission network, see M. Slotboom, 'Recent Developments of Competition Law and the Impact of the Sector Inquiry' in the previous edition of this Report at p. 107 and 108.

4.4 Margin Squeezing as Abuse of Dominance

A final case worth mentioning here is the appeal in *Deutsche Telekom*.[35] This case is relevant for energy law purposes as well despite the fact that it concerns the telecommunication industry for two reasons. Firstly, it confirms that margin squeezing is a separate form of abuse that is relevant for vertically integrated undertakings in a network industry. Secondly, it clearly establishes that the competition rules can be applied in regulated sectors and even to behaviour by a dominant undertaking that is regulated. To start with the latter reason: the *Deutsche Telekom* saga started in 1999 when a number of competitors of Deutsche Telekom on the downstream market complained to the Commission about Deutsche Telekom's prices for local loop access services (i.e. price incurred by a third party for access to Deutsche Telekom's network) in relation to the retail prices charged by Deutsche Telekom to end-users. According to the Decision the Commission took in 2003, Deutsche Telekom had abused its dominant position by means of a margin squeeze.[36] This refers to the situation in which a vertically integrated undertaking sells access services to a network that is an essential facility at a price that will not allow a competing undertaking that is as efficient as the vertically integrated undertaking to profitably offer it's own services. In *Deutsche Telekom*, for example, the network access fees were higher than the price Deutsche Telekom would charge end-users. This effectively meant that any third party could only compete with Deutsche Telekom on the downstream market when it sold it's services at a loss.[37] One of Deutsche Telekom's arguments was that that the network access fees were actually set by the German telecoms regulator.[38] This argument was rejected by both the General Court and the Court of Justice.[39] This means that competition supervision and regulation can co-exist, leading to the conclusion that the mere fact that network tariffs are approved by a regulator does not shield a dominant network operator from the application of Article 102 TFEU.

The other reason why *Deutsche Telekom* is relevant to other network-bound industries is the acceptance by the highest Union Court of margin squeezing as a form of abuse. This effectively means that any vertically integrated undertaking that is dominant on a market for transport services will have to check whether its tariffs for network access will allow an as efficient competitor to compete with it on the downstream market.[40] Concerning the 'as efficient competitor-test', the Court indicates that the dominant undertaking's costs and charges set the standard. This means that if the dominant undertaking itself would not be able to sell profitably on the downstream market, an

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35 Case C-280/08 P *Deutsche Telekom*, judgment of 14 October 2010, n.y.r.

36 Decision 2003/707, *Deutsche Telekom*, OJ 2003 L 263/9.

37 Decision 2003/707, paras. 102 – 105.

38 Interestingly, similar complaints were also made to this regulator which resulted in a retrospective investigation that, however, did not result in a finding of 'price dumping', Case C-280/08 P *Deutsche Telekom*, para. 2, where para. 24 of the judgment by the General Court are set out.

39 Case C-280/08 P *Deutsche Telekom*, paras. 78 – 88 where the Court finds that approval of the tarriffs by the regulator does not exclude that decisions concerning the setting of the actual tarriffs are still attributable to the undertaking. In para. 90 the Court observes that the Commission's interpretation of Article 102 TFEU cannot be bound by a decision by a national authority. On a similar note, paras. 105 – 109 explain that the principle of protection of legitimate expectations does not provide for immunity from Article 102 TFEU.

40 Case T-271/03 *Deutsche Telekom* [2008] ECR II-477, para. 237, upheld in Case C-280/08 P *Deutsche Telekom*, paras. 172 – 183.

as efficient competitor would not be either.[41] This duty to avoid a margin squeeze not only rests on the dominant undertaking, it also applies, by virtue of the duty of loyalty enshrined in Article 4(3) TEU[42] to the national regulator.[43]

Finally, the judgment in *Deutsche Telekom*, and more generally the Commission's practice concerning exclusionary abuse are now increasingly breathing the language of the so-called effects-based approach to competition law. In a nutshell this means that the Commission is obliged to establish that the conduct under investigation has negative effects on consumer welfare as this will ensure that the Commission is protecting competition rather than individual competitors.[44] In *Deutsche Telekom*, the Court is succinct when it holds as abusive pricing practices that have the effect of excluding as efficient competitors as these are capable of making market entry more difficult or impossible for these competitors and thus strengthen the dominant undertakings position to the detriment of consumers' interests.[45] This essentially means that market entry for as efficient competitors is an intermediary objective of Article 102 TFEU. These policy objectives for the enforcement of Article 102 come dangerously close to the policy objectives of regulation, such as that applicable to the liberalisation process in the energy sector. Indeed, we see that the simultaneous application of regulatory law and antitrust law is certainly possible and may well result in unbundling through antitrust.

5 Enforcement of Antitrust Law: The Increased Use of Commitment Decisions

In the previous paragraph we have observed that all Article 102-cases ended with commitment decisions. Such decisions are made possible by Article 9 of Regulation 1/2003.[46] In a commitment decision the Commission sets out its preliminary findings to the undertaking under investigation which then responds by proposing commitments to end the competition infringements. Such commitments are then market tested by the Commission in order to establish that they are indeed effective to end the competition problem.[47]

This market testing essentially makes the commitment process a trialogue between the Commission, the undertaking under investigation and the interested parties (which may well include complainants, competitors or organisations of consumers), resulting in interesting negotiation dynamics. In this regard, the proposed commitments invariably start off with a statement by the undertaking under investigation that it does not agree with the Commission's findings or at the very least does not consider the offering of commitments as an acknowledgement that an infringement took place. Still, these undertakings are willing to voluntarily offer considerable commitments, such

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41 Case C-280/08 P *Deutsche Telekom*, paras. 197 – 202.

42 Previously Article 10 TEC.

43 Case C-280/08 P *Deutsche Telekom*, para. 91.

44 Commission Guidance on the enforcement priorities in applying Article 82 of the EC Treaty [now Article 102 TFEU] to abusive exclusionary conduct by dominant undertakings, OJ 2009 C 45/7, paras. 5 and 6.,

45 Case C-280/08 P *Deutsche Telekom*, para. 253.

46 OJ 2003 L 1/1.

47 Such market tests take place on the basis of Article 27(4) of Regulation 1/2003 and generally involve a short notice in the OJ. *E.g*. OJ 2009 C 239/9 (*Swedish Interconnectors*)

as the divestiture of entire transmission networks and generation capacity.[48] This response by these undertakings is particularly puzzling in view of the fact that the Member States have by and large opposed exactly such unbundling in the Third Package. One possible explanation for this willingness to voluntarily offer such commitments may be seen in the Court's judgment in *Alrosa*.[49] This is the first case where the legality of a commitment decision was under investigation. The central point in this judgement was the proportionality standard to be applied by the Commission. Should this be the strict standard applicable to 'normal infringement decisions' adopted on the basis of Article 7 of Regulation 1/2003, or a more lenient proportionality standard?

The Court observed that the Commission has a margin of appreciation in examining whether the commitments are appropriate and necessary, also in view of ensuring procedural efficiency.[50] Moreover, the principle of proportionality applicable to all acts of Union institutions requires the Commission only to ascertain that the commitments are effective to address the competition problems identified. In this regard the Commission must also investigate whether these undertakings have not offered less far-going commitments that would also address the competition problems adequately. Finally, the Commission is not obliged to seek out less onerous or more moderate solutions than the commitments offered to it, or to compare the commitments offered by an undertaking with the (potential) measures it would itself have imposed in an Article 7 decision, and to regard as disproportionate any commitment which goes beyond these (potential) measures.[51] The Court firmly ground this reasoning in the observation that undertakings offering such commitments consciously accept that the concessions they make may go beyond what the Commission could itself impose on them in an Article 7-decision.[52] The Court gives two reasons why undertakings may wish to avoid further investigations and the possible Article 7-decision: the finding of an infringement and the possibility of a fine. In view of the record fines recently imposed by the Commission the latter may indeed tempt undertakings into offering commitments, but the former may well be even more important. This relates to the fact that a finding of an infringement could well serve as evidence in a civil damages claim and thus bring with it the risk of a antitrust liability that exceeds the financial risk by far.[53]

6 Consolidation and Sophistication: Merger Control and the Energy Sector

2009 and 2010 have seen a further opening up of markets and concomitant consolidation of the European energy sector with a good 20 cases from 1 December 2009. The overwhelming majority of these cases did not raise any serious competition concerns and thus ended with decisions on he basis of the simplified procedure. Two cases worth mentioning here are the *Tennet / E.On* takeover and the *RWE / Essent* acquisition.

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48 Cases COMP/38.389 and COMP/38.399 ended with the divestiture by E.On of its transmission system as well as 5000 Mw of generation capacity.

49 Case C-441/07 P *Commission v Alrosa Company Ltd*, judgment of 29 June 2010, n.y.r.

50 Case C-441/07 P *Commission v Alrosa Company Ltd*, para. 35.

51 Case C-441/07 P *Commission v Alrosa Company Ltd*, para. 39 – 47.

52 Case C-441/07 P *Commission v Alrosa Company Ltd*, para. 48.

53 see M. Slotboom, 'Recent Developments of Competition Law and the Impact of the Sector Inquiry' in the previous edition of this Report at p. 100.

Tennet / E.On essentially implements the divestiture commitments offered by E.On in the German Balancing Market case.[54] We see that the Commission identifies no competition concerns primarily because Tennet is an unbundled transmission system operator and thus has no incentive to allocate transmission capacity in a discriminatory or anticompetitive manner.[55] The positive effect of all this unbundling (be it through antitrust or liberalisation), is that it allows for easier clearance of mergers. It may, however, be noted that even complete unbundling does not shield a TSO from competition concerns, as *Swedish Interconnectors* shows.

The takeover in RWE / Essent raised rather more competition concerns primarily because of the vertical integration of RWE, the close oligopoly on the German electricity market and because of the interconnection capacity constraints on the German-Netherlands border.[56] The latter point was relevant because the Netherlands imports electricity from Germany and following the merger RWE / Essent could have an incentive to reduce transmission capacity to the Netherlands in order to raise prices in that market. This would, however, simultaneously reduce prices in Germany and models studied by the Commission revealed that this strategy would not be profitable in more than 5 – 10% of all hours in a given year, thus reducing the incentive to withold interconnection capacity.[57] A further analysis of the administration of the interconnectors reveals that the ability to reduce interconnection capacity is theoretical at best.[58] On a similar note, the Commission concludes that RWE / Essent does not have an incentive to strategically limit investments in interconnection capacity increases. The merger therefore does not lead to competition effects at the border between the Netherlands and Germany. Anti-competitive effects are, however, envisaged on the German electricity wholesale market, where RWE and E.On are considered to form a duopoly and thus form (part of) a collective dominant position.[59] This situation of collective dominance would be increased because of Essent's share in Stadtwerke Bremen. In order to alleviate these competition concerns, RWE / Essent has committed to divest the share it has in Stadtwerke Bremen.

To summarise: merger activity in the energy sector continues as a result of industry consolidation and we see that the Commission's appraisal of the competitive effects becomes more sophisticated. In this regard the Commission is also aided by interested parties whose in-depth knowledge of the industry help it better identify competition issues as well as to appraise the viability of proposed commitments.

7 Public Interference in the Energy Sector

7.1 Introductory remarks

The energy sector has traditionally been characterised by extensive interference by public authorities. The transition from a sector dominated by statutory monopolies to a market in the process of liberalisation has not reduced the public interference, but rather changed its nature. By and large the European Union imposes restraints on the Member State interference with energy

54 COMP/39.389, where E.On offered to divest its transmission network.

55 COMP/M.5707, paras. 11 and 12.

56 COMP/M.5467

57 Decision in Case COMP/M.5467, paras. 190 – 197.

58 Decision in Case COMP/M.5467, paras. 198 – 206.

59 Decision in Case COMP/M.5467, paras. 237 and 238.

markets by two means: state aid control (Article 107 and 108 TFEU) and the rules on public undertakings (Article 106 TFEU). Concerning the latter, previous issues of this Report have extensively discussed the Greek Lignite case, which is one of the most prominent cases dealing with the exclusive rights enjoyed by public energy companies.[60] The last few years have seen the introduction of a rather extensive set of rules on the European level that can also be brought under the heading of public interference in the energy markets: the European emissions trading scheme.

7.2 Member State Interference in Energy Markets

We have seen that Article 106 TFEU is applied relatively infrequently. This should not come as surprise as the balance that this provision tries to strike between markets and universal services has been implemented in secondary Union law, such as the liberalisation directives. This greatly reduces the need for a residual application of the general Treaty rules.

As regards state aid supervision, Commission activity is rather more extensive. The majority of cases, however, are decided in accordance with the Commission's Guidelines and follow the methodology set out in the General Block Exemption Regulation.[61] Here we may refer to the fact that the Council has recently adopted a Decision on state aid for the closure of uncompetitive coal mines.[62]

Worth mentioning here are the legal developments concerning possibly selective tax breaks from national eco taxation schemes and other schemes compensation reductions of competitiveness. It is well known that most Member States have enacted some form of energy taxation and in doing so these Member States are all too aware of the effects of such eco taxes on the competitiveness of national industry.[63] This, however, forces the Commission and – ultimately – Union Courts to consider the state aid character of such measures.

A recent case in which the General Court had to deal with this type of question indirectly in relation to the energy sector is *ThyssenKrupp Acciai Speciali Terni*.[64] This case results from an Italian scheme that compensated certain producers of electricity and notably those who produce electricity for own consumption (so-called self-producers) when their production installations were nationalised with the creation of ENEL in 1962. This compensation took the form of a preferential tariff on the basis of which ENEL would have to supply the undertakings whose installations were nationalised. Whilst the preferential tariff was initially qualified as compensation, and thus did not constitute state aid, the extension of the tariff after 2005 did amount to state aid. ThyssenKrupp's appeal against the Commission's decision was rejected.

More directly related to the energy sector is the *EDF* case in which the General Court annulled the Commission decision according to which EDF had enjoyed a tax concession amounting to approximately € 890 million.[65] Whilst the General Court accepts that this measure could affect trade

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60 see M. Slotboom, 'Recent Developments of Competition Law and the Impact of the Sector Inquiry' in the previous edition of this Report at p. 110.

61 *E.g.* the Guidelines on State Aid for Environmental Protection, OJ 2008 C 82/1. The General Block Exemption Regulation is laid down in Regulation 800/2008, OJ 2008 L 214/3.

62 Available from: http://register.consilium.europa.eu/pdf/en/10/st16/st16229-re01.en10.pdf.

63 *Cf.*, concering so-called carbon leakage, H.H.B. Vedder, 'The Carbon Challenge to Competition' in the previous edition of this Report, pp. 45 – 74.

64 Case T-62/08 *ThyssenKrupp Acciai Speciali Terni / Commisson*, judgment of 1 July 2010, n.y.r.

65 Case T-156/04 *EDF / Commission* [2009] ECR II-4503.

between Member States, despite the fact that the measure in question predates the implementation of Directive 96/62 on the liberalisation of the energy market, the Decision is annulled because the Commission should have undertaken a private investor test. The applicability of this test was rejected by the Commission because it did not qualify the tax break as a capital injection. The General Court, however, considers that the position of the French state as both the sole shareholder as well as the tax creditor of EDF, results in the applicability of the private investor test.

7.3 EU Public Interference in Energy Markets: the Emission Trading Corpus

Although intuitively not directly associated with competition law, the rules on emissions trading can also be brought under this heading. The reasons for this are essentially twofold. Firstly, the corpus of EU emissions trading law is based on the idea of an emissions trading market. Secondly, this market is characterised by potential market failures and thus requires public intervention to function efficiently.

The point of departure in this regard is the amended Emissions Trading Directive.[66] According to this Directive the electricity sector will have to buy all allowances in auctions from 2013 onwards.[67] This means that there will not only be a carbon market for trading excess allowances, but there will also be a markets on which allowances will have to be bought. As already indicated in the New Emissions Trading Directive, this will require EU-wide rules on auction design and operation for these allowance auctions.[68] These rules have been adopted in the form of Regulation 1031/2010 on the timing, administration and other aspects of auctioning of greenhouse gas emission allowances pursuant to the Emissions Trading Directive.[69] This Regulation attempts to ensure that these auctions take place in an open, transparent, harmonised and non-discriminatory manner and thus do not distort competition. The Auctioning Regulation envisages single-round, sealed bid, uniform price auctions (Article 5) conducted via an electronic platform (Article 4(1). In principle there will be one EU-wide auctioning platform, but Member States may opt-out of this platform and set up their own platform after notification to the Commission (Article 30). Such auctions will be held on a weekly (for standard allowances) or two-monthy (for aviation allowances) basis (Article 8(4)).

All in all, the Auctioning Regulation is a remarkably complete but also complex piece of legislation hammered out in a relatively short period. However, it is also a rather complex piece of legislation a result of, inter alia, the opt-out possibility from the EU-wide auctioning platform. Any decision by a Member State to set up a national auctioning platform invariably affects the level of harmonisation and may entail risks for undistorted competition on the carbon market.

8 Conclusion

The above analysis shows that all the cases and legislative developments in this overview have one major trait in common: a drive towards a Europanisation. Not only have the three liberalisation

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66 Directive 2003/87 as amended by Directive 2009/29, OJ 2009 L 140/63.

67 Directive 2009/29, recital 19 of the preamble. It may be noted that Article 10c provides for transitional free allocation to electricity generators in specific circumstances.

68 Directive 2009/29, Article 10(4).

69 OJ 2010 L 302/1.

packages resulted in more access to markets and – to a certain extent – the transformation of national energy markets into European energy markets and the concomitant necessity to approach these markets on a European scale, policy making concerning these markets is also shifting to the EU level. Even where the degree of Europeanisation is limited, *e.g.* in the liberalisation process where the Member States keep a firm grip on the legislative process, we see that Europeanisation takes place through the application of the antitrust rules. Even the fact that the Auctioning Regulation provides for national auctioning platforms should not obscure the fact that this Regulation was adopted by the Commission on the basis of an Emissions Trading Directive that only transfers more powers to the EU-level.