Survey

The Application of EU Competition Law in the Energy Sector

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I. Introduction

The year 2010 has been a year of consolidation in the ongoing process of the liberalisation of European energy markets. The regulatory developments underlying this process started in the 1990s and reached a new high point in 2009, when the so-called third liberalisation package was adopted, tightening the regulatory grip on the energy sector with strict rules on unbundling, the establishment of new and strengthening of existing authorities, and generally adjusting recent legislation to adapt to current developments and past experiences. After intense debate before the adaption of the third liberalisation package, attention has shifted away from the principles underlying the new regulatory rules to their concrete implementation. With regard to antitrust enforcement, the European Commission has continued to impose extensive remedies on undertakings it suspects of having abused their market power, while the number of ongoing and new cases in the energy sector seems to be diminishing. On the other hand, national competition authorities have been eager to step into the breach and have taken an active role in applying competition rules to the energy sector.

This article starts off with a brief summary of the regulatory framework of energy markets as it presents itself after adoption of the third liberalisation package. The next section deals with the Commission's enforcement activities in 2010—mainly investigations into alleged breaches of Art. 102 TFEU—followed by an overview of national enforcement activities across Member States. In the final section, observations are made on how the Commission has used the commitment procedure under Art. 9 Regulation 1/2003[1] with regard to the long-term capacity bookings of incumbent undertakings on gas networks to extend the scope of Art. 102 TFEU beyond the limits set by the European courts or the Commission's own case law.

Key Points

- The liberalisation of European energy markets has culminated in the adoption of the third energy package in 2009, which has led to intense implementation action by Member States, national authorities, undertakings and European associations.
- Competition rules have been enforced mostly by ways of commitment decisions at European level while, at a national level, authorities investigated cases of market foreclosure, potential collusive behaviour and manipulations in wholesale markets.
- On a substantive point, the Commission considers that long-term and large-scale capacity reservation can amount to an abuse irrespective of the needs of the dominant company. That view is problematic for operators and does not seem compatible with current competition law principles.

II. Development of the regulatory framework of energy markets

The liberalisation of European energy markets is an ongoing process which started around 20 years ago. The aim of the liberalisation process was to remove national monopolies and stimulate cross-border trade to attain a single European energy market, supposedly leading to lower prices and better services for consumers. A third party access regime and protection mechanisms against discrimination by vertically integrated energy utilities were introduced by European directives in the mid to late 1990s.[2] The liberalisation process was then re-enforced by the launch of the so-called second

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

energy package in 2003[3] including an obligation on Member States to fully open their electricity and gas markets by way of a regulated third party access regime and far reaching rules on legal, operational and informational unbundling.

Even before these measures had been fully implemented by Member States, the Commission launched sector inquiries into the functioning of the European electricity and gas markets in 2005, investigating potential shortcomings of the liberalisation process. The Commission published its final sector inquiry report on 10 January 2007 and identified several deficiencies then remaining on European energy markets.[4] Its main concerns were:

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

To address the concerns identified in the sector inquiry, the Commission not only used its powers under the antitrust rules but also proposed further regulatory and structural measures leading to the third legislative package. After lengthy discussions this was adopted in July 2009.[5] At the heart of the package are the formation of a European Network of Transmission System Operators (ENTSO)[6] for electricity and gas, respectively, 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 authorities[7] and, most important, the implementation of more stringent unbundling rules[8] designed to ensure effective independence of the network business from the rest of the vertically integrated energy utilities. As most rules will be applicable from 3 March 2011, the year 2010 has seen a lot of activity at European and national levels, both by regulators and undertakings/associations to implement the new rules and bring them to life.

On the European side the Agency for the Cooperation of Energy Regulators (ACER) has been established.[9] With the decision that ACER will have its seat in Ljubljana[10] and the designation of a director[11] as well as the hiring of staff, the first steps have been taken towards ACER becoming fully operational before 3 March 2011. The creation of ACER further formalises a process of cooperation between national regulatory authorities that started with the Madrid (gas) and Florence (electricity) Forums, and had led to the Council of European Energy Regulators (CEER)[12] and ERGEG.[13] Within ACER, national regulators, represented by a Board of Regulators, the Director and Administrative Board and the Commission will

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; 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.

4 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.

5 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.

6 Art. 5(2) Electricity Regulation (EC) No 714/2009; Art. 5(2) Gas Regulation (EC) No 715/2009.

7 Regulation (EC) No 713/2009.

8 Art. 9, 13–23 Electricity Directive (EC) 2009/72; Art. 9, 14–23 Gas Directive (EC) 2009/73.

9 For an in-depth overview of ACER cf. Ermacora, 'The Agency for the cooperation of Energy Regulators' in Jones (ed.), *EU Energy Law, Volume I: The Internal Energy Market—The Third Liberalisation Package* (Claeys & Casteels, Leuven 2010).

10 Commission Press Release IP/09/1885 of 6 December 2009.

11 Commission Midday Express Press Release EXME 10 / 07.05 of 7 May 2010.

12 Established in the year 2000, now acting as a preparatory body for ERGEG.

13 European Regulators' Group for Electricity and Gas, the Commission's formal advisory group of energy regulators; established by Commission Decision 2003/796/EC of 11. November 2003 on establishing the European Regulators' Group for Electricity and Gas, [2003] OJ L 296/34.

cooperate on regulatory issues and tasks assigned to ACER. These include[14] monitoring TSOs and their cooperation, especially through the newly created ENTSOs, which have to prepare and implement network codes and ten-year network developments plans. ACER has few autonomous decision-making powers, limited to the field of technical issues in relation to cross-border energy networks and to cases where national authorities cannot agree or jointly request ACER to act. Further decision-making powers are reserved for the Commission—with ACER in a purely advisory role—whose position concerning cross-border issues has been strengthened considerably in the third energy package. Even before ACER started operating, the ENTSOs and ERGEG had begun to prepare network codes and ten-year network development plans so that ACER can hit the ground running in 2011.

At a national level, the directives were being transposed into national law. To aid and influence this process the Commission published so called 'Interpretative Notes' on certain topics touched upon by the directives, outlining its views on potentially contentious questions arising in the transposition process.[15] It remains to be seen how Member States react to this attempt to use soft law to support the Commission's positions that could not be agreed upon when the legislative package was passed by the Council.

The Commission has demonstrated that it will monitor and enforce the transposition of the energy directives into national law, initiating proceedings against a large number of Member States for still not having fully implemented the rules of the second energy package in 2010.[16] While it is not clear whether this will actually lead to infringement procedures before the ECJ, the ECJ nonetheless had the opportunity to assess a member state's transposition of the directive in a preliminary ruling case. The ECJ had to decide whether European law allowed for two different tariffs for domestic transmission and transit (cross-border-transmission) of gas to be foreseen by national regulation. So far, only the Advocate General has delivered her opinion,[17] clearly taking the view that such a discrimination contravenes EU law *prima facie* but might be justified, if significant cost differences in providing the respective service justify a different treatment of domestic transmission and gas transit.

III. Commission enforcement activities

Independent of and complimentary to regulatory developments, the Commission continued its enforcement of competition rules in the energy sector by means of commitment decisions pursuant to Art. 9 Reg. 1/2003 in 2010. With these decisions, the main wave of cases directly resulting from the sector inquiry appears to have passed, leaving only a few ongoing investigations into the energy sector—at least in the public domain.

A. Gas networks: more commitments

In the gas sector the Commission ended three long-running investigations against incumbent integrated gas companies by declaring commitments binding under Art. 9 Reg. 1/2003. This continues a trend started in recent years with the Commission having already settled abuse of dominance cases against *Distrigaz*[18] and *RWE*[19] under Art. 9 Reg. 1/2003. The three most recent decisions were directed against *GDF Suez*, *E.ON* and *ENI*, the incumbents in France, parts of Germany and Italy.

1. *GDF Suez* and *E.ON*: abusive long-term capacity reservation

The Commission's allegations in the investigations against *GDF Suez*[20] and *E.ON*[21] were rather similar. The Commission's main point was that the respective gas supply branch of the integrated undertaking had booked a large part of the entry capacity to the verti-

14 A comprehensive overview over ACER's tasks is given in ACER's 2011 Work Programme, 21 September 2010, 6ff, <http://www.energy-regulator.eu/portal/page/portal/ACER_HOME/The_Agency/Work_programme/ACER%20Work%20Programme%202011.pdf> accessed 20 October 2010.

15 Commission (EC), Commission Staff Working Paper 'Interpretative Note on Directive 2009/72/EC concerning common rules for the internal market in electricity and Directive 2009/73/EC concerning common rules for the internal market in natural gas—the Unbundling Regime'; Commission Staff Working Paper 'Interpretative Note on Directive 2009/73/EC concerning common rules for the internal market in natural gas—Third Party Access to Storage Facilities'; Commission Staff Working Paper 'Interpretative Note on Directive 2009/72/EC concerning common rules for the internal market in electricity and Directive 2009/73/EC concerning common rules for the internal market in natural gas—Retail Markets'; Commission Staff Working Paper 'Interpretative Note on Directive 2009/72/EC concerning common rules for the internal market in electricity and Directive 2009/73/EC concerning common rules for the internal market in natural gas—the regulatory authorites' (22 January 2010).

16 Commission Press Release IP/10/836 of 24 June 2010; Commission Memorandum MEMO/10/275 of 24 June 2010.

17 Opinion of AG Trstenjak in Case C-241/09 *Fluxys SA v Commission de régulation de l'électricité et du gaz (CREG)*, delivered 28 September 2010.

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

19 *RWE gas foreclosure* (Case COMP/39.402) Commission Decision of 18 March 2009 [2009] OJ C 133/10.

20 *GDF* (Case COMP/39.316) Commission Decision of 3 December 2009 [2010] OJ C 57/13.

21 *E.ON Gas* (Case COMP/39.317) Commission Decision of 4 May 2010 [2010] OJ C 278/9.

cally integrated gas network on a long-term basis. In the Commission's view this could possibly lead to market foreclosure as third parties did not have the opportunity to gain access to customers due to a lack of available transport capacity.

To offset the Commission's concerns *GDF Suez* and *E.ON* proposed to release a large share of their respective long-term reserves of gas import capacity into their respective networks. In a first step, a pre-defined amount of entry capacity was to be freed up for third parties by 1 October 2010, the beginning of the gas year 2010/2011. Then, the companies committed to further reduce their capacity bookings to certain thresholds by 2014 (*GDF Suez*) and 2015 (*E.ON*) and keep their capacity bookings under these thresholds for a further ten years.

The alleged abuse goes beyond established Art. 102 TFEU case law. The Commission did not focus on whether *GDF Suez* and *E.ON* actually used or needed these capacities to fulfil their own (long-term) import and downstream supply contracts but rather only concentrated on the potential effects on market access by competitors.

2. *ENI*: discrimination of third party shippers

The latest Commission decision in the gas sector was directed against *ENI*, the Italian incumbent.[22] The Commission suspected that *ENI* had harmed 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, eg with interruptible instead of firm capacity) and strategic underinvestment—a novel concept under Art. 102 TFEU—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 capacity demand from third party shippers. Through this behaviour, *ENI* was supposedly able to protect its margins in the downstream gas supply markets. To address the Commission's concerns, *ENI* committed to divest its shares in the companies that own, operate and manage the transport capacity on the international pipelines *TAG*, *TENP* and *Transitgas* to bring gas into northern Italy respectively from Russia (*TAG*) and the North of Europe (the system *TENP*/*Transitgas*). The divestiture commitment is similar to the one *RWE* offered in 2009; both cases are based on the alleged preferential treatment of the companies' supply branch by the vertically integrated network operator. The cases against *GDF Suez* and *E.ON* on the other hand do not focus on discriminatory behaviour of the network operator but rather on practices of the supply branch itself. Interestingly, in the cases against *RWE* and *ENI*, the Commission does not address the question of long-term booking of capacity on the pipelines, even though one would suppose that the same effects the Commission presumed in the investigations against *GDF Suez* and *E.ON* would also arise there.

B. Electricity

1. Swedish interconnectors

The Commission made binding pursuant to Art. 9 Reg. 1/2003 commitments offered by the Swedish electricity TSO, *Svenska Kraftnät* (*SvK*), 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.[23] The Commission had voiced 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. The alleged practice was found to contradict the Commission's objective of establishing an integrated European electricity market. *SvK* argued that the export restraints were necessary to alleviate internal congestion in its electricity distribution network. The case demonstrates an inherent conflict of the Commission's incentives to open network-bound markets to competition and the factual circumstances existing in European energy markets. Most networks were developed to cover the need for 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 claimed to have information on alternative means of managing these congestion problems which would not favour

22 *ENI* (Case COMP/39.315) Commission Decision of 28 September 2010.

23 *Svenska Kraftnät* (Case COMP 39.351) Commission Decision of 14 April 2010 [2010] OJ C 142/28.

consumers in Sweden over consumers in neighbouring EU and EEA Member States.

2. *EdF*: long-term supply contracts

Another investigation settled under Art. 9 Reg. 1/2003 by the Commission focused on market foreclosure on the French market for the supply of large industrial customers with electricity.[24] This investigation against *EdF* was opened in July 2007[25] and the Commission issued a Statement of Objections against *EdF* on 28 December 2008.[26] The Commission expressed concerns that the contracts concluded by *EdF* with large industrial consumers in France may prevent customers from switching to other suppliers thereby leading to market foreclosure. The Commission seemingly applied the test developed in the *Distrigaz*[27] case. Regarding the market position of the supplier, *EdF* is by far the largest producer on the French market for electricity. The contracts tied a large share of every single customer's demand for a long period of time, with the totality of contracts apparently covering a significant share of the market. Moreover, under the same contracts, the resale of electricity appeared 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. To address the Commission's concerns, *EdF* offered commitments that were made binding by the Commission on 17 March 2010. Structurally similar to the *Distrigaz*-Commitments, *EdF* has to guarantee that for the duration of ten years (or until *EdF*'s market share falls below 40 per cent in two consecutive years) on average 65 per cent of its supply volumes are returned to the market every year, so that other suppliers have a chance to compete for those volumes. Furthermore, new contracts concluded by *EdF* shall only have a maximum duration of five years. Interestingly, the decision allows a longer duration as long as the customer has a one-sided opt-out opportunity at least every five years, contrary to the vertical block exemption regulation, where such a construction would be qualified as running over five years. While *EdF* can continue to offer customers new contracts on an exclusive basis, it is obliged to offer an alternative, economically viable non-exclusive contract as well. Finally, *EdF* committed to waive the existing restriction of resale clauses and not to include such clauses in future contracts.

The Commission is further investigating *EdF* with regard to a possible manipulation of the electricity wholesale market unrelated to the issue of long-term contracts.[28]

3. Dawn raids in the Czech electricity sector

On 24–26 November 2009 the Commission conducted inspections at the premises of energy companies in the Czech Republic. The Commission is investigating whether *ČEZ Group*, the largest electricity producer in the Czech Republic, has distorted competition to enhance its dominant position on the Czech wholesale electricity market.[29] The behaviour under investigation includes creating obstacles for third parties' power plant projects, limitation of trade in brown coal and influencing prices on the wholesale electricity market either unilaterally or together with other players, leading to market foreclosure.[30] While the Commission's accusations sound somewhat familiar to other investigations against incumbent energy companies, other developments in the context of the inspections most certainly do not. First, the fact that inspections were to take place was revealed by a Czech news outlet one day beforehand. Whether *ČEZ* or other players knew of the inspections even earlier remains open as well as how or by whom the information was leaked.[31] Then, another company targeted by the Commission, *J&T Group*, is under investigation for obstructing the Commission's inspection by not granting proper access to electronic files and email accounts, possibly consti-

24 *Long-term electricity contracts France* (Case COMP/39.386) Commission Decision of 17 March 2010 [2010] OJ C 133/5.

25 Commission Memorandum MEMO/07/313 of 26 July 2007.

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

27 In *Distrigaz* (*supra* 19), the Commission identified five elements to be considered when determining whether long-term contracts are to be considered illegal under competition rules. 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.

Cf. Commission Memorandum MEMO/07/407 of 11 October 2007.

28 Commission Memorandum MEMO/09/104 of 11 March 2009.

29 Commission Memorandum MEMO/09/518 of 24 November 2009.

30 Press Release by *CEZ Group* of 24 November 2009 <http://www.cez.cz/en/cez-group/media/press-releases/2693.html> accessed 5 November 2010.

31 L Rousek, 'CEZ Denies Being Warned On E.U. Inspection', *Wall Street Journal Blogs—New Europe* (New York, 1 December 2009) <http://blogs.wsj.com/new-europe/2009/12/01/cez-denies-being-warned-on-eu-inspection/> accessed 5 November 2010.

tuting a refusal to submit to an inspection.[32] According to newspaper reports, paper shredders were running 'at full speed' at the targeted companies' premises before the Commission arrived.[33]

IV. National enforcement activities

National competition authorities have by no means taken a back seat to the Commission in enforcing competition law in the energy sector in 2010. Besides investigating the energy sector by ways of sector inquiries, national competition authorities have investigated manipulations in the wholesale markets and potential collusive behaviour in scenarios much like recent Commission investigations. Furthermore, the authorities have looked into abusive behaviour by dominant undertakings especially with regard to market foreclosure by way of impeding customers from switching their supplier, for example by restricting access to information.

A. Germany

In Germany, the *Bundeskartellamt* has had a busy year investigating the energy sector with sector inquiries into the gas, electricity and district heating[34] markets.

The results of the sector inquiry into the gas market were published in December 2009.[35] The main findings were that most of the entry- and exit-capacity on German networks was booked long-term, mainly by the vertically integrated incumbent undertakings still dominant in their traditional home markets.[36] While the *Bundeskartellamt* held that these bookings possibly had a foreclosing effect on the market, it restrained itself from taking action as it did not find indications of capacity hoarding,[37] and indicated that an amendment of the regulatory regime would be a better solution.[38] The authority did, however, issue twelve commitment decisions prohibiting an apparently widespread practice unearthed by the sector inquiry, namely the inclusion of resale restrictions in supply contracts containing take-or-pay-clauses with mainly industrial customers.[39] The sector inquiry also brought evidence that competition is picking up on the German gas markets,[40] leading the authority to reassess its position on long-term supply contracts concluded between the large utilities and regional and local supply companies. The *Bundeskartellamt* opted not to prolong the restrictions on the scope and duration of such contracts that it had imposed in 2006.[41] Regarding the geographic market definition of wholesale gas markets, the *Bundeskartellamt* discussed the possibility of a market wider than the networks concerned, namely along the borders of the market areas, but decided that further monitoring was needed to assess whether competition actually was strong enough throughout a market defined this way to merit a change.

The release of the final report of the sector inquiry on the electricity market was expected at the end of November 2010.[42] It focused on pricing behaviour on the wholesale level in connection with electricity generation, based on production data for the years 2007 and 2008. Whilst the depth and scope of information requested by the authority might lead to a thorough assessment of the electricity market in 2007 and 2008, the sector inquiry's value for future decisions could be limited due to recent structural changes on the German electricity market.[43] Not only have two of the four

32 Commission Press Release IP/10/627 of 28 May 2010.

33 F Bouc, J Plesl, 'ČEZ o razii věděl pět dní předem, komise to chce vyšetřit' *Lidové noviny* (Prague, 1 December 2009) <http://byznys.lidovky.cz/cez-o-razii-vedel-pet-dni-predem-komise-to-chce-vysetrit-piv-/firmy-trhy.asp?c=A091130_221936_firmy-trhy_tsh> accessed 5 November 2010; C Compton, 'J&T endures another EC probe' *The Prague Post* (Prague, 1 June 2010) <http://www.praguepost.com/business/4603-jandt-endures-another-ec-probe.html> accessed 5 November 2010.

34 *Bundeskartellamt*, Press Release 'Bundeskartellamt durchleuchtet Fernwärmesektor' of 14 September 2009.

35 *Bundeskartellamt*, 'Sektoruntersuchung Kapazitätssituation in den deutschen Gasfernleitungsnetzen Abschlussbericht gemäß § 32e Abs. 3 GWB' December 2009, <http://www.bundeskartellamt.de/wDeutsch/download/pdf/Stellungnahmen/0912_Abschlussbericht_SU_Gasfernleitungsnetze.pdf> accessed 12 October 2010.

36 Ibid, 10ff.

37 Ibid, 17ff.

38 Ibid, 28ff.

39 *Bundeskartellamt*, 'Gas and electricity suppliers agree to renounce resale bans—Bundeskartellamt gets companies to abandon anti-competitive contract clauses', Press Release of 7 July 2010 <http://www.bundeskartellamt.de/wEnglisch/News/press/2010_07_07.php> accessed 12 October 2010.

40 Note 35, p. 22, 26.

41 *Bundeskartellamt*, 'Substantial improvement of competition conditions in gas distribution sector—Bundeskartellamt's decisions on long-term gas supply contracts successful', Press Release of 15 June 2010 <http://www.bundeskartellamt.de/wEnglisch/News/press/2010_06_15.php> accessed 12 October 2010.

42 F Meßing, T Wels, 'Interview—Mehr Konkurrenz beim Strom!', *Westdeutsche Allgemeine Zeitung*, (Essen, 13 October 2010) <http://www.derwesten.de/nachrichten/wirtschaft-und-finanzen/Mehr-Konkurrenz-beim-Strom-id3828056.html> accessed 7 November 2010.

43 Cf. a study by *Frontier Economics* commissioned by *E.ON*, 'Marktkonzentration im deutschen Stromerzeugungsmarkt' <http://www.eon.com/download/dwn-news/9949,431/RPT_Frontier_EON-Konzentrationsanalyse_Final_20102010_stc.pdf> accessed 25 October 2010.

large transmission grids been sold from their integrated owners to independent operators,[44] with a third probably following shortly,[45] but the distribution of generation capacity amongst market players has changed dramatically due to E.ON's sale of power plants and drawing rights under a Commission commitment decision[46] as well as the installation of renewable generation capacities. There have been hints that the sector inquiry might lead to a change in policy with regard to the geographic extension of the electricity wholesale market, broadening the current definition to include not only Germany but also Austria.[47] In late 2009, the *Bundeskartellamt* had already acknowledged the existence of intense competition on non-regulated retail markets, changing its view on market definition from a local market defined by the grid area of the local distributor to a national market.[48] Unrelated to the sector inquiry, the *Bundeskartellamt* has also adopted commitment decisions against a number of electric heating providers, forcing them to implement extensive measures aimed at opening up the regional markets dominated by the incumbent providers.[49] In addition, 13 providers are to pay out reimbursements of €27.2 million to their approximately 530,000 electric heating customers.

Another sector inquiry into the fuel sector has not been concluded yet. The preliminary report published by the *Bundeskartellamt* in 2009[50] had strongly influenced a merger prohibition decision[51] that was overturned on appeal in August 2010.[52] The *Oberlandesgericht Düsseldorf* held that the authorities' presumptions leading to the prohibition of the acquisition of 59 petrol stations in the Federal States of Sachsen and Thüringen by *Total* were partly incorrect. Whilst the definition of two separate product markets for petrol and diesel fuel was confirmed, the court did not agree that there was a dominant oligopoly between the major distributors in the local markets concerned. Even though the markets concerned are highly concentrated, the court found no proof of a sanctioning mechanism constraining the presumed oligopolists' behaviour and leading to implicit coordination but rather found there to be functioning competition on prices, service and access to customers. The *Bundeskartellamt* has appealed the decision.[53]

Another development in German competition law is not directly related to the energy sector but might well lead to repercussions at a later stage. On the initiative of the governing coalition's junior partner, the FDP, the ministry of economics has introduced a controversial proposal to amend the German competition code to give the *Bundeskartellamt* the right to demerge dominant undertakings on highly concentrated and static markets without having to prove abusive behaviour.[54] While the passing of the bill is unclear, the energy sector has been named as one where this new tool might be applied first.

B. United Kingdom

In the United Kingdom a two-year consultation process led to Ofgem (Office of the Gas and Electricity Markets) publishing a new regime for network fee regulation in October 2010,[55] introducing significant changes to the British regulatory system which had served as an example for the incentive regulation systems of several Member States. Whilst 20 years of regulation in the UK

44 *E.ON* sold its high voltage transmission grid (*Transpower*) to the Dutch grid operator *Tennet* (cf. Commission Decision M.5707 of 4 February 2010 [2010] OJ C 60/1) and *Vattenfall* sold its German high voltage transmission grid (*50Hertz*) to the Belgian grid operator *Elia* and *IFM*, an investment vehicle of Australian pension funds (cf. Commission Decision M.5827 of 10 May 2010 [2010] OJ C 191/3).

45 *RWE* reportedly is considering selling a majority share in its high voltage transmission grid (*Amprion*), cf. C Bauer and T Wels, 'RWE gibt Stromnetz-Tochter ab' *Westfälische Rundschau* (Dortmund, 5 October 2010) <http://www.derwesten.de/nachrichten/wirtschaft-und-finanzen/RWE-gibt-Stromnetz-Tochter-ab-id3797467.html> accessed 7 November 2010.

46 *German Electricity Wholesale Market* (Case COMP/39.388) and *German Electricity Balancing Market* (Case COMP/39.389) Commission Decision of 26 November 2008 [2009] OJ C 36/8.

47 D Fockenbrock, K Stratmann, 'Wir brauchen die Abschreckung' *Handelsblatt* (Düsseldorf, 29 March 2010) <http://www.handelsblatt.com/politik/deutschland/kartellamtschef-andreas-mundt-wir-brauchen-die-abschreckung;2553636> accessed 7 November 2010.

48 *Integra/Thüga* (Case B8-107-09) *Bundeskartellamt* Decision of 30 November 2009, [40].

49 Bundeskartellamt 'Bundeskartellamt—Energy Sector Successful conclusion of abuse proceedings against electric heating providers', Press Release of 29 September 2010 <http://www.bundeskartellamt.de/wEnglisch/News/press/2010_09_29.php> accessed 8 November 2010.

50 *Bundeskartellamt*, 'Bundeskartellamt publishes Interim Report on Fuel Sector Inquiry' Press Release of 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.

51 *Total Deutschland GmbH/OMV Deutschland GmbH* (Case B8 175/08) *Bundeskartellamt* decision of 29.

52 *Oberlandesgericht Düsseldorf*, VI-2 U Kart 6/09, decision of 4 August 2010, WuW/E DE-R 3000.

53 *Oberlandesgericht Düsseldorf*, 'Tankstellenübernahme—Kartellamt will Total bremsen' *Manager Magazin* (Hamburg, 6 September 2010) <http://www.manager-magazin.de/unternehmen/artikel/0,2828,715936,00.html> accessed 8 November 2010.

54 Cf. H Satzky 'Novellierung des GWB: Entflechtung von Großkonzernen?', WuW 2010, 614; R Bechtold 'Zum Referentenentwurf einer Entflechtungsregelung' BB 2010, 451; *Bundeskartellamt* 'Entflechtung als Instrument des Kartellrechts' Hintergrundpapier zur Tagung des Arbeitskreises Kartellrecht am 7. Oktober 2010 <http://www.bundeskartellamt.de/wDeutsch/download/pdf/Diskussionsbeitraege/Hintergrundpapier_Arbeitskreis_Kartellrecht_2010.pdf> accessed 8 November 2010.

55 *Ofgem*, 'RIIO: A new way to regulate energy networks', decision 128/10 of 4 October 2010 <http://www.ofgem.gov.uk/networks/rpix20/

had led to a significant reduction of network access fees, it also seemed to be less suitable for current infrastructure investment challenges.[56] Given the evermore intense nature of regulation—with the process of setting new tariffs taking up to two and a half years for every five year regulation period—Ofgem undertook to thoroughly examine the pre-existing regulation. In the different consultation rounds several models including broad deregulation were proposed. The end result, however, appears to be rather more than less complex. The new model is called RIIO, 'setting Revenue using Incentives to deliver Innovation and Outputs'. The most significant changes in the new model are longer regulation periods of eight years, a strict orientation on outputs in the price control process and a greater participation of stakeholders in the regulating process. To incentivise network operators to offer better products, network fees are to be dependent on the network operator reaching a set of so called primary outputs divided into six categories: customer satisfaction, reliability and availability, safety, conditions for connection, environmental impact and social obligations. While there will be a minimum level of performance to be reached by every network operator, each network operator will have to conclude individual goals with Ofgem. The network operator will have to demonstrate to Ofgem the measures it is willing to implement and their respective costs in a detailed business plan—to be approved and controlled by Ofgem. It appears doubtful whether RIIO actually attains the goals of simplifying the regulatory regime and providing incentives for investment as the new set of rules is highly complex and the regulated fee level appears to be highly uncertain due to the number of variables necessary for fee calculation.

Ofgem also adopted a new policy on network mergers, urging the merger authorities to take the possible effects of a merger on effective regulation into account when assessing a merger between network operators.[57] Ofgem stated that a higher number of operators enables it to get more and better input when assessing the market, leading to better benchmarking and regulation. Also, a higher number of operators means more competition on capital markets as well as potentially more innovation. From a regulatory perspective, Ofgem announced that it would not continue to reduce allowed revenues by a fixed amount after a merger (known as the 'merger tax') but rather use general price regulation mechanisms splitting efficiency gains between consumers and network operators at a certain ratio.

In July 2010 Ofgem published a report on liquidity on Great Britain's wholesale electricity market,[58] following up the 2008 energy supply probe[59] and forming part of a continuing consultation and monitoring process. Ofgem found the market's performance to be mixed. Although improvements had been made, as for example the churn rate had increased, long-term liquidity continued to be weak and price transparency had not improved. In the view of Ofgem, this might have led to difficulties especially for non-vertically integrated participants, as low liquidity may have hindered entry and growth of small market participants. Ofgem expected market coupling between Great Britain and the Netherlands through 'Britned' in 2011 to increase liquidity by easier access for European energy firms. Based on further market development, Ofgem will decide whether regulatory intervention will be necessary. In a February 2010 paper,[60] Ofgem had proposed four main regulatory measures for improving liquidity:

- an obligation requiring large generators to trade with small/independent suppliers;
- market matching arrangements;
- mandatory auctions;
- self-supply restrictions on large vertically integrated utilities.

Regarding enforcement of antitrust rules, the Supreme Court refused *National Grid* a further appeal on a 2008 Ofgem decision[61] in August 2010,[62] which originally had imposed a fine of £41 million on *National Grid* for the abuse of a dominant position on the metering market. The fine had first been reduced to £30 million by the CAT[63] and then to £15 million by the Court of

consultdocs/Documents1/Decision%20doc.pdf> accessed 8 November 2010.

56 *Ofgem*, 'RPI-X @20 Investment Working Group Report' of 14 October 2009 <http://www.ofgem.gov.uk/Networks/rpix20/Stakeholder/Documents1/Working%20group%20on%20investment%20final%20paper%20public%20version.pdf> accessed 8 November 2010.

57 *Ofgem*, open letter of 25 May 2010 'Public statement on Ofgem's network company merger policy', <http://www.ofgem.gov.uk/Networks/Policy/Documents1/Merger%20policy%20statement.pdf> accessed 7 October 2010.

58 *Ofgem*, 'GB wholesale electricity market liquidity: summer 2010 assessment' 29 July 2010 <http://www.ofgem.gov.uk/Markets/WhlMkts/CompandEff/Documents1/GB%20wholesale%20electricity%20market%20liquidity%20-%20summer%202010%20assessment.pdf> accessed 8 November 2010.

59 *Ofgem*, 'Energy Supply Probe—Initial Findings Report' 6 October 2008 <http://www.ofgem.gov.uk/Markets/RetMkts/ensuppro/Documents1/Energy%20Supply%20Probe%20-%20Initial%20Findings%20Report.pdf> accessed 8 November 2010.

60 *Ofgem*, 'Liquidity Proposals for the GB wholesale electricity market' 22 February 2010 <http://www.ofgem.gov.uk/Markets/WhlMkts/CompandEff/Documents1/Liquidity%20Proposals%20for%20the%20GB%20wholesale%20electricity%20market.pdf> accessed 8 November 2010.

61 *Ofgem*, Decision 21/08 of 21 February 2008, Case CA98/STG/06.

62 *National Grid v Gas and Electricity Markets Authority* UKSC 2010/0061.

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

Appeal, which stated that 'it is not self-evident that the arrangements made with the gas suppliers crossed the line into abuse'[64] and attributed a mitigating effect to the fact that the *National Grid* had extensively consulted the authority before implementing the measures—changed due to the consultation—later held to be abusive. Even this reduced fine remains the highest fine yet issued for an abuse of dominance in the UK.[65]

C. France

In France, wholesale markets are becoming more liquid but are still being dominated by—partly—state owned incumbents *EdF* and *GDF Suez*.[66] A legislative measure to further competition on the French market for electricity was included in the proposed adaption of the third electricity directive into French law.[67] The French legislator planned to establish a right for alternative suppliers to purchase up to 100 TWh per year[68] of the basic electricity of nuclear origin produced by *EdF* at a price set by the regulator until 2025. The objective is to correct the effect on the electricity market resulting from *EdF*'s ownership of all operating nuclear plants, which provides it with a competitive advantage in terms of production cost, one of the factors potentially contributing to *EdF*'s extremely high market share. The Commission endorsed the French plans when they were first presented, especially with regard to the abolition of regulated tariffs for companies—a matter which the Commission had been investigating under the state aid rules and as an infringement procedure.[69]

D. Italy

The Italian *Autorità Garante della Concorrenza e del Mercato* (*AGCM*) continued its enforcement practice with a number of decisions and the initiating of several proceedings concerning the energy markets in 2010. In a series of cases *AGCM* made binding commitments by vertically integrated incumbent companies to provide other suppliers access to information on a non-discriminatory basis to facilitate the switching of suppliers by customers. These commitments addressed concerns that the undertakings had withheld relevant information and thus foreclosed downstream markets from their competitors.[70] *AGCM* launched a new investigation against a gas distribution concessionaire who delayed or refused to furnish information required by local authorities to prepare calls to tender for awarding the next service contract.[71]

On the electricity market *AGCM* is investigating various instances of possible market manipulation. On 27 January 2010 *AGCM* launched two investigations into a possible manipulation of wholesale markets for the Sicily macro area. The Italian regulatory authority for electricity and gas had detected anomalous behaviour in the relevant wholesale markets leading *AGCM* to believe that either *ENEL* might have withheld production capacity in order to create supply shortages and therefore set higher prices on the day-ahead market, or alternatively *Edipower*'s shareholders (who are its customers and suppliers at the same time) colluded to reduce quantities being offered on the day-ahead markets, possibly also involving *Edipower* generation plants throughout the country.[72] On 6 October 2010 *AGCM* launched an investigation into a possible market sharing agreement between several operators of thermal electric power plants in Italy. It is investigating whether the producers came to an agreement on taking turns to offer balancing electricity to *TERNA*, the rel-

64 *National Grid v Gas and Electricity Markets Authority* [2010] EWCA Civ 114, 128.

65 *Ofgem*, 'Supreme Court refuses National Grid appeal on gas meter contracts—statement', Press Release of 5 August 2010 <http://www.ofgem.gov.uk/Media/PressRel/Documents1/National%20Grid%20Statement5Aug.pdf> accessed 6 October 2010.

66 *Commission de Régulation de l'Énergie* 'Le fonctionnement des marchés de gros de l'électricité et du gaz naturel en 2009–2010', 25 October 2010 <http://www.cre.fr/fr/content/download/10266/172342/file/101025_Rapport_Surveillance.pdf> accessed 8 November 2010.

67 Projet de loi portant nouvelle organisation du marché de l'électricité, n° 2451, déposé le 14 avril 2010, as amended by the *Assemblée Nationale* in first reading and the *Sénat*; at the time of writing, the bill was still pending.

68 Amounting to about 25% of *EdF*'s total generation from nuclear plants and just under 20% of total power generation in France (based on 2009 figures; cf. EdF Group—Activity and Sustainable Development Report 2009, 46 <http://www.edf.com/html/RA2009/uk/catalogue/appli.htm> accessed 7 October 2010; RTE: The French Electricity Report 2009, 8 <http://www.rte-france.com/uploads/media/pdf_zip/publications-annuelles/rte-be09-en-02.pdf> accessed 7 October 2010).

69 Commission Memorandum MEMO/09/394 of 15 September 2009.

70 *AGCM*, Decision of 10 December 2009, *A410—Exergia/Enel-Servizio di Salvaguardia* (Provvedimento n.20549) [2009] Bollettino Settimanale 49, 5; cf. Press Release of 21 December 2009 <http://www.agcm.it/agcm_eng/COSTAMPA/E_PRESS.NSF/0af75e5319fead23c12564ce00458021/7b1d59613d6636dfc125769b0033e5c5?OpenDocument> accessed 8 November 2010; Decisions of 8 September 2010: A411—*SORGENIA/A2A* (Provvedimento n. 21528) [2010] Bolletino Settimanale 35, 5; A411A—*SORGENIA/ACEA* (Provvedimento n. 21529) [2010] Bolletino Settimanale 35, 30; A411B—*SORGENIA/ITALGAS* (Provvedimento n. 21530) [2010] Bolletino Settimanale 35, 49; A411D—*SORGENIA/IRIDE* (Provvedimento n. 21531), [2010] Bolletino Settimanale 35, 64.

71 *AGCM*, Press Release of 20 October 2010 <http://www.agcm.it/agcm_eng/COSTAMPA/E_PRESS.NSF/0af75e5319fead23c12564ce00458021/6fd8b55e577ce7ebc12577c7002ac414?OpenDocument> accessed 8 November 2010.

72 *AGCM*, Press Release of 2 February 2010 <http://www.agcm.it/agcm_eng/COSTAMPA/E_PRESS.NSF/0af75e5319fead23c12564ce00458021/772d04e3c7f4dcedc12576d200345648?OpenDocument> accessed 8 November 2010.

evant grid operator, and thereby creating the opportunity to raise price levels.[73]

On the market for domestic use LPG supply *AGCM* issued sanctions totalling €22 million to suppliers that had allegedly taken part in an agreement to coordinate nationwide variations in the public price lists from 1995 to 2005. This activity supposedly took place at top level meetings of the companies involved with the purpose of coordinating parallel price lists. *ENI* was exempted from fines under the authority's leniency rules for its active participation in uncovering the secret cartel for which there was very little direct evidence.[74]

In an unusual move *AGCM* decided to reopen a proceeding against *ENI* in which it had fined *ENI* €290 million in 2006[75] for not investing into additional pipeline import capacity on the Trans Tunisian Pipeline connecting Italy to Tunisia. This decision had been appealed by *ENI* and partly annulled by the *Tribunale Amministrativo Regionale del Lazio* as far as it concerned the proportionality of the fine.[76] Although a further appeal brought both by *ENI* and by *AGCM* is still pending before Italy's highest administrative court, the *Consiglio di Stato*, *AGCM* decided to take a new decision in relation to the fine to be imposed on *ENI*, which was expected to be issued by 31 January 2011.[77] On the regulatory front, *ENI* was also under attack, as a new decree on natural gas was passed, obliging companies with a market share of over 40 per cent to sell a certain amount of gas or invest in new storage capacity.[78]

E. Spain

In Spain, the *Comisión Nacional de la Competencia* (*CNC*) has initiated a number of proceedings in the energy sector over the past year. Regarding electricity, the *CNC* is investigating whether several electricity producers violated Spain's competition act by shifting supply from the daily market to the technical restrictions procedure,[79] possibly supported by the actions of their distributor companies. This would have led to higher revenues for the undertakings involved while raising the transmission system operator's costs, which are borne by all network users. According to the authority, the alleged behaviour could constitute an individual or collective abuse of a dominant position, or consciously parallel conduct.[80] Another potential abuse of a dominant position currently under investigation by the *CNC* concerns three integrated utilities. Complaints made by associations of electrical installation businesses indicate that the utilities might have furthered their own electrical installation businesses by using information provided to them by their electricity distribution businesses. That business associations can also be on the other end of the *CNC*'s attention is shown by inspections conducted in November 2009 following which the *CNC* extended an ongoing investigation against several large electricity companies[81] to *UNESA*, the Spanish Electricity Industry Association.[82] *UNESA* might have played an active part in coordinating the alleged attempt of the companies to withhold necessary information required by competitors to enable customers to switch their supplier. The *CNC* is also looking into whether *Gas Natural* has attempted to hinder customers from changing their gas supplier by declining to process requests not made in a certain format and communicating misleading information to consumers, thus foreclosing market access.[83] Finally, in October 2010 the *CNC* opened formal proceedings against the Spanish Gas Association for alleged anti-competitive conduct, consisting of an agreement on or

73 *AGCM*, Press Release of 13 October 2010 <http://www.agcm.it/agcm_eng/COSTAMPA/E_PRESS.NSF/0af75e5319fead23c12564ce00458021/6975322acb706747c12577c7002b9f82?OpenDocument> accessed 8 November 2010.

74 *AGCM*, Decision of 24 March 2010, *I700—Prezzo del GPL per Riscaldimento Regione Sardegna* (Provvedimento n. 20931) [2010] Bollettino Settimanale 12, 8; cf. Press Release of 24 March 2010 <http://www.agcm.it/agcm_eng/COSTAMPA/E_PRESS.NSF/0af75e5319fead23c12564ce00458021/b2b833553f09d241c12576f7002df55d?OpenDocument> accessed 8 November 2010.

75 *AGCM*, Decision of 15 February 2006, *A358—ENI Trans Tunisian Pipeline* (Provvedimento n. 15174) [2006] Bolletino Settimanale 5, 8.

76 *Tribunale Amministrativo Regionale del Lazio*, Decision of 29 November 2006, Case 3582/2006—*ENI Trans Tunisian Pipeline*.

77 *AGCM*, Decision of 13 May 2010, [2010] Bollettino Settimanale 19, 5 and 38, 4.

78 *Decreto Legislativo 13 agosto 2010, n. 130*; published in *Supplemento ordinario n. 195/L alla Gazzetta Ufficiale* of 18 August 2010.

79 Capacity limitations in the power transmission network can lead to situations where network stability can only be maintained by increasing or reducing output of certain power plants. Costs for such measures are borne by the network operator which passes them on as part of network access fees.

80 *CNC*, 'CNC opens formal proceedings against several electric utilities', Press Release of 5 October 2009 <http://www.cncompetencia.es/Inicio/GestionDocumental/tabid/76/Default.aspx?EntryId=31877&Command=Core_Download&Method=attachment> accessed 20 October 2010.

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

82 *CNC*, 'Notice on the extension of the proceedings opened in the electricity sector to include UNESA', Press Release of 4 February 2010 <http://www.cncompetencia.es/Inicio/GestionDocumental/tabid/76/Default.aspx?EntryId=34217&Command=Core_Download&Method=attachment> accessed 20 October 2010.

83 *CNC*, 'CNC opens new proceedings in gas and electricity sectors', Press Release of 3 December 2009 <http://www.cncompetencia.es/Inicio/GestionDocumental/tabid/76/Default.aspx?EntryId=33305&Command=Core_Download&Method=attachment> accessed 20 October 2010.

collective recommendation of tariffs for certain inspection services, subsequently forwarded to the autonomous communities.[84]

F. Austria

The Austrian *Bundeswettbewerbsbehörde* continued its review of liquid fuel markets, investigating possible reasons for major pricing differences between different Austrian regions.[85] As vertically integrated market players explained their price changes at the retail level by the corresponding changes of the *Platts* notations, the authority investigated how pricing information given by *Platts*, a company providing market information in the energy sector, affected the Austrian market and how *Platts* conducted its price assessments.[86] The investigations were concluded without the finding of an infringement; the authority will continue to monitor markets and publish a monthly newsletter of price developments on the liquid fuel and crude oil markets in Austria and Europe.[87]

G. Belgium

The Belgian *Direction Générale de la Concurrence* conducted dawn raids at the premises of several companies active in the wholesale of electricity in Belgium on 22 September 2009.[88] Possible infringements of competition law under investigation include restrictive practices and/or the abuse of a dominant position, in particular capacity withdrawal and price formation. In the light of this investigation the Belgian *Auditorat du Conseil de la Concurrence* requested a partial referral of the merger control proceeding in *EdF*'s acquisition of a controlling stake in Belgian energy producer and supplier *SPE* as far as it concerned Belgian electricity markets. The *Auditorat* considered the acquisition to significantly affect competition on various electricity markets in Belgium, in particular by creating or strengthening a collective dominant position of *Electrabel* and *SPE* in so far as the ultimate shareholder of both parent companies of these undertakings (ie *GDF Suez* and *EdF*) would post-merger be identical (the French government holding company).[89] In November 2009, the Commission, after refusing the referral,[90] cleared the acquisition, subject to the divestment of a planned power plant project by *EdF*.[91] It held that it was the better placed authority as certain cross border issues arose, especially regarding market coupling and market interconnectors, and that it had a good understanding of the Belgian energy markets from recent cases. Taking the view that *GDF Suez* and *EdF* were indeed independent under the criteria set out in its jurisdictional notice, the Commission held that collusion between the two entities and a collective abuse of dominance was not likely to result from the transaction. The decision is currently under review by the General Court.[92]

H. Poland

In Poland the situation on energy markets still seems to reflect the problems the Commission had identified in its Sector Inquiry Report in 2007, with a highly concentrated market structure leading to low liquidity on the wholesale market. *UOKiK*, the Polish competition authority, has been actively striving to further competition, issuing 27 antitrust-decisions since 2003.[93] Nonetheless, regulatory intervention was deemed necessary; an amendment to the energy law brought an obligation for electricity generators to sell 15 per cent

84 *CNC*, 'The CNC opens formal proceedings against SEDIGAS', Press Release of 8 October 2010 <http://www.cncompetencia.es/Inicio/GestionDocumental/tabid/76/Default.aspx?EntryId=45623&Command=Core_Download&Method=attachment> accessed 20 October 2010.

85 *Bundeswettbewerbsbehörde*, 'Treibstoffpreise und deren spezifische Einflussfaktoren im Bundesland Voralberg', August 2009 <http://www.bwb.gv.at/NR/rdonlyres/6BB6DB74-62AD-4320-9999 256CC1C572C2/36804/EnderichtVorarlberg_August2009.pdf; accessed 8 November 2010; 'Treibstoffpreise in Salzburg: Entwicklungen und Einflussfaktoren', September 2009 <http://www.bwb.gv.at/NR/rdonlyres/B07A9310-272F-438F-BC82-1D2338E769E8/36820/EndberichtTreibstoffmarktSalzburg_20091.pdf> accessed 8 November 2010.

86 *Bundeswettbewerbsbehörde*, 'FCA's Report on Platts Price Assessments', July 2010 <http://www.bwb.gv.at/NR/rdonlyres/A485689F-5A02-4FD2-A9C3-BB29E9087310/38070/Platts_FinalReport.pdfaccessed 8 November 2010.

87 Available at <www.bwb.gv.at/BWB/treibstoffnews/default.htm> accessed 8 November 2010.

88 *L'Auditorat du Conseil de la concurrence*, Press Release of 22 September 2009 'Perquisitions au sein d'entreprises actives dans le secteur de la vente en gros d'électricité en Belgique', <http://economie.fgov.be/fr/binaries/Communiqu%C3%A9%20de%20presse%20Autorit%C3%A9%20belge%20de%20la%20concurrence%2022%2009%2009_tcm326-74612.pdf> accessed 8 November 2010.

89 *L'Auditorat du Conseil de la concurrence*, Press Release of 15 October 2009 'L'Auditorat auprès du Conseil de la concurrence a demandé à la Commission européenne de lui renvoyer le projet d'acquisition de SPE par EDF', <http://economie.fgov.be/fr/binaries/Communiqu%C3%A9%20de%20presse%20Autorit%C3%A9%20belge%20de%20la%20concurrence%2015%2010%2009%20EDF_tcm326-80071.pdf> accessed 8 November 2010.

90 Commission, Decision of 12 November 2009 rejecting the request of the competent authorities of Belgium asking for the partial referral of case No COMP/M.5549—*EDF/Segebel*.

91 Commission, Decision M.5549 *EDF/Segebel* of 12 November 2009 [2010] OJ C 57/9.

92 Case T224/10, [2010] OJ C209/41; appeal brought by the Belgian consumer protection organisation *Test-Achats*, cf. 'Test-Achats introduit un recours pour s'opposer à la concentration EDF—SPE' <http://www.test-achats.be/energie/test-achats-introduit-un-recours-pour-s-opposer-a-la-concentration-edf-spe-s653953.htm> accessed 8 November 2010.

93 *UOKiK*, 'UOKiK'S report on electric energy', Press Release of 15 March 2010 <http://www.uokik.gov.pl/news.php?news_id=2043&news_page=3#> accessed 8 November 2010.

of their production on the wholesale market to enhance liquidity.[94]

A further impetus for the development of competitive markets could be provided by the Polish government's privatisation efforts of state holdings in the energy sector.[95] In this respect, *UOKiK* has not shied away from contradicting the Polish government in its choice of purchasers, fearing consolidation of negative market structures.[96]

Regarding the gas market, the use of the Yamal Pipeline connecting Russia to the western European markets via Belarus and Poland led to intense discussions between the (state owned) undertakings[97] and governments involved as well as the Commission, which insisted on the applicability of European legislation. The Russian demands of long-term (until 2045) exclusive transportation rights on Yamal and the increase of long-term Russian gas deliveries to Poland by about 40 per cent—with the so-called 'Gazprom Clause' limiting the trade of such Gas within the EU—were contrary to the Commission's policies on diversification of supply sources and equal access to gas pipelines. Whilst the Commission addressed perceived regulatory shortcomings by sending Poland a reasoned opinion,[98] it also took an advising role in contract negotiations to ensure the application of European law.[99] A deal was signed at the end of October, with a shorter duration and—formally—the introduction of independent operatorship of and third party access to the Yamal Pipeline, albeit without the Commission's final approval.[100]

V. Long-term capacity reservation abusive irrespective of company needs?

In the commitment decisions against *GDF Suez*[101] and *E.ON*[102] the Commission held that the long-term booking of a large part of the entry capacities giving access to a certain market can constitute an abuse under Art. 102 TFEU irrespective of whether the undertaking concerned needs these bookings to fulfil (long-term) import or supply agreements with third parties. In the following, we will show that this view contravenes established case law, regulatory provisions and basic principles of competition law.

A. European courts on the concept of abuse

In light of the European courts' case law, need-orientated long-term capacity bookings are not abusive within the meaning of Art. 102 TFEU, even if they are made to an extent that results in transmission demands of third parties (partly) being rejected. The existence of the third party access rules in Directive 2003/55 has the effect of raising the bar for a behaviour to be abusive because the third party access rules do provide alternatives for competitors.

1. General application of Art. 102 TFEU

The Court of Justice has defined an abuse under Art. 102 TFEU as follows:

> *The concept of abuse is an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition.*[103]

It appears that the long-term booking of a large part of the entry capacities of a market cannot constitute an abuse under this definition without considering the transport needs of the dominant undertaking. While such bookings might have a foreclosing effect in spite of the regulatory 'use it or lose it' provisions due to their long duration and encompassing scope, they can be considered as 'normal' competitive behaviour taking into account the general market framework as defined in the regulatory provisions and general market practice. Long-term contracts are widely used within the gas sector. Long-term capacity contracts usually correspond with long-term import contracts which play an

94 In force since 11 March 2010.

95 *UOKiK* (n 93).

96 P Wasilewski; 'UPDATE 2-Polish utility PGE signs $2.5 bln Energa deal', *Reuters* (New York, 15 September 2010) <http://www.reuters.com/article/idUSLDE68E1GP20100915> accessed 8 November 2010;M Kruk, M Sobczyk 'UPDATE:Poland Amends Energy Policy To Allow PGE-Energa Tie-Up' *Wall Street Journal*, (New York, 29 September 2010), <http://online.wsj.com/article/BT-CO-20100929-705972.html> accessed 11 October 2010; P Wasilewski; 'Poland's PGE seeks clearance of Energa deal' *Reuters* (New York, 20 October 2010) <http://www.reuters.com/article/idUSLDE69J1XE20101020> accessed 8 November 2010.

97 *Polskie Gornictwo Naftowe i Gazownictwo SA* (*PGNiG*) and *Gazprom OAO*.

98 Commission Press Release IP/10/945 of 14 July 2010.

99 Ewa Krukowska 'EU says Poland, Russia "very close" to agreement in talks on gas supplies', *Bloomberg* (New York, 11 October 2011) <http://www.bloomberg.com/news/2010-10-11/russia-poland-very-close-to-gas-agreement-eu-says-update1-.html> accessed 8 November 2010.

100 M Sobczyk 'Update: Russia to boost natural gas supplies to Poland', *Global Finance* (New York, 29 October 2010) <http://www.gfmag.com/latestnews/latest-news-old.html?newsid=8557511.0> accessed 8 November 2010.

101 Note 20 above.

102 Note 21 above.

103 ECJ, Case 85/76 *Hoffmann-La Roche* [1979] ECR 461, [38–39].

important role in ensuring a secure energy supply for Europe. This general practice is used by undertakings irrespective of their position on the relevant markets. The availability of capacities is ensured by the non-discriminatory access and usage rules laid down in the relevant regulatory provisions.

The regulatory provisions do not expressly touch the topic of long-term bookings, their admissibility or scope. In various instances, however, long-term import contracts are recognised as positive and important for European gas supply.[104] Attempts by the Commission or the European Parliament to limit those contracts failed.[105] The choice of the legislator not to touch upon existing import contracts and capacity bookings would be contravened by competition law measures aimed at limiting or modifying such bookings. Directive 2009/73 does not provide for any other changes in the legal situation. It does suggest in Recital 33 that the national regulatory authorities now have the instrument of a gas release programme in order to promote competition. This means that it is still in the national legislators' discretion to adopt corresponding rules. Furthermore, where granting access jeopardises or prevents the due and proper fulfilment of take-or-pay contracts—which is usually the case in respect of import contracts—the gas directives authorise the Member States to repeal provisions regarding access to the system in their entirety if the interference with or jeopardy of the import take-or-pay contracts cannot be otherwise avoided.[106] Under the aspect of Community loyalty pursuant to Art. 4 (3) of the EU Treaty, however, measures that are within the national legislators' discretion on principle must not be circumvented by an excessive application of competition competences by the Commission.

2. Essential facilities doctrine

The booking of long-term capacities by the dominant incumbent cannot be qualified as an infringement of Art. 102 TFEU under the so called essential facilities doctrine either. Decisions by the European courts on the granting of licences regarding intangible property rights set up conditions which are not met. There is no decision by the European courts holding that the owner of a physical infrastructure can be forced under Art. 102 TFEU to grant access to a facility that it controls and that may be essential for competition in a downstream market.

a. Decisions on intangible property rights

In *Microsoft*, the General Court stated that the refusal of a dominant undertaking to grant third parties a licence for the use of a product protected by an intellectual property right is not abusive as such. Only in 'extraordinary circumstances' might this be the case, with the following circumstances—cumulatively—being necessary for establishing an abusive refusal of access:

- the refusal relates to a product or service indispensable to the exercise of a particular activity on a neighbouring market;
- the refusal is of such a kind as to exclude any effective competition on that neighbouring market;
- the refusal prevents the appearance of a new product for which there is potential consumer demand.[107]

The General Court's judgment is based on precedents set in *Magill*[108] and *IMS Health*,[109] where the Court of Justice also required extraordinary circumstances of the aforementioned nature to be necessary to hold a refusal to access abusive.

Access to import capacities does not appear indispensable for competing on the neighbouring gas supply markets in every case. Gas can be sourced from liquid hubs within a market, capacities can be booked on secondary markets or on an interruptible basis, distribution networks might be accessible via different transmission grids, within market area cooperations access might be bookable in other transmission networks and, finally, it might be viable to construct alternative pipelines to supply customers. Only when all these alternative means of supplying downstream customers are not available, can access to the transport capacity in question be deemed to be indispensable and the next criterion has to be considered.

It appears doubtful that the refusal of import capacity access in itself excludes any effective competition in the neighbouring gas supply markets, especially taking the existence of 'use it or lose it' provisions into account, which free up unused capacity for third parties. High market shares in the downstream markets might arise from better prices or service by the dominant undertaking rather than abusive behaviour. The quality and availability of the other market access options mentioned above also have to be taken into account when assessing the exclusion of any effective competition.

104 Eg Recitals 25, 31 Directive 2003/55/EC.
105 See COM (2001) 125 final, p. 34ff; European Parliament, Session document A5-0077/2002 final, part 1, p. 110 (Amendment 152).
106 Art. 27 Directive 2003/55/EC and Art. 48 Directive 2009/73/EC.
107 CFI, Case T-201/04 *Microsoft v Commission* [2007] ECR II-3601 [331ff].
108 ECJ, Cases C-241/91, C-242/91 *Magill* [1995] ECR I-743.
109 ECJ, Case C-418/01 *IMS Health* [2004] ECR I-5309.

Additionally, the purchase of gas from companies other than the incumbent can hardly constitute 'new goods or services not offered by the owner of the right and for which there is a potential consumer demand'[110] as demanded by the Court of Justice in *IMS Health* and *Magill* and reflected in the Commission's notice on the priorities in the application of Art. 82 EC (now 102 TFEU).[111] Rather, other competitors would only 'duplicate' the incumbent's product, which excludes an abuse under the ECJ's *Volvo*-Judgment.[112]

Finally, there is a substantial difference between the granting of 'access' (ie a licence) to an intangible property right and the granting of access to a physical infrastructure: granting a licence breaks the exclusivity of the intangible property right, but does not impair the rights owner in exercising its right in any other respect. The rights owner can continue working in the market just as before, using the business concept protected under the intangible property right. In the case of gas transmission grids, capacities are limited. Therefore, granting of access to a fully booked infrastructure necessarily leads to a re-distribution of the physically available capacities unfavourable to the owner of the facility, who cannot continue to use it to the extent necessary to allow the performance of the existing import contracts (as shown by the use before). Until now, it had been common ground that in the case of limited capacity, the owner of the infrastructure facility does not have to limit its own operations.[113]

b. Bronner

There is only one case in which the Court of Justice commented on access to physical infrastructures under Art. 102 TFEU: *Bronner.*[114] Here, the Court of Justice expressly left open whether its own case law in *Magill* could be applied to the issue of the access to physical infrastructures:

> *Therefore*, even if *that case-law on the exercise of an intellectual property right* were applicable *to the exercise of any property right whatever, . . .*[115]

The Court of Justice did not have to decide that question as it held that the refusal of access was not abusive, setting narrow limits for the concept of abuse.[116] When assessing whether access to the infrastructure in question was indispensable, the Court of Justice—drawing on Advocate General Jacob's Opinion[117]—held that this is the case only when an undertaking with the size and output of the dominant incumbent could not construct an alternative infrastructure on economically viable terms.[118]

B. Commission decisions

While the Courts' case law is not clear on the issue, even the Commission's own decisions do not provide an appropriate authority for the decisions against *E.ON* and *GDF Suez*. The existence of sector specific regulation provides a decisive difference between the decisions on long-term supply contracts and network access cases. Moreover, the decisions on access to physical infrastructures differ in one important factual aspect from the *E.ON Gas* and *GDF Suez* cases. In the precedents cited by the Commission, the infrastructure in question was not fully used, so free capacity would have been available for competitors without the abusive behaviour.

1. Applicability of decisions on long-term supply contracts to long-term transport capacity contracts

The Commission has held that long-term supply contracts encompassing a large part of the market can be abusive, as they bind customer demand in a way that does not allow competitors to compete for the bound demand.[119] This reasoning cannot be transposed to cases concerning long-term transport capacity contracts. Long-term transport capacity bookings do not hinder competitors to conclude supply contracts downstream. The transport capacity market is densely regulated, with 'use it or lose it' provisions ensuring that unused capacity is withdrawn. If an undertaking loses customers, it will not be able to use its transport capacity bookings, which then will be marketed to third parties either on the secondary market or by the

110 *IMS Health* (n 109) [49]; ECJ, *Magill* (*supra* 109) [54].

111 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 C45/7 [86ff].

112 ECJ, Case 238/87 *Volvo v Veng* [1988] ECR 6211; in his Opinion in *IMS Health*, AG Tizzano expressly refers to this judgment, Opinion of AG Tizzano, Case C-418/01 *IMS Health* [2004] ECR I-5042 [61ff], [65].

113 Cf. European Commission: 'DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses', December 2005 [234]; R O'Donoghue and AJ Padilla, *The Law and Economics of Article 82 EC* (Hart Publishing, Oxford 2006) 250ff; R Whish, *Competition Law* (6th edn OUP, Oxford 2008) 697.

114 ECJ, Case C-7/97 *Bronner* [1998] ECR I-7791.

115 Ibid [41] (emphasis added).

116 Capobianco, 'The essential facility doctrine: similarities and differences between the American and the European approach' [2001] 26 ELR 548; Doherty, 'Just What Are Essential Facilities?' [2001] CMLR 397, 422ff; Hancher, 'Case Note on Oscar Bronner' [1999] CMLR 1289, 1307; Kotlowski, 'Third-Party Access Rights in the Energy Sector: A Competition Law Perspective' [2007] 16 Utilities Law Review 3, 101, 105.

117 *Bronner* (n 114), Opinion of AG Jacobs of 28 May 1998, [68ff].

118 *Bronner* (n 114), [45ff].

119 *Distrigaz* (n 18), *Long-term electricity contracts France (EdF)* (n 24).

network operator who has the right and obligation to withdraw unused capacity. Regulation thus guarantees that success on the supply market is not hindered by the lack of transport capacities. Rather, transport capacities are complementary to the upstream and downstream supply contracts. Furthermore, even under the '*Distrigaz*-Test' regulatory decisions have to be taken into account. Long-term import contracts are protected by European regulation; they have to be considered as efficiency gains when judging corresponding capacity bookings.

2. Commission decisions on access to physical infrastructures

(a) In the case *B&I Line v. Sealink Harbours and Stena Sealink*,[120] the Commission took the view that a company which not only owns but also uses its infrastructure must grant its competitors access to said infrastructure on terms and conditions not less favourable than those applicable to itself. The decision was criticised because the Commission assumed that even measures to increase the efficiency of the market-dominating company should be ruled out if these negatively affected other users of the facility.[121] In light of *Bronner* it cannot be assumed that such a broad interpretation of Art. 102 TFEU could have been maintained before the Court of Justice if the decision had been challenged. A basic consideration of competition policy is that an undertaking should be allowed to address its own inefficiencies which constitutes competition on the merits and is desirable for improving market results and consumer welfare.

(b) *In Sea Containers v Stena Sealink* the Commission based its decision on a number of Court of Justice decisions that have no relation to the issue of access to essential facilities,[122] for example the *Télémarketing* case. In that judgment, the Court of Justice had considered the unjustified elimination of competition in a secondary market for 'ancillary activities' to constitute an abuse.[123] However, neither the operation of a ferry line nor the supply of gas can be seen as 'ancillary activities'—as in *Télémarketing*—in relation to the respective upstream physical facilities.[124] Neither does *Commercial Solvents*[125] support the Commission's position, as it dealt only with the termination of an existing business relationship detrimental to the customer and not with access to an essential facility.[126]

(c) In the third 'harbour case', *Port of Rødby*,[127] the Commission again based its decision on the *Télémarketing* case law, which does not provide a sound legal basis for the application of the essential facilities doctrine. Furthermore, the Commission's decision did not oblige Denmark as operator of the harbour to grant access to the port but gave it the option of allowing the new entrant to construct new harbour facilities. Furthermore, the Commission accepted the notion that capacity which is fully used does not have to be made available to third parties.[128]

(d) In the case *Frankfurter Flughafen*,[129] the Commission's legal assessment is based upon the *Télémarketing* case law once more, which again is questionable. The Commission states that even if there is an obligation to grant third parties access, the congestion of the infrastructure will in principle be recognised as a justification for denying access. Then, the Commission opines that the owner of the infrastructure might even be obliged to take necessary measures to enhance capacity.[130] The Commission does not refer to any precedent in this part of the decision and leaves unclear how far such an obligation might reach. Its view not only restricts the owner's property right but also forces him to raise and invest additional capital—giving the third party access to a facility that does not even exist. This goes beyond the *Télémarketing* case law, the Commission has taken this issue up again in the decisions against *GDF Suez*[131] and *ENI*.[132]

(e) *British Midland v Aer Lingus* cannot be drawn upon either to support an assumption that there is established case law regarding access to essential facilities. In this case, the Commission held that the unilateral refusal to interline—by inconsistently maintaining or aborting agreements with competitors in such a way that certain competitors were placed at a competitive disadvantage—was 'not normal competition on the merits'.[133] It concluded that the refusal to interline led to 'the imposition, contrary to normal industry practice, of a significant handicap on a competitor by

120 Commission, Case IV 34.174 *B&I Line v Sealink Harbours and Sealink Stena* [1992] CMLR 5/255.
121 Maltby, 'Restrictions on Port Operators: Sealink/B&I Holyhead' ECLR 1993, 223, 224ff.
122 Commission, Case IV/34.689 *Sea Containers v Stena Sealink* [1994] OJ L 15/8 [66] with fn. 6.
123 ECJ, Case 311–84 *CBEM (Télémarketing)* [1985] ECR 3621 [27].
124 Doherty, 'Just what are essential facilities?' CMLR 2001, 397, 414; Martenczuk, 'Anmerkung zu Bronner' Europarecht 1999, 565, 567.
125 ECJ, Cases 6/73, 7/73 *Commercial Solvents* [1974] ECR 223.
126 Martenczuk (n 124).
127 Commission, *Port of Rødby* [1994] OJ L 55/52.
128 Ibid [15].
129 Commission, Case IV/34.801 *Flughafen Frankfurt/Main AG* [1998] OJ L 72/30.
130 Ibid [86].
131 Note 20 above.
132 Note 22 above.
133 Commission, Case IV/33.344 *British Midland v Aer Lingus* [1992] OJ L 96/34 [25].

raising its costs and depriving it of revenue',[134] especially as interlining had 'for many years been accepted industry practice, with widely acknowledged benefits' for both competitors and customers.[135] Capacity bookings on a gas transmission network which are required for complying with long-term import contracts, can hardly be qualified as contrary to industry practice as the congruence of capacity bookings and import contracts has been a basic principle in the gas sector for many years.

VI. Conclusion

As in the years before, the energy sector has been a focus of the Commission's enforcement practice in 2010. At the same time, national competition authorities are stepping up and taking a more and more active role in ensuring the application of competition rules to the energy sector. It remains to be seen whether the Commission's enforcement focus will shift away from the energy sector, as a further strengthening of competition can be observed already as a result of the full implementation of the second energy package in several traditionally less competitive energy markets across Member States. This trend should be reinforced in the coming years with the implementation of the third legislative package by Member States upcoming in 2011.

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134 Ibid [30].

135 Ibid [25].