Workshop on European Energy Law

Avoiding market distortions by the incumbents

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Agenda

A. Tools to Avoid Market Distortions

B. Sector-Specific Regulation

C. Competition Law Enforcement

D. Conclusions
A. Tools to Avoid Market Distortions

- Sector-specific regulation
- Competitive energy markets
- Competition law (Art. 101/102 TFEU)
B. Sector-Specific Regulation

- **Third Energy Package: Key features**
  - Effective unbundling: separation of energy supply and generation or production activities from network operations
  - Regulatory oversight: stronger independence of national regulatory authorities (NRA); greater regulatory powers to monitor compliance with third-party access rules, unbundling obligations, congestion and interconnection management

- Sector-specific regulation is in principle well suited to avoid distortions in transmission/distribution networks (natural monopolies); under permanent supervision by NRA
Loopholes of Sector-Specific Regulation

- **Incorrect implementation** of Third Package in several Member States. In 2016, Commission sent reasoned opinions to
  - Germany: incorrect transposition of requirements concerning independent transmission operator and powers of NRA
  - Spain: legislation prevents incumbents from building and operating interconnectors to other Member States
  - Hungary: Government sets terms and conditions for connection and access to national networks and cross-border infrastructure

- Sector-specific regulation addresses networks but not **generation, trade, and supply** so that market distortions are not avoided ex ante

C. Competition Law Enforcement

- Competition law tackles market distortions at **all levels of supply chain** if and when regulation is not applicable/effective.

- Competition law is **complementary** to sector-specific regulation: DG COMP can **intervene in regulated sectors** even if NRA already regulated conduct of incumbent.

- Competition law does not avoid (except for deterrence) but **terminates and sanctions existing market distortions** (ex post application).

- Commission **increased antitrust enforcement** in energy sector after sector inquiry.
## Antitrust Energy Cases

### Exclusionary conduct (Art. 102)

<table>
<thead>
<tr>
<th>Company</th>
<th>Description</th>
<th>Decision Year</th>
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<tbody>
<tr>
<td>DistriGaz</td>
<td>long-term supply contracts</td>
<td>Commitment decision – 2007</td>
</tr>
<tr>
<td>RWE Gas</td>
<td>capacity hoarding/margin squeeze</td>
<td>Commitment decision – 2009</td>
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<tr>
<td>GdF</td>
<td>long-term capacity bookings/underinvestment</td>
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<td>EDF</td>
<td>long-term supply contracts</td>
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<tr>
<td>ENI</td>
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<td>E.ON Gas</td>
<td>long-term capacity bookings</td>
<td>Commitment decision – 2010</td>
</tr>
<tr>
<td>CEZ</td>
<td>capacity hoarding</td>
<td>Commitment decision – 2013</td>
</tr>
<tr>
<td>OPCOM</td>
<td>discrimination</td>
<td>Infringement decision – 2014</td>
</tr>
<tr>
<td>BEH Electricity</td>
<td>territorial restrictions</td>
<td>Commitment decision – 2015</td>
</tr>
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<tr>
<td>Greek Lignite</td>
<td>insufficient access to lignite</td>
<td>Commitment decision – 2008/2009</td>
</tr>
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Antitrust Energy Cases

**Exploitative conduct (Art. 102)**

- E.ON Electricity (capacity withholding/balancing costs)  Commitment decision – 2008
- Swedish Interconnectors (discrimination)  Commitment decision – 2010

**Collusive conduct (Art. 101)**

- E.ON/GdF (market sharing)  Infringement decision – 2009
- Power Exchanges (market sharing)  Infringement decision – 2014

**Pending**

- Oil and biofuels case (manipulation of benchmarks) (opening of proceedings in 2015)
- BEH Gas (access to gas infrastructure) (Statement of Objections in 2015)
- Gazprom (upstream gas market) (Commitment decision – 2017?)
BEH Gas Case

- Opening of proceedings in July 2013 and SO in March 2015

- Commission’s concerns
  - BEH allegedly restricting access to gas transmission network and gas storage facility as well as reserved capacity in Bulgaria

- Potential abuse of dominance – Art. 102 TFEU
Gazprom Case

- September 2011: Commission initiated competition inquiry in the energy markets of the Central and Eastern EU Member States
- Opening of proceedings in September 2012 and SO in April 2015
- Commission’s concerns
  - Hindering competition in the gas supply markets in Bulgaria, Hungary, Latvia, Lithuania, Poland, and Slovakia by imposing territorial restrictions (including export bans, destination clauses etc.)
  - Pursuing an unfair pricing policy in Bulgaria, Estonia, Latvia, Lithuania, and Poland and
  - Making gas supplies to Bulgaria and Poland conditional on obtaining unrelated commitments concerning gas transport infrastructure
Gazprom’s Commitments

- Gazprom submitted proposal for commitments in December 2016 and DG COMP published market test in March 2017
  - **Territorial restrictions**: not to apply any clause restricting resale; right to request a change from their original delivery points to new delivery points
  - **Pricing issues**: introduce competitive benchmarks into its price review clauses in contracts with customers; increase the frequency and speed of price revisions
  - **Infrastructure issues**: Gazprom confirmed that South Stream Project is terminated and not to claim damages for its cancellation; no commitments regarding Yamal-Europe pipeline

- Market test ends on 4 May 2017: Commitment decision this year?
Main Characteristics of Enforcement Practice

- Most antitrust cases based on **Art. 102 TFEU** (not Art. 101)

- Extensive use of Art. 9 Reg. 1/2003 commitment decisions (likely also in BEH Gas and Gazprom)

- Since 2013: Commission moves towards **Eastern Europe** – CEZ, OPCOM, BEH Electricity, BEH Gas, Gazprom
D. Conclusions

- Sector-specific regulation is not enough to avoid all market distortions
- Competition law enforcement is necessary also in regulated areas
- Art. 102 effective tool: Commission has power to implement structural commitments via Article 9 Reg. 1/2003 decisions
- Competition law is independent from legislative process (winter package)
- Cooperation between NRAs and competition authorities necessary in order to avoid divergent decisions