

Workshop on European Energy Law

Avoiding market distortions by the incumbents

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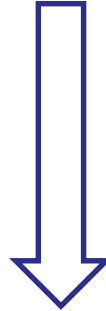
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Agenda

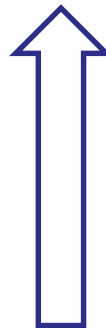
- A. Tools to Avoid Market Distortions
- B. Sector-Specific Regulation
- C. Competition Law Enforcement
- D. Conclusions

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
- Since Commission sector inquiry (2005-2007): **combined strategy** – strict sector-specific regulation and proactive enforcement of competition law

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)

Distrigaz (long-term supply contracts)	Commitment decision – 2007
RWE Gas (capacity hoarding/margin squeeze)	Commitment decision – 2009
GdF (long-term capacity bookings/ underinvestment)	Commitment decision – 2009
EDF (long-term supply contracts)	Commitment decision – 2010
ENI (capacity hoarding/underinvestment)	Commitment decision – 2010
E.ON Gas (long-term capacity bookings)	Commitment decision – 2010
CEZ (capacity hoarding)	Commitment decision – 2013
OPCOM (discrimination)	Infringement decision – 2014
BEH Electricity (territorial restrictions)	Commitment decision – 2015

Art. 102/Art. 106

Greek Lignite (insufficient access to lignite)	Commitment decision – 2008/2009
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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