

# *Competition and State aid in the Energy Sectors*

**Nevin Alija**

**PhD Researcher**

**Catholic University of Portugal**

# STRUCTURE

- Introduction
- Article 101 TFEU
- Article 102 TFEU
- Merger control
- State Aid
- Need for Competition and State aid law?

## Introduction

- EU Competition Law?
- Set of rules of the Treaty on the Functioning of the European Union
  - Antitrust (Article 101 + 102 TFEU)
  - Mergers
  - State aid (Article 107 TFEU)
- Many other instruments:
  - Regulations (1/2003), soft law (Communications, Notices, etc.)
- Treaty establishing Energy Community (Article 18)

# ENFORCEMENT

- EU competition law primarily enforced by specialized administrative agencies
  - European Level – the Commission
    - Powers defined in Regulation 1/2003
    - Investigations (dawn raids, etc.), Infringement decisions, Fine Settlements, Remedies, Interim measures, Powers on NCAs
  - National level – NCAs
- EU competition law enforced in the context of ordinary litigation before courts
- Annulment proceedings (Article 263, 261 and 256 TFEU)



## Article 101 TFEU

1. Prohibited as incompatible with the internal market:

“all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market (...)”

2. Any agreements or decisions prohibited shall be automatically null and void.

### 3. **EXCEPTION**

may be declared inapplicable to agreements which :

- a) “contribute to improving the production or distribution of goods or to promoting technical or economic progress,
- b) allow consumers a fair share of the resulting benefit, and which do not:
- c) impose on the undertakings concerned restrictions which are not indispensable;
- d) afford such undertakings the possibility of eliminating competition”

# Cartels

## Agreements amongst rivals to

- Fix prices
- Limit output
- Share markets
- Limit investments
  
- **Policy priority for Commission** (wide investigation powers, incentives devices (leniency etc.)
  
- **Sanctions => Heavy fines**





## **CASE COMP/39.401 – E.ON and GDF**

- Companies jointly constructed the Megal pipeline in 1975
- Market sharing agreement 1975 – 2005
- Agreed not to enter each other's markets.
- Declared “null and void”, but...
- **Case T-360/09, E.ON Ruhrgas v Commission**
- **FINE 320 million Euro each!**

Anti-competitive agreements  
in the Energy Sectors

## Article 102 TFEU

Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States.

Such abuse may, in particular, consist in:

- a) Imposing unfair trading conditions;
- b) limiting production, markets or technical development to the prejudice of consumers;
- c) applying dissimilar conditions to equivalent transactions;
- d) making the conclusion of contracts subject to acceptance of supplementary obligations



# ABUSE OF DOMINANCE

## Dominance

*“a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers” (United Brands)*

Art 102 prohibits not dominance, but its abuse

## Indicators for dominance:

- High market shares (>40% = presumption of dominance)
- Low market shares of competitors
- Financial capacities
- Vertical integration
- Barriers for market entry



## ABUSE OF DOMINANCE IN THE ENERGY SECTORS

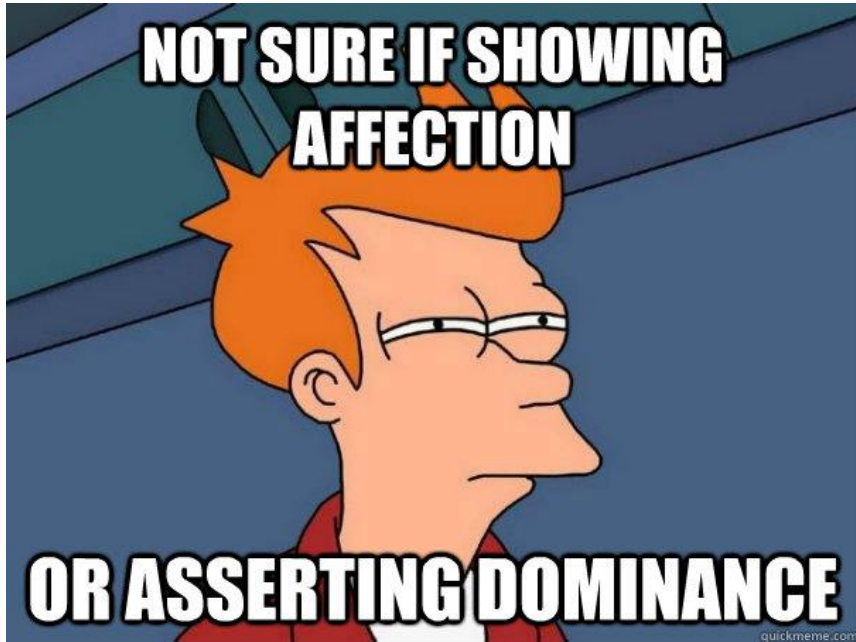
### ESSENTIAL FACILITY

*“the expression essential facility is used to describe a facility or infrastructure which is essential for reaching customers and/or enabling competitors to carry on their business and which cannot be replicated by any reasonable means”*

*(Telecom Access Notice)*

### ABUSE :

- A refusal to deal
- Two distinct markets and the requested company has a dominant position in the upstream market
- Input is essential for competition in the downstream market
- Refusal leads to total elimination of competition
- No objective justification for the refusal



## **CASE COMP/B-1/39.316 Gaz de France**

Foreclosure of GDF's competitors from access to its gas network

- long-term capacity reservation
- strategic underinvestment

### **Commitments**

- Release approximately 10% of its long-term reservations of gas import capacity into France, in favor of third parties
- reduce its share of these reservations to below 50% in 2014, calculated from the total long-term capacity reservations for each year
- GDF Suez would not be restricted to book interruptible or short-term capacity

ABUSE OF DOMINANCE  
IN THE ENERGY SECTOR



# MERGER CONTROL

- **Mergers**, proposed mergers, acquisitions and joint ventures involving companies -> subject to **Regulation 139/2004 EC (ECMR)**
- **Duty to notify and Mandatory Suspension**
  - Concentration
  - EU dimension
  - Impediment of effective competition
- **Result of Assessment**
  - Clearance
  - Prohibition
  - Conditional Clearance
- They often bring efficiencies, and only generate problems in exceptional circumstances

# Merger Control in the Energy Sectors

## M.3440 - ENI / EDP / GDP

- Proposed acquisition of GDP by EDP and ENI
- Commission Investigation found GDP and EDP held dominant positions on the wholesale and retail markets for electricity and gas in Portugal
- Merger could result in loss of potential competition and strengthen dominant position

## Case T-87/05 EDP v Commission

The General Court dismissed the appeal but took the view that the concentration would impact only the electricity market as Portugal was enjoying the derogation under the Second Gas Directive.



STATE AID

## ARTICLE 107(1) TFEU

*Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.*



## EXISTENCE OF STATE AID

- Is there an intervention by the State or through State resources?
- Does the intervention give the recipient an advantage on a selective basis?
- Is competition distorted or potentially distorted?
- Is there any potential to affect trade between Member States?



- **COMPATIBLE AID ACCORDING TO ARTICLE 107(2)**
  - (a) aid having a social character, granted to individual consumers, provided that such aid is granted without discrimination related to the origin of the products concerned;
  - (b) aid to make good the damage caused by natural disasters or exceptional occurrences;
- **MAY BE CONSIDERED TO BE COMPATIBLE ACCORDING TO ARTICLE 107 (3)**
  - (a) aid to promote the economic development of underdeveloped areas where the standard of living is abnormally low
  - (b) aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State;
  - (c) aid to facilitate the development of certain economic activities or of certain economic areas
  - (d) aid to promote culture and heritage conservation
- **DE MINIMIS REGULATION**
- **GENERAL BLOCK EXEMPTION REGULATION**



# STATE AID IN THE ENERGY SECTORS

**Case C-379/98 PreussenElektra v Schleswig AG**

**Feed-in-scheme of renewable electricity at fixed (higher than market) prices, prescribed by generally binding law and implemented by virtue of private law contracts without a transposing decision of any public authority**

**The Court decided that there is no “aid granted by a Member State or through State resources” in place if a private electricity supplier is obliged by binding and immediately applicable law to take delivery of electricity generated from renewable sources at regulated minimum prices.**

**The resulting economic advantages in PreussenElektra do neither rely on a direct nor indirect transfer of public money.**

**On the contrary: If prices are invoiced and paid out by a governmentally dominated clearing agency aid is granted “through State resources”.**





Competition is deemed to increase economic welfare

- Allocative efficiency (prices, costs)
- Productive efficiency (costs)
- Dynamic efficiency (investments)

Level playing field for all competitors

Competition rules are needed to help achieve market integration

NEED FOR COMPETITION  
AND STATE AID LAW?



Thank you for  
your attention!