

e-Concurrence / e-Competitions**Energy Special Issue****“Unilateral Conduct in the Energy Sector”****John Ratliff and Roberto Grasso****WilmerHale, Brussels¹****22 December 2011**

[1] The object of this foreword to the Special issue of e-Concurrence / e-Competitions is to provide an overview of the most recent developments in the EU Competition authorities’ practice regarding unilateral conduct in the energy sector, as reported in e-Competitions (abbreviated here to “e-C”)². There are more than 90 cases reported (including national court judgments and investigations, which were settled or did not result in a decision).

[2] The approach taken here is to look at the way that the national competition authorities (“NCAs”) and national courts have been applying what is now Art. 102 of the Treaty on the Functioning of the European Union (“TFEU”)³, or its national equivalents, since Regulation 1/2003⁴, alongside the European Commission’s (“EC”) recent enforcement. To that end, we have broken out the material into what we hope are useful topics, as explained below.

[3] The EC’s activity in the energy sector has been important and extensive in the last few years. Notably, the EC has adopted nine decisions since the EU Energy Sector Inquiry⁵ (“the EU SI”), including some significant settlements pursuant to Art. 9 of Regulation 1/2003.

¹ With thanks to Cormac O’Daly, Oliver Fleischmann, Natalie Achenbach and Lisa Arsenidou for their contributions.

² The views expressed in this paper are personal and do not necessarily reflect those of Wilmer Cutler Pickering Hale and Dorr LLP. References to the European Commission’s website are to DG Competition’s specific competition “page”: http://ec.europa.eu/comm/competition/index_en.html.

³ Previously Article 82 of the EC Treaty.

⁴ OJ EU L1/1, 4 January 2003.

⁵ Distrigas, Case 37966, EC Press Release (“IP”) IP/07/1487 and MEMO/07/407, 11 October 2007; OJ EU C9/8, 15 January 2008; EdE, Case 39386, IP/10/290, 17 March 2010; OJ EU C 133/5, 22 May 2010; ENI, Case 39315, IP/10/1197, 29 September 2010; OJ EU C352/8, 23 December 2010; E.on, Cases 39388 and 39389, IP/08/1774, 26 November 2008; OJ EU C36/8, 13 February 2009; E.on, Case 39317, IP/10/494, 4 May 2010; OJ EU C278/9, 15 October 2010; E.on/GdF, Case 39401, IP/09/1099, 8 July 2009; OJ EU C248/5, 16 October 2009; GdF Suez, Case 39316, IP/09/1872 and MEMO/09/536, 3 December 2009; OJ EU C57/13, 9 March 2010; RWE, Case 39402, IP/09/410, 18 March 2009; OJ EU C133/10, 12 June 2009; and Svenska Kraftnät, IP/10/425, 14 April 2010; OJ EU C142/28, 1 June 2010. The EC’s decisions are all available on its website.

[4] In its Final Report on that inquiry the EU had identified several shortcomings in the electricity and gas markets: Mainly too high a market concentration in most national markets; a lack of liquidity, preventing successful new entry; too little integration between EU Member State markets; and the absence of transparently available market information, leading to distrust in the pricing mechanism⁶.

[5] Most of the EC investigations since appear to have been prompted by the EU SI. Notably, the EC has taken on cases related to: Vertical integration conflicts; foreclosure issues in relation to infrastructure capacity; foreclosure issues in relation to long-term contracts; cross-border issues; and alleged market manipulation. As we will see, new abuses such as “strategic underinvestment”, “capacity hoarding” and “withholding of generation capacity” have been raised.

[6] National decisions have sometimes addressed similar issues, with some cases of considerable importance. For example, the Italian Competition Authority’s (“ICA”) cases on strategic underinvestment in 2006 and on alleged market manipulation in 2011. Other national decisions address different concerns. For example, there are many cases on exploitative abuses, such as excessive pricing; or tying obligations related to supply or payment; and many cases focussing on practical issues of interconnection (such as access to technical information); and access to infrastructure (such as a voltage grid for onward local supply). It is also interesting to see that some national cases started with national energy regulator (“NER”) complaints to the NCA; and that, often a NCA may also “reciprocate” in the sense of consulting a NER on the appropriateness of a proposed commitment.

[7] Taken as a whole, it will be seen that there are a lot of decisions, generally showing a developing pattern. There are many fines and many cases settled with commitments. It should also be noted that there is an Energy Working Group in the European Competition Network of EU NCAs, likely fostering a coordination of EU and EU NCA practice.

[8] We now plan to review the recent cases reported based on the following topics (although it may be appreciated that some issues will come up under more than one topic heading, as cases are described):

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⁶ EU Energy Sector Competition Inquiry, Final Report, Frequently Asked Questions, MEMO/07/15, 10 January 2007, available on the EC’s website.

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1. Abuse of strategic underinvestment

[9] The EC has recently closed two investigations related, amongst other things, to alleged strategic underinvestment, with commitments: One case concerned GdF Suez's alleged foreclosure of access to gas import capacities in certain balancing zones in France; the other concerned ENI's alleged abuses on the market for the transport of natural gas to Italy and on the downstream markets for the supply of gas.

[10] In these cases the EC's references to "strategic underinvestment" were new. In its ENI decision, the EC stated that a dominant essential facility holder is under an obligation to take "all possible measures to remove the constraints imposed by the lack of capacity and to organise its business in a manner that makes a maximum amount of capacity of the essential facility available".

[11] It could be argued that this just followed from earlier essential facility cases, such as that involving access to the ramp at Frankfurt Airport⁷. However, the EC's position was controversial, especially if it was meant to infer a wide duty.

[12] It appears that, in the EC's view, a company in such a position may be obliged to share the existing capacity, or even to make specific investments to expand the capacity of its facility, if there is appropriate demand and it makes economic sense to do so, looking at the facility concerned on a standalone basis.

[13] However, it will be seen that these cases involve specific circumstances, where it appears that a specific demand is identified and not met, not some broad doctrine that any dominant company which controls an essential facility, always has to invest to meet any demand. In other words, there still may be reasonable justifications for not investing, depending on the facts.

⁷ Case 34801, FAG Flughafen Frankfurt, OJ EU L72/30, 11 March 1998.

(a) GdF Suez (2009) (EC)

[14] In 2009, GdF Suez faced claims that it had foreclosed access to gas import capacities in certain balancing zones in France, thereby restricting competition on the downstream gas supply markets through, amongst other things, the strategic limitation of investment in additional import capacity at two LNG terminals. (12/2009, e-C 34851) In one case, this was despite the existence of a firm capacity request from a competitor following an open season procedure. The EC stated: “The preliminary assessment also pointed to financial analyses, which apparently concluded that, given the firm capacity requests received in the open season procedure, extension of the capacity at the Montoir de Bretagne terminal would have been sufficiently profitable.....”. In the case of another terminal at Fos Cavaou, the EC criticised that GdF had not conducted an open season procedure to assess third-party demand. As part of its commitments GdF offered to release capacity at the two LNG terminals.

(b) ENI (2010) (EC)

[15] In 2010, ENI was faced with claims that it had abused its dominant position on the market for the transport of natural gas to and into Italy, as well as on the downstream gas markets for the supply of gas by, amongst other things, strategically limiting investments in its international transmission pipeline system, despite short and long-term demand from third-party shippers.

[16] While denying any infringement, ENI offered a structural remedy, namely to divest its current shareholdings in companies related to international gas transmission pipelines to a suitable purchaser independent from ENI, who would not raise prima facie competition concerns.

[17] The EC accepted commitments from ENI to divest its shares in the companies which own, operate and manage the transport capacity on the international pipelines TAG, TENP and Transitgas, bringing gas into Northern Italy respectively from Russia (TAG) and the North of Europe (the TENP/Transitgas system).⁸

(c) ENI (2006) (Italy)

[18] Interestingly, the strategic underinvestment abuse appears to be one of the few instances where it is the EC that followed developing NCA practice, rather than the other way round. Notably in 2006, in another case, the ICA investigated ENI's decision not to pursue its planned investment in pipeline capacity. (2/2006, e-C 501)

⁸ TAG was sold to Cassa Depositi e Prestiti, an Italian company; TENP/Transitgas to Fluxys, a Belgian company.

[19] It appears that ENI planned an expansion of capacity through greater compression capacity on the pipeline for gas from Algeria via Tunisia to Sicily (the TMPC pipeline), operated by its subsidiary. Afterwards, having allocated capacity, it was alleged that ENI delayed that expansion because of an expected oversupply of gas to Italy. The ICA found this abusive, fined ENI €290 million and ordered ENI to allocate capacity to third parties.

[20] On appeal the fine was overturned on the basis that the issues were novel. In December 2010 the Italian Supreme Administrative Court ordered the fine to be set at €20 million⁹.

2. Commitment to invest in new infrastructure

[21] A related idea is the remedy, whereby a company may choose to offer to build more infrastructure to meet a competition concern. This occurred in 2010 in the EC Svenska Kraftnät case. (4/2010, e-C 34860)

[22] There, the EC closed its investigation alleging that this entity (in fact a government controlled department), which controlled transmission and balancing in Sweden, had abused its dominant position by reducing export interconnection capacity between Sweden and its neighbours at times of anticipated internal congestion in the Swedish transmission network.

[23] The EC considered that this reduction of export capacity discriminated on the basis of residence between Swedish electricity customers and customers in other EU Member States, without any objective justification. The possible abuse was on the Swedish electricity transmission market, but had effects on the wholesale and retail electricity markets in neighbouring countries.

[24] Interestingly, amongst other things, Svenska Kraftnät (“SVK”) committed to build and operate a new 400 kV transmission line by the end of November 2011. This commitment was considered necessary, because the system of bidding zones agreed in the other commitments which were offered was considered not sufficient to manage congestion in the Swedish West-Coast-Corridor. SVK also committed to divide the Swedish transmission system into two or more bidding zones and manage congestion without limiting trading capacity on the interconnectors.

[25] It appears that SVK wanted to keep a unitary pricing zone in Sweden, whereas the grid structure and pattern of supply and demand meant that variations in prices, with related pricing zones, were required. In particular, without structural market changes, prices in Southern Sweden could be higher than in the North.

⁹ ENI/Trans-Tunisian Pipeline, Judgment No 9306 of 20 December 2010.

[26] Interestingly, it appears that, as a result of the changes concerned, some regions might have higher prices (at least until the relevant grid bottlenecks were removed), while others may have lower prices (e.g. the regions in neighbouring countries which had entered into supply contracts relying on the interconnector supply, which SVK had blocked previously to keep Swedish prices as a whole lower and unitary). Overall that appears to have been considered an improvement in EU consumer welfare.

3. Access to infrastructure

[27] There are two main NCA decisions we would like to mention here. (Other cases come under other headings below.)

(a) Demasz/DHE (2008) (Hungary)

[28] In February 2008, the Hungarian Competition Authority (“HCA”) held that the practice by Demasz and DHE (respectively the owner and operator of the only electricity distribution network in the Demasz service areas) of refusing requests from wind farms to transform certain sections of their network into dual-system networks was objectively justified and did not affect competition between wind farms. (2/2008, e-C 27240)

[29] The decision was influenced by the fact that the transformation of the network into a dual-system is only one way of connecting wind farms to a dedicated connection point. The second possibility is through an overhead or underground cable network built by the operator of the wind farm itself. Demasz and DHE required all wind farms to build their own infrastructure between their power generation sites and the dedicated connection points.

[30] The HCA held that this practice was objectively justified. In particular, the HCA accepted that the construction, operation and maintenance, as well as the development of a dual-system network would require Demasz and DHE to incur costs that it would not incur if they did not convert certain parts of their network into dual-system networks. Also the HCA accepted that such an obligation would adversely affect their ability to develop their network independently.

[31] For another case on wind farm access see the note on the ENEA Operator case (2008) (Poland). (9/2008, e-C 26197)

(b) Mainova (2005) (Germany)

[32] In June 2005, the German Federal Court of Justice upheld a decision of the German Competition Authority ordering Mainova, which is the incumbent regional electricity utility in

Frankfurt, to provide requesting operators with access to its medium-voltage power grids, which they needed to supply their customers with electricity in their low-voltage area grids. (6/2005, e-C 488)

[33] Mainova alleged, amongst other things, that the operation of the network as a whole would become more expensive, if it had to allow others in, as operating a network with “insular exclaves” is inefficient. Interestingly, the Court rejected this ground of appeal, noting that rising costs were part of the liberalisation process and could be dealt with by delegated legislation if the inefficiencies of a fragmented distribution should become excessive. Some cherry-picking of the most lucrative areas was also to be expected, but such competition was part of the liberalisation process.

[34] Mainova also argued that for an “essential facility” abuse in German Competition law, a company had to be dominant on the infrastructure market, here the medium-voltage power grid, and the downstream market for area networks. The Court rejected this, considering that dominance on the network/infrastructure was enough.¹⁰

4. Long-term capacity booking as a refusal to supply

[35] In two interesting cases the EC has focussed on the issue of long-term capacity bookings, which were treated as a form of refusal to supply.

(a) GdF Suez (2009) (EC)

[36] Here the EC found that GdF Suez (“GdF”), the leading gas supplier in France and owner of the largest gas transmission network in France via its subsidiary GRTgaz, had booked on a long-term basis (until 2019) the vast majority of available capacities at the main entry points into the French gas transmission network. (12/2009, e-C 34851) This meant that competitors could not acquire transport capacities to enter the market.

[37] The EC considered GdF’s gas network to be an essential facility, since access was necessary to carry on business in the gas supply markets of GdF’s grid area. Further, GdF was found dominant on several related import and supply markets. The long-term capacity bookings were therefore treated as refusals to supply which could maintain or reinforce such positions.

¹⁰ We also note a Polish case of refusal to supply gas network access to a competitor to import gas into Poland (PGNIG / Bartimpex (2009) (Poland) (7/2009, e-C 27843)); and a Turkish case of refusal to give access to an electricity transfer and distribution network to a competitor (Enerjisa and Toros / CEAS (2007) (Turkey) (2/2007, e-C 13997)) both with debate as regards competition and sectoral regulation jurisdiction. See also the short note concerning a case of access to essential facilities in Spain, 3/2009, e-C 28367.

[38] GdF offered commitments to reduce its capacity bookings to a maximum of 50% on the H-gas network, with a phased release (first some 10-15% of total capacity) at the most important entry points, then later a further release, bringing GdF's share to a maximum of 50% by 2014.

[39] The EC appears to have rejected all arguments that the network could be reproduced (although one may think that, to some extent, this may be viable in a cherry-picking strategy) and further, not to have been deterred by the existing long-term supply contractual arrangements.

(b) E.on (2010) (EC)

[40] The EC took a similar position in the E.on case in May 2010. (12/2009, e-C 34851) Controversially, the EC noted that even if E.on had used its booked capacities for its own supply business, this could not, in itself, exclude an abuse under Article 102 TFEU. The EC also emphasised that E.on built its network pre-liberalisation, at a time when it would have been shielded from competition.

[41] Whilst denying any infringement, E.on committed to a phased release of capacity for H-gas (again first some 10-15% of capacity) and then to a further release bringing E.on's share to 50% by 2015 and for the L-gas network to 64% by 2015.

5. Other capacity access and hoarding issues

[42] Access to capacity has been the focus of various decisions at EU and national level, with cases raising a variety of interesting and new issues.

(a) ENI (2010) (EC)

[43] In the ENI¹¹ case, the EC alleged that the Italian incumbent had refused to grant access to capacity available on the transport network ("capacity hoarding"), and offered capacity in a less useful manner ("capacity degradation"), despite significant short and long-term demand from third party shippers.

[44] On capacity hoarding, the EC alleged that ENI would have refused to offer available or unused capacity to other shippers on the pipelines concerned. It was also alleged that ENI failed to increase the efficiency of capacity management, thereby mitigating congestion. Further, that ENI may have understated the capacity technically available to third parties. This was treated as a form of "constructive refusal to supply".

¹¹ IP/10/1197, 29 September 2010 (see above footnote 5).

[45] As regards capacity degradation, the EC alleged that ENI may have intentionally delayed allocation of new capacity or fragmented it into shorter sales, when it could have been offered on a longer term basis. Further, the EC alleged that ENI may have allocated separate and uncoordinated capacity to complementary pipelines, or interruptible rather than firm capacity, making it less useful and attractive.

[46] The EC considered that such practices may have led to a foreclosure of competitors trying to transport and sell gas to Italian customers and therefore may have restricted competition on the downstream gas supply markets.

[47] Interestingly, as noted above, ENI offered to divest its shares in the companies which own, operate and manage the transport capacity on various international pipelines bringing gas into Northern Italy, from Russia and the North of Europe.

[48] The EC accepted these commitments, stating that they effectively addressed its concerns, namely the conflict of interest resulting from the vertical integration of the company in both the transport and supply of gas. In particular, the EC considered that the commitments ensured that third party requests to access the gas pipelines would be dealt with by an entity independent of ENI. According to the EC, any incentive for ENI, as operator of the transport pipelines, to make additional profits from transporting more gas on its pipelines was more than outweighed by the incentive for ENI to maximise its profits from selling gas to customers on the Italian wholesale market by reducing access to that market for potential competitors.

(b) RWE (2009) (EC)

[49] The EC's decision in the RWE case in March 2009 also involved the separation of transport networks from the supply business. (3/2009, e-C 35038) Again, the vertical integration of production, transmission and distribution activities was found to preserve an incentive for the owners of the transport networks to favour their own supply business and to keep entry barriers for newcomers high.

[50] The EC took the preliminary view that RWE may have abused its dominant position on its gas transmission network by way of refusal to supply transportation capacity.

[51] The EC's view was that RWE's gas transmission network could be considered an essential facility and that RWE may have pursued a strategy of systematically keeping transport capacities for itself, especially on important bottlenecks. RWE had booked almost the entire transport capacity on its own network on a long term basis. The EC alleged that RWE may have understated

its technically available capacity and managed its transport capacities in a way that prevented competitors from accessing it.

[52] Whilst denying any infringement, RWE undertook to sell its entire German gas transmission network with a total length of approx. 4000 km, including the necessary personnel and ancillary assets and services, which the EC accepted.

[53] This was a controversial settlement because unbundling was an issue raised in the Third EU Energy Liberalisation Package.

(c) ENI/GNL Italia (2007) (Italy)

[54] In March 2007, the ICA closed proceedings by accepting commitments from ENI, the Italian incumbent, for the alleged abusive conduct of its subsidiary (GNL Italia) on the market for liquefied natural gas (LNG). (3/2006, e-C 13672)

[55] GNL Italia, the owner of (at the time) the only LNG receiving terminal in Italy, was accused of having overbooked the whole terminal capacity and refused access to the facilities to third parties. The concern was that ENI had bought up the terminal's entire receiving and re-gasification capacity between 2002 and 2005, with the aim of excluding other undertakings in competition with ENI (which holds a dominant position in the downstream market of wholesale supply of natural gas) from providing the national system with LNG.

[56] The relevant markets identified were the market for continuous re-gasification of LNG in the terminal of Panigaglia and the downstream market of wholesale supply of gas in the Italian system. The final commitments submitted by ENI consisted in a gas release programme over two years by ENI for some 4 bcm of gas, together with favourable conditions of supply. (3/2007, e-C 13342)

[57] On access to re-gasification capacity, see also the Enagas / Gas Natural case in Spain. (3/2007, e-C 14012; e-C 14793; 6/2010, e-C 33575)

6. Long-term / exclusive supply contracts

[58] Another type of abuse investigated by the EC in recent years concerns long-term and exclusive supply contracts in the downstream gas and electricity sectors. The EC focussed on such abuses in, for example, its Distrigas and EdF cases. (3/2010, e-C 34858) Both ended with commitments.

(a) Distrigas (2007) (EC)

[59] In its 2007 decision, the EC expressed concerns under what is now Art. 102 TFEU that Distrigas' long-term gas supply contracts in Belgium would prevent customers from switching and would thereby limit the scope for other gas suppliers to conclude contracts with customers, foreclosing their access to the market¹².

[60] However, Distrigas offered commitments, which were considered sufficient to address those concerns. Notably, Distrigas undertook to ensure that for each calendar year a minimum of 65% and, for all calendar years over the four year commitment period, an average of minimum 70% of the gas which it supplies to industrial users and electricity producers in Belgium would be contestable by third parties, or "returned to the market" (with some flexibility built into these assessments). Distrigas also removed certain use requirements on customers, allowing them to resell gas if they so wished.

[61] No new contract with industrial users and electricity producers could be longer than five years in duration. Customers with existing contracts which were that long or longer were given unilateral termination rights with prior notice and without indemnity so that, in effect, they became one year contracts. The commitments were to last for four years from the start of 2007 (i.e. until December 2010) and were to apply as long as Distrigas held a share of more than 40% of the market and at least a 20% gap to its nearest competitor.

(b) EdF (2010) (EC)

[62] In the EdF case the EC alleged that the volume, duration and exclusive nature of EdF electricity supply contracts with large industrial customers hindered competitors' entry and expansion in this retail market. **(3/2010, e-C 34858)** In addition, the EC alleged that the supply contracts contained an illegal prohibition on resale insofar as electricity had to be consumed at the point of delivery. The EC considered that this restriction prevented customers from managing their energy supply and exacerbated a lack of liquidity on the trading market.

[63] In March 2010 the EC accepted commitments offered by EdF. EdF offered to ensure that each year an average of 65% of the electricity that it had contracted to sell to large industrial customers would return to the market, with a minimum of 60% per calendar year.

¹² IP/07/1487 and MEMO/07/407, 11 October 2007 (see above footnote 5).

[64] Interestingly, the EC stressed that the objective here was to create a real opportunity for competition, noting that it would have been disproportionate to oblige EdF to give away some customers, which would have amounted to imposing a market share cap.

[65] EdF also committed to enter into non-exclusive contracts with large industrial customers, with a maximum duration of five years, or provide that the customer can opt out of the contract, without incurring a penalty, every five years. To address the allegedly illegal resale restriction, EdF offered to remove the relevant provision from its new contracts, and to allow large industrial customers to change the power withdrawal points stipulated in their contracts. These commitments are for 10 years unless EdF's market share falls below 40% for two consecutive years.

[66] NCAs have adopted a number of decisions with regard to long-term supply contracts.

(c) EdF / KalibraXE (2007) (France)

[67] In April 2007, the French Competition Authority (“the Conseil de la Concurrence”; “the Conseil”) closely scrutinized EdF's exclusivity clauses on the market for the supply of electricity to eligible customers, in response to a complaint by a trading operator, KalibraXE. That company sought interim measures denying EdF the ability to enter into exclusive supply contracts. **(4/2007, e-C 13724; e-C 13746)**

[68] The Conseil first stressed that exclusivity provisions to the benefit of a dominant operator are not a per se abuse of a dominant position. In line with the findings of the EU SI, the Conseil distinguished between partial exclusivity and full exclusivity. It then considered the exclusivity clauses, taking into account the scope and duration of the exclusivity clauses, the existence of technical reasons for imposing exclusivity, possible efficiencies and financial compensation granted to the customers, in exchange for the exclusivity.

[69] The Conseil found EdF's conduct abusive, because of the lack of information given to EdF's potential customers regarding the conditions for early termination (notably the amount of any indemnity payable) and the ambiguity of the clauses describing the circumstances in which a termination penalty was triggered.

[70] The Conseil ordered interim measures, requiring EdF within two months to define in its general terms and conditions of sale, the rules applicable in case of early termination of the supply agreements concluded with its customers who have exercised their eligibility and to inform customers that they will not incur any penalty at the normal expiry date of the agreement.

(d) DONG (2005) (Denmark)

[71] In December 2005, the Danish Competition Council (“DCA”) scrutinised a supply agreement of natural gas provider DONG, which contained an exclusive supply clause preventing Hovedstadsregionens Naturgas (“HNG”) and Naturgas Midt-Nord (“MN”) from buying gas from other suppliers for a little over six years, and two price methodologies, whereby the supply price to these companies varied according to whether they were supplying metered or non-metered customers. **(12/2005, e-C 418)**

[72] DONG was found to have a dominant position, with some 83% of the Danish wholesale market and some 65% of the Danish retail market. HNG / MN were held to account for some 18% of the Danish retail market.

[73] The DCA objected to the duration of the agreements and their pricing structure. However, the DCA approved the supply agreement between DONG and the two retailers, after the parties offered binding commitments shortening the agreement by two years and committing to avoid exclusivity clauses and different cost prices if they were to renegotiate the agreement.

(e) ENEL / Clienti Idonei (2003) (Italy)

[74] In November 2003, the ICA imposed a fine of €2.5 million on ENEL and its wholly-owned subsidiary ENEL Energia, for applying various exclusive dealing arrangements in violation of what is now Art. 102 TFEU. **(11/2003, e-C 14764)**

[75] The ICA found that ENEL Energia had abused its dominant position on the market for electricity supply to eligible customers by, amongst other things, imposing exclusive purchasing obligations; a ban on purchases from competitors; price increases in case of purchases from competitors; and rebates conditional upon the renewal of the supply agreement.

[76] All these provisions, applied by a dominant firm, were found to tie a substantial part of the demand, resulting in foreclosure of competition. It appears that the exclusive dealing arrangements concerned some 17% of eligible customers and some 54% of electricity supplied by ENEL in 2012. The decision was upheld on appeal in 2006.¹³

¹³ Tribunale Amministrativo Regionale, Judgment No 10678 of 20 October 2006.

7. Alleged withholding of generation capacity

(a) E.on (2008) (EC)

[77] In November 2008, the EC brought two cases to an end involving E.on, accepting commitments offered. (11/2008, e-C 35136) The EC stated that it was concerned that E.on was abusing its dominant position on the German electricity wholesale market through a strategy to withdraw available generation capacity, with a view to raising electricity prices to the detriment of consumers. The idea is that E.on may have withdrawn cheaper production capacity which it owned to push the market price up to that determined by a more expensive plant in the merit order of supply and then benefitted from the overall supply price obtained. The EC considered that this may also have been complemented by a medium and long-term strategy of deterring actual or potential competitors from entering the generation market and thereby limiting the market volume in the electricity generation.

[78] As regards the case on the German electricity balancing market, the EC was concerned that E.on may have abused its dominant position on the market for the demand of secondary balancing reserves in the E.on network area in two ways. First, by increasing its own costs by favouring its own production affiliate and passing the costs on to the final consumer; and second, by preventing power producers from other EU Member States from exporting balancing energy into the E.on balancing market.

[79] Whilst denying the alleged infringements, E.on offered to make significant divestments, some 5000 MW of E.on's generation capacity (which appears to be from several plants in the merit curve of supply cost). The EC considered that this removed both the ability and the incentive for E.on to withdraw capacity, as alleged. E.on also offered to divest its German electricity transmission system business consisting of its 380/220 kV-line network, the system operation of the E.on control area and related activities. Again, this was a controversial settlement, given the legislative debate on unbundling at the time.

(b) ENEL / Edipower (2010) (Italy)

[80] In December 2010, the ICA closed two parallel investigations, one for alleged abuse of dominance by the ENEL group; the other for alleged collusion between Edipower and its industrial shareholders, in the power generation capacity market in Sicily, Italy. (12/2010, e-C 34257)

[81] As far as the assessment of Art. 102 TFEU was concerned, ICA noted that ENEL owned 50% of power generation capacity in Sicily and alleged economic or physical withholding of

electricity to create shortages and raise prices in peak demand hours, when ENEL held a pivotal position.

[82] As far as the assessment under Art. 101 TFEU is concerned, ICA reached a preliminary conclusion that Edipower and its industrial shareholders had agreed to withhold their proportional capacity owned within the generation plant of San Filippo del Mela. Such plant was also pivotal (i.e. capable of determining the electricity price level in Sicily) in at least 30% of the hours scrutinised.

[83] The Italian regulators considered that such conduct affected the setting of the relevant prices in Sicily and also the national single electricity price (“PUN”), to the detriment of consumers (based on the weighted average of zonal prices). In both cases, the ICA closed proceedings, making binding the commitments offered by ENEL and Edipower.

[84] In its preliminary assessment, the Italian regulator made explicit reference to the EC investigation into E.on’s market conduct in Germany. (11/2008, e-C 35136)

8. Divestments to resolve conflicts of interest

[85] The EU SI identified as main fundamental deficiencies in the competitive structure of the current electricity and gas markets the systematic, structural conflict of interest caused by insufficient unbundling of networks from the competitive part of the sector¹⁴. Since then, as noted above, in three cases the EC has accepted proposed undertakings, which include unbundling and noted that such remedies were proportionate to the competition concern claimed, to the extent required in proceedings under Art. 7 of Regulation 1/2003.

[86] It may be useful to recap the three cases where this has come up so far:

- In E.on (2008) (EC) (11/2008, e-C 35136), E.on committed to divest about 5000 MW of E.on’s generation capacity and to divest its German electricity transmission system business consisting of its 380/220 kV-line network, the system operation of the E.on control area and related activities.
- In RWE (2009) (EC) (3/2009, e-C 35038), the EC accepted RWE’s commitment to sell its entire German gas transmission network, with a total length of approx. 4000 km, including the necessary personnel and ancillary assets and services.

¹⁴ EU SI, cited above footnote 6, p.11, para. 11.

- In ENI (2010) (EC), the Italian gas incumbent committed to divest its current shareholdings in companies related to international gas transmission pipelines to a suitable and independent purchaser.

[87] Some argue that the EC's decisions to accept structural remedies in this way is disproportionate, in view of the EU legislator's decision in the Third EU Energy Liberalisation Package to accept alternative models for unbundling of energy companies. However, others argue that the EC is not responsible for what the party alleged to infringe will offer as a remedy and that the EC's review of proportionality in a settlement procedure is a limited one. In other words, being a settlement, such a review does not have to be as precise as a full infringement case under Art. 7 of Regulation 1/2003.

[88] Beyond that, it appears that the EC, as a competition authority, considers that it may be justified to require structural unbundling, through appropriate divestments, if necessary to resolve specific competition concerns. Notably, the EC has referred to the proportionality of these structural solutions to resolve the conflict of interest and also where monitoring behavioural commitments may be difficult (although arguably, in some cases, that may be possible through coordination with NERs).

[89] In any event, the main point to note is the tendency to structural remedies including commitments to divest in these EC cases.

9. Pricing abuses

[90] There have been many EC, NCA and national court decisions with regard to pricing issues. The main ones which we would highlight are as follows:

(a) RWE (2009) (EC)

[91] Part of the EC decision against RWE noted above was based on the EC's concern that RWE may have abused its dominant position by way of a margin squeeze. (3/2009, e-C 35038)

[92] The EC stated that RWE may have set its transmission tariffs at an artificially high level in order to squeeze its competitors' margin; and that such behaviour has the effect of preventing even an equally efficient competitor from competing effectively on the downstream gas supply markets.

[93] The EC stated that its investigation had revealed that RWE had negative profit margins in its downstream gas supply business, which contrasted with its overall profitable German gas

business, including its network business where, according to the available evidence, RWE made considerable annual profits.

[94] The EC suggested that the margin squeeze may also have been reinforced insofar as RWE may have deliberately created an asymmetry in the cost structure between RWE and its competitors. For instance, by using a rebate policy which, in fact, only benefitted RWE, or by exempting itself from paying balancing costs, while other transport customers faced the risk of high penalty fees within RWE's transmission network.

[95] As mentioned above, whilst denying the infringement, RWE offered a structural remedy, namely to divest its entire existing high-pressure gas transmission network and this was accepted.

(b) EdF Direct Energie (2007) (France)

[96] In June 2007, the Conseil de la Concurrence imposed interim measures upon EdF, obliging EdF to offer a wholesale contract proposing reasonable and non-discriminatory wholesale offers, accessible to all retail suppliers, to new entrants in the French retail electricity market. (7/2007, e-C 14000)

[97] A new entrant, Direct Energie which supplies small professional customers, alleged that EdF had abused its dominant position by: (i) a margin squeeze effect due to the excessive price of the wholesale contract; (ii) discriminatory wholesale pricing conditions applied to third party purchasers, as compared to the conditions to which EdF sells to its own retail subsidiary; (iii) a refusal to offer long-term supply conditions, which would reflect EdF's base-load nuclear generation costs, with a refusal to implement the supply programme recommended by the French Energy Regulator ("CRE"); and (iv) a refusal to provide transparent and non-discriminatory access to its nuclear programmes.

[98] The Conseil accepted the margin squeezing claim, but rejected the others. EdF then was invited to make remedy proposals, which it did. EdF made its wholesale offer publicly available in July 2007, offering 1500 MW, i.e. twice as much volume as was then consumed by small professional customers on the non-regulated market. The duration of contracts would be between 10 and 15 years.

[99] Interestingly, the Conseil appears to have cooperated with CRE, considering CRE's assessment of margin squeezing and consulting CRE in the assessment of the EdF's proposed remedies.

(c) Union Fenosa (2010) (Spain)

[100] In Spain in recent years there have been a series of interesting decisions concerning the so-called “market for technical restrictions”. One of these is the recent ruling of the Spanish Supreme Court, concerning a SCA case against Union Fenosa. (1/2010, e-C 30709)

[101] By way of background, it should be noted that the SCA has brought cases against several power generating companies, each of which was accused of abusing its market dominance in a regional Spanish electricity “market caused by technical restrictions”.

[102] The SCA claimed that the companies were offering unusually high prices in the initial bid for the daily market for electricity, so as not to be selected for the daily market, thereby enabling them to be called later to solve network constraints on the “markets for technical restrictions”, i.e. the markets for supplying electricity in particular regions because of technical system constraints on supply.

[103] These cases are based on the special features of the Spanish energy market at the time, in which power generation companies could submit one bid to sell electricity on the spot market, which was matched with purchase offers beginning with the lowest offers, until the demand of distributors and retailers throughout Spain was met. Power generation companies whose bids were too high to be matched would then be called at a later stage to supply additional electricity in areas where network constraints existed and shortages appeared. At the time, they would then be paid on the basis of their initial bid in respect of the daily market.

[104] The SCA imposed fines of some €01,520 on each company.

[105] These cases have raised all sorts of interesting arguments, such as:

- The issue that the conduct concerned is on a market where a company may not be dominant (the national daily spot market) with, however, effects in a market where it may be dominant (a regional technical restrictions market);
- to whether creating a shortage by bidding too high in such circumstances is abusive;
- whether the prices concerned were in fact abusively high (measured against costs) given the circumstances; and
- whether the high daily spot market price could be objectively justified in the circumstances.

[106] It appears that the Spanish system has now changed, allowing dual bids, which appears to mean one in the daily spot market and another in the later technical restrictions market.

[107] There are many interesting notes on the various stages of these cases in e-Competitions. For example, concerning Viesgo Generación (12/2006, e-C 13144 and e-C 13219); Iberdrola Castillon (3/2007, e-C 13345; 2/2008, e-C 16059); and Gas Natural (4/2008, e-C 18720).

[108] In January 2010, the Spanish Supreme Court annulled a judgment of the Appellate Administrative Court and quashed the SCA's decision against Union Fenosa. More specifically, the Supreme Court disapproved the cost calculation process carried out by the SCA, concluding that the yardstick for whether prices were excessive should not be based on the historical prices in the daily market, but rather on the usual costs in the technical restrictions market.

[109] The SCA was also found to have disregarded the distortions created by the obligation for generators to submit only one price offer per period, notwithstanding the fact that this single offer could be matched within two different markets involving different costs. Further, the Supreme Court held that the SCA erred in not taking into account the uncertainty that generators faced if their bids were not finally selected in the technical restrictions market.

(d) Gas supply procedures (2008) (Germany)

[110] In December 2008, the German Competition Authority (the "Bundeskartellamt", "BKA") announced that it had accepted commitments from gas suppliers in 29 cases out of 33 pending proceedings offering compensation to consumers worth €127 million. (5/2009, e-C 26132)

[111] The BKA alleged that the undertakings concerned abused their dominance by demanding prices that differed significantly from those that would have been charged had effective competition existed in consumer markets in 2007 and 2008. It appears that the BKA took the view that the net revenue for both years was some 55%.

[112] In most of the cases the BKA and the gas suppliers settled after they had made commitment offers. The gas suppliers agreed to grant bonus payments and credits for their customers on the next annual bill, amounting to 50% of the overall compensation, to postpone scheduled price increases and/or reduce retail tariffs for the rest, and not to pass on scheduled increases of wholesale prices for gas in 2008.

[113] See also the notes on recent German legislation against excessive prices in the energy sector in 12/2007, e-C 15530 and 12/2006, e-C 12643.

(e) RWE (2006) (Germany)

[114] In December 2006, BKA issued a Statement of Objections to RWE, taking the view that it had abused its dominant position on national electricity markets by including more than 25% of the market price of CO2 emission certificates in its electricity prices. In the BKA's view, under normal competitive conditions, a passing-on of the price of emission certificates would not be possible. (12/2006, e-C 12732) The energy providers argued, on the other hand, that prices for emission certificates are opportunity costs which have to be factored into pricing (otherwise it would make more economic sense to sell the certificates than use them).

[115] The BKA appears to have accepted this to some extent, indicating that it intended to allow RWE to include up to 25% of the certificates value as, due to regulatory obligations, only a small part of the emission certificates actually could be sold on the market.

(f) Elsam (2008) (Denmark)

[116] In March 2008 the Danish Competition Appeals Tribunal ("the Tribunal") ruled on an appeal against an excessive pricing decision made by the Danish Competition Council ("the DCA") in June 2007. (3/2008, e-C 21224) In that decision the DCA found that Elsam had abused its dominant position in the wholesale market for physical electricity in Western Denmark by using a bidding strategy for the sale of electricity on Nord Pool Spot, which resulted in excessive prices for some 1,484 hours between January 2005 and December 2006. This was the DCA's third ruling against Elsam.

[117] The Tribunal upheld the DCA's decision for the period of January 2005 to June 2006, even though Elsam's strategy was based on previously given commitments not to submit bids higher than the expected prices in neighbouring countries. However, the Tribunal annulled the DCA's decision as regards the second half of 2006, when Elsam had submitted bid prices based on not exceeding its marginal costs, a strategy also provided for under the commitments. The Tribunal found the DCA's reasoning insufficient.

[118] It may also be of interest to note some decisions where NCAs rejected claims of excessive pricing.

(g) Ekfors (2007) (Sweden)

[119] As noted further below, there have been a number of cases in Sweden concerning a dispute between Ekfors and two municipalities in the north of Sweden, Övertornea and Happaranda.

[120] The two municipalities were supplied with electricity by Ekfors but, from 2004, were faced with bills for the electricity they use in road and street lighting which had more than doubled. The municipalities chose to pay a price they considered reasonable, while seeking to negotiate. However, for the winter season 2006/07, Ekfors refused to supply until the municipalities settled the outstanding amount.

[121] The municipalities then applied to the Swedish Competition Authority (“SwCA”) alleging abuse of dominant position. The SwCA rejected the complaint.

[122] On appeal, the Market Court denied the claim. The Court was reported as holding that Ekfors dominance was “weak” and that Ekfors and the municipalities were equally dependent on each other. Further, it appears that a majority of the Court found that the claimed refusal to supply had not been shown to restrict competition on the upstream or downstream markets. The minority on the other hand found excessive pricing and refusal to supply. (11/2007, e-C 15760; e-C 16061)

[123] Clearly a controversial and interesting case.

(h) Productschap Tuinbouw / Gas Terra (2009) (The Netherlands)

[124] In June 2009, the Dutch Competition Authority (the “NMa”) ruled on a complaint by two agricultural interest groups which are users of natural gas against alleged excessive pricing by Gas Terra. (6/2009, e-C 32022) They also claimed that Gas Terra discriminated with different prices between large and small scale users and between Dutch and non-Dutch users.

[125] Interestingly, the NMa proceeded by commissioning an economic study by Frontier Economics to benchmark the wholesale prices of Gas Terra. Considering the results, the NMa then noted that Gas Terra’s prices were higher than the benchmarked prices for some hypothetical competitors and/or periods, but found the differences not significant taking into account a margin for error and that the differences were based on estimated (hypothetical) benchmark prices. This was not enough to conclude that Gas Terra’s prices were excessive.

[126] The NMa also did not consider that price discrimination had been established, given the different natures of the ordering and prices concerned.¹⁵

10. Discrimination and market partitioning

[127] There were a large number of national decisions with regard to discrimination and market partitioning, some involving high fines.

(a) RWE Transgas (2006-2007) (Czech Republic)

[128] In August 2006, the Czech Competition Authority (the “CCA”) at first instance imposed a fine on RWE Transgas, the dominant supplier of natural gas to retail distributors, equivalent to some €13 million. **(8/2006, e-C 12409)**

[129] The following infringements had been found:

- application of less advantageous terms to distributors not belonging to the RWE group;
- market division through a clause prohibiting the sale of gas by retail distributors outside of a specified territory; and
- discrimination, consisting in the billing of the same fee for the storage of gas for different categories of customers, despite the fact that the costs incurred in the provision of the services differed between the categories.

[130] This was in relation to a period between November 2004 and August 2006.

[131] In March 2007, the appellate body of the CCA (the Chairman) confirmed the abuse of dominant position, but reduced the fine to some €3.4 million, partly due to the fact that RWE Transgas provided the CCA with cooperation after the first instance decision (i.e. by amending the respective contracts concluded with non-consolidated distributors). The fine was also reduced due to dismissal of some of the allegations (geographical restriction of supply vis-à-vis RWE companies (i.e. based on the intra-enterprise doctrine) and as regards the different prices for storage of gas). **(3/2007, e-C 13659 and e-C 13612)**

[132] RWE Transgas then challenged the CCA decision at the Regional Court in Brno, which quashed it in October 2007, on the ground that unlawful behaviour may not be sanctioned twice. Notably, it appears that the CCA increased the fine due to application of both national and EU

¹⁵ See also the Latvian case of excessive pricing of liquefied gas to apartment houses from underground (Propana Gas (2008) (Latvia)). **(12/2008, e-C 25688)**

legislation to one infringement. This was found to amount to an infringement of the ne bis in idem (unlawful double jeopardy) principle. **(10/2007, e-C 14824)**

[133] The CCA then filed an appeal to the Supreme Administrative Court, which overruled the decision of the Regional Court in October 2008. The Court took the view that the CCA is entitled to impose a fine for violation of both EU and Czech law at the same time. Such a parallel application of EU and national competition law was not excluded by the enforcement system in Regulation 1/2003, nor was it contrary to the European Convention of Human Rights, ne bis in idem applying rather to cases of two distinct proceedings, not the parallel application of EU and national law in one proceeding. Since EU and national competition law pursue different objectives, concurrent application was also possible. The case was remitted to the Regional Court for further procedure. **(10/2008, e-C 22673)**

(b) Mazeikiu Nafta (2005-2009) (Lithuania)

[134] In December 2005, the Lithuanian Competition Authority (“LCA”) imposed a fine equivalent to some €0.27 million on AB Mazeikiu Nafta (“MN”), the national oil refinery, for discriminatory pricing on the market for ex-refinery sales of diesel and on the market for ex-refinery sales of petrol with a geographical scope encompassing Lithuania, Latvia and Estonia. **(12/2005, e-C 426)**

[135] MN was found to have infringed by:

- economically unjustified and therefore discriminatory pricing;
- forcing its biggest customers into signing annual contracts with a minimum purchase obligation (equivalent to loyalty-inducing target rebates); and
- territorial discrimination, as Lithuanian customers had been charged higher prices than those in Latvia and Estonia.

[136] The investigation concerned the period 2002-2004.

[137] In June 2007, the Vilnius District Administrative Court annulled the decision on several procedural and substantive grounds including disagreement with LCA’s product and geographic market definition. **(6/2007, e-C 13786)**

[138] Then, on further appeal, in December 2008, the Lithuanian Supreme Administrative Court held that no significant procedural violations had occurred which justified the annulment of the LCA’s decision. This included a finding that Art. 11(4) of Regulation 1/2003 does not confer

rights on private persons, so any failure of the LCA to coordinate with the EC before issuing its decision was irrelevant. (12/2008, e-C (23815))

[139] However, on the substantive questions the Court identified a number of factual circumstances and arguments raised by MN, which the LCA had failed to consider in its infringement decision, notably, a failure to analyse the conditions of competition beyond the territories of Lithuania, Latvia and Estonia. The Court also questioned the LCA's assessment on barriers to entry to the market. The Supreme Administrative Court therefore ruled that the original infringement decision was null and void, but asked the LCA to re-investigate.

[140] The LCA re-investigated the case beginning in January 2009 and maintained its opinion concerning the abuse by MN of its dominant position in the market.

[141] In December 2010, the LCA narrowed the geographic market of the case to the territory of the Republic of Lithuania, and concluded that the pricing policy employed by MN (now AB Orlen Lietuva) was designed to restrict the entry of competitors into the Lithuanian market. Non-compete obligations, MN's annual loyalty system and certain rebates were found unlawful, the latter involving discrimination between certain undertakings operating in the same market. All of this was found to be to avoid competition from imported diesel from the East and petrol from the West.

[142] As a result, the LCA fined AB Orlen Lietuva (the former Mazeikui Nafta) the equivalent of some €2.38 million. In April 2011, the Vilnius Regional Administrative Court upheld this decision. (4/2011, e-C 36588)¹⁶

(c) ENEL / ENEL Produzione (2006) (Italy)

[143] This case arose from a complaint by the Italian Energy Regulator concerning certain anomalies in trends of the national price in June 2004 and January 2005. The ICA found that ENEL enjoyed significant market power on the relevant market for the wholesale supply of electricity in the four macro-areas covering the whole territory of Italy, namely the North, the South, Sicily and Sardinia.

[144] The ICA found that ENEL might have used its market power, which made it indispensable in certain areas, to determine the flow of imports and exports of electricity with the other macro-areas and to maintain relevant differences in the price amongst the different areas. This would have created a so-called "leader-followers" model, in which ENEL had the role of price-maker in all the

¹⁶ See also the Latvian case on Mazeikui Nafta pricing of grade 95E petrol, reported in 7/2006, e-C 1376.

different macro-areas, while its competitors were all price-takers. The idea was therefore that ENEL was extending its dominant position, using its market power. (12/2006, e-C 14765)

[145] ENEL offered to settle the case, whilst denying any infringement. ENEL proposed (i) to sell virtual capacity in the South macro-area; (ii) to determine an auction procedure in order to establish the sales price of the virtual capacity; and (iii) to fix a two year period for the release of the capacity. These commitments were not considered sufficient (after consultation with the Italian Energy Regulator).

[146] Then, in a second proposal, ENEL committed: (i) to raise the amount of virtual capacity it would sell to a total amount of 1000 MW in 2007 and 700 MW in 2008; (ii) to reduce the sales price of virtual capacity; (iii) to establish limitations on the maximum amount which could be allotted to each bidder; (iv) to provide a draw mechanism in case demand exceeds supply offer; and (v) to distinguish the virtual capacity to be sold in different products, namely base-load (650 MW), peak (350 MW) and off-peak (350 MW).

[147] It appears the idea was to eliminate the pivotal role enjoyed by ENEL in the South macro-area and to reduce that role in the North macro-area, while giving competitors access to sources of supply at more competitive conditions than those in the Italian electricity trading market (on which ENEL was found to have the ability to determine prices). These were accepted by ICA.

(d) Enemalta (2007) (Malta)

[148] In this case the Maltese Commission for Fair Trading endorsed the decision of the Maltese Office of Fair Trading, according to which Enemalta Corporation had abused its dominance in the market for the provision of fuels in Malta, by applying discriminatory pricing policies to equivalent transactions with its agents and distributors. (4/2007, e-C 14006)

[149] In particular, by allowing the complaining distributor (Cassar Fuels) only a 14-day credit term for payment, while other agents and distributors in the same market level were allowed a 60-day credit term for payment.

[150] An interim order was issued whereby Enemalta Corporation was provisionally restrained from allowing the complainant shorter credit terms than those generally allowed to other undertakings.

11. Failure to provide or late provision of technical information

[151] In the Final Report of its EU SI, the EC identified a general lack of transparency in market operations and stated that access to market information should be further enhanced¹⁷. There have been several interesting NCA decisions addressing such lack of transparency and access to information.

(a) Distribution Companies (2009) (Spain)

[152] In Spain distribution companies are obliged to maintain a database with information on their power access points (so-called “SIPS”). Access to these SIPS should be made available to any interested commercialisation company.

[153] In April 2009 the SCA, further to proceedings prompted by a complaint by Centrica, fined five distribution companies (Endesa, Iberdrola, Union Fenosa, Electra de Viesgo and Hidrocantrabrico) some €36.6 million (in total).

[154] The SCA found that these companies had abused their dominant positions in power distribution, by infringing their obligation to grant massive (i.e. general) and unconditional access to their SIPS, thereby reducing the sales capacity of competitors on the downstream market for power commercialisation, to the benefit of their own related sales companies. The distribution companies were found to be requiring specific applications as regards potential clients for such SIPS data, which was making it more difficult and less efficient for third parties to compete in the downstream market. Such conduct also involved discrimination as compared to the distribution companies’ own commercialisation companies. (4/2009, e-C 26212 and see the SCA website)

[155] In 2009 and 2010 there were also two interesting Italian decisions relating to the failure to provide information or late provision of information and data, which were alleged to hinder competition. Both were resolved by commitments.

(b) ENEL/Exergia (2009) (Italy)

[156] In December 2009, the ICA concluded a proceeding accepting commitments from ENEL and two of its subsidiaries, ENEL Distribuzione and ENEL Servizio Elettrico. (12/2009, e-C 33435)

¹⁷ EU SI, cited above footnote 6, p.13, para. 64 and p.7, paras 24-26.

[157] Investigations were launched following a complaint from Exergia which reported delays, errors and omissions by ENEL companies, when transferring customer-related, technical and fiscal data which were necessary for traders to operate in the market for retail sale of electric power to non-residential customers.

[158] ENEL held a monopoly on the essential information required by new entrants. The commitments established a method for controlling, in advance, the quality of personal data provided by operators from the ENEL group, thus preventing any deterioration of the information.

(c) Distribution companies/Sorgenia (2010) (Italy)

[159] In September and October 2010, the ICA concluded five proceedings pursuant to Art. 102 TFEU, by making mandatory the commitments proposed by several vertically-integrated companies (A2A, Acea, Italgas, Hera and Iride) operating in the markets for electricity and gas sales and distribution.

[160] The investigations were preceded by a complaint from Sorgenia, an operator which is not vertically-integrated, which claimed the distribution companies were using inefficient procedures and obstructive behaviour to raise competitors' costs in entering the retail markets for gas and electricity, in particular by making switching difficult for customers (for example, by delaying the release of data). Discrimination against sellers which were not integrated with the local distributor was established on a preliminary basis¹⁸.

(d) SP Manweb (2006) (UK)

[161] In October 2005, the UK Gas and Electricity Market Regulator ("Ofgem") accepted commitments offered by SP Manweb which were intended to ensure that point of connection ("POC") information and design approval are provided within recommended timescales to non-affiliated independent connection providers ("ICPs").

[162] An ICP had complained that SP Manweb had engaged in anti-competitive behaviour when providing non-contestable electricity connection services, affecting the market for the provision of such services, by delaying the provision of POC information to ICPs by SP Manweb's affiliated connection provider Core and by discriminating in the supply of such information. SP Manweb also undertook to offer all ICPs the same access to its IT systems as currently enjoyed by Core. **(10/2006, e-C 12561)**

¹⁸ ICA Annual Report 2010, English Version, p.11.

12. Making access conditional on unrelated obligations

[163] The NCAs have also adopted a number of decisions which do not have their counterpart in parallel EC decisions, focussing often on exploitative abuses, such as where a company has abused its dominant position by conditioning access to its transmission network to unrelated obligations.

(a) Eustream (2010) (Slovakia)

[164] In June 2010, the Slovak Regional Court upheld the decision of the Slovak Competition Authority (the “SLCA”) in 2008. The SLCA which had imposed a fine of SKK 98.9 million (some €3.28 million) on Eustream for abuse of dominant position, by enforcing unfair trade conditions, unrelated to the subject matter of agreement, with respect to the conclusion of agreements in the gas sector. (6/2010, e-C 32223)

[165] In order to connect Gas Trading’s distribution network in an industrial park to Eustream’s transmission system, Eustream requested to purchase the Gas Trading’s connection infrastructure. Eustream set and offered a purchase price equal to the fee for access to Eustream’s system. Eustream argued that it needed to ensure a safe and reliable operation of the transmission system and to maintain a situation where none of the distribution network operators that were connected to the transmission system owned connection infrastructure.

[166] The SLCA found such an explanation unsupported both in law and fact and that this conduct was an exploitative abuse.

(b) Bulgaria Elektrorazpredelenie (2010) (Bulgaria)

[167] A second decision on this sort of abuse was adopted in June 2010 by the Bulgarian Competition Authority (“BCA”). (6/2010, e-C 31626)

[168] The BCA fined electricity supplier EVN Bulgaria Elektrorazpredelenie AD (“EVN”) for abusing its dominant position on the electricity supply market, by making the conclusion of the contract for access rights with Yana (a textile manufacturer) conditional on the acquisition of Yana’s cable installation, called Yana3.

[169] Yana3 connects EVN’s hub station to Yana’s textile manufacturing plant and also to third parties. EVN needed to make certain modifications to Yana’s installation for that supply. As a result, EVN sought to acquire the installation.

[170] The State Commission for Energy and Water Regulation found that Yana3 formed an indispensable part of EVN's distribution network, insofar as it connected EVN not only to Yana itself, but also to other consumers. The State Commission therefore ruled that Yana could not refuse EVN's access to these facilities.

[171] However, the BCA found no relationship between the conclusion of the access contract, which was aimed at compensating Yana for the usage of its Yana3 installations by EVN and the acquisition of those installations by EVN. To link the two was an exploitative abuse of EVN's position as electricity supplier.

13. Making supply conditional on the payment of invoices

[172] There have been a number of decisions in which NCAs held that it was an abuse of dominance to make the supply of gas or electricity conditional upon certain payment terms, such as the payment of the bills in arrears, due by a different customer supplied at the same connection.

(a) Union Fenosa (2011) (Moldova)

[173] In February 2011, the Moldovan Competition Authority found that Union Fenosa had abused its dominant position on the market for the supply and distribution of electricity by including an automatic notice of disconnection in monthly invoices. (2/2011, e-C 34942)

(b) Various decisions (2010/2011) (Bulgaria)

[174] Similarly, the BCA has issued several decisions holding that refusals to supply electricity because of payment issues amounted to an abuse of dominance. For example, where this was due to the existing debts of the previous owner of the facility (see E.on Bulgaria Sales (5/2010, e-C 31410), EVN Bulgaria Elektrosnabdiavane (3/2010, e-C 30926 and 3/2010, e-C 38135 and see also 3/2011, e-C 37380; 5/2010, e-C 31189)).

(c) ENEL Distribuzione (2007) (Italy)

[175] In October 2007, the ICA took a similar position. It closed proceedings against ENEL Distribuzione for making the activation of a new supply contract conditional upon the payment of the bills in arrears due by a different customer supplied at the same connection point¹⁹, after ENEL offered commitments to resolve that issue. ENEL offered internal rules that activation had to be related to the new customer's position only, with related internal monitoring. (8/2007, e-C 14860)

¹⁹ ICA decision of 21 August 2007, Case No A390, Enel Distribuzione/Attivazione Fornitura Subordinata a Pagamenti Morosita' Regresse, Provvedimento No 17169.

(d) Other

[176] See also Macedonian decisions finding that charging for invoices was abusive when the cost of electricity supply had been regulated and capped at a price inclusive of the invoice (Elektrostopanstvo) (2009; 2010) (Macedonia). (9/2010, e-C 33282; 12/2009, e-C 30927)

14. Sub-markets of electricity supply

[177] There have also been a number of interesting decisions reported in e-Competitions on sub-markets of the electricity supply sector. Notably, in Sweden and Hungary there have been decisions on the markets for street lighting services.

(a) Ekfors Kraft (2010) (Sweden)

[178] In February 2010, the SwCA issued an interim order and imposed an obligation on Ekfors Kraft to provide access to its electricity mains supply. (2/2010, e-C 32044) Ekfors had refused to provide such access to the city of Haparanda, since Haparanda decided to erect its own network of street and road lights in the municipality.

[179] The refusal was held to amount to an abuse of a dominant position on the market for providing electricity mains supply for the transmission of electricity in the area of the concession right, denying the city's entry into the local market for street lighting services. The concession rights to electricity mains supply in Haparanda were found to confer upon Ekfors a monopoly for these services and the electricity mains was found to constitute an essential facility.

[180] The Market Court upheld the SwCA's interim order, confirming that unresolved economic disputes (described above) might constitute an objective justification to refuse access to an essential facility. However, the burden of proof in such a case is on the dominant company, which Ekfors had not discharged, because it had not shown the details of the alleged debt owed by the city, or substantiated its claim that the city would not pay future debts.

(b) Demasz (2008) (Hungary)

[181] Demasz is an electricity provider holding a monopoly for electricity supply to municipalities and other consumers in the southern part of Hungary. It also held a strong position on three electricity sub-markets, namely the markets for maintenance, modernisation/improvement and operation of street lighting systems. This derived from the legal requirement that its approval was necessary for plans regarding the modernisation of street lighting systems. Following partial

liberalisation, alternative service providers were allowed to enter the sub-markets, while Demasz retained its monopoly on the electricity supply market.

[182] The HCA investigated various practices of Demasz and found that Demasz had abused its dominant position in the supply market by setting out extra conditions, beyond technical-safety considerations, such as agreements on operational and ownership issues, for the alternative service providers in the sub-markets, in order to approve their construction plans regarding the modernisation of street lighting systems. (9/2008, e-C 22892)

[183] Demasz was also found to have concluded agreements with more favourable conditions with municipalities where Demasz modernised the street lighting systems, as compared to agreements with other municipalities, with the aim of preserving Demasz's monopoly position in the other sub-markets. Further, Demasz was found to have had entered into long-term agreements with municipalities before the partial liberalisation, with high penalties restricting or at least restraining consumers from concluding new agreements with other service providers. The penalties were considered to block the entry of alternative service providers to the market.

[184] In September 2008, the HCA's decision was upheld by the Hungarian Court of Appeal.

15. Specific markets

[185] The NCAs have adopted a number of decisions on specific energy product or service markets.

(a) Jet fuel (2008/2011) (Various)

[186] The competition issue of pricing and/or discriminatory practices in relation to the supply of jet fuel at airports, or access to related infrastructure, has been well-known for many years. There are several recent examples reported in e-Competitions. For instance, in Austria (4/2008, e-C 19526 and 6/2007, e-C 14065), in Croatia (5/2011, e-C 37377) and in Lithuania (3/2010, e-C 33462).

(b) Motor Fuels (2010) (Russia)

[187] In Russia there has also been a case concerning the wholesale supply of motor fuels and aviation fuel in which the Russian Competition Authority found that four vertically-integrated fuel suppliers abused their collective dominant position by charging higher and discriminatory prices to independent firms than to their own affiliates.

[188] In May 2010, as regards one of these companies, TNT-BP, this ruling was upheld by the Russian Supreme Commercial Court. (5/2010, e-C 31901)

(c) Monoethylene Glycol / Radiator Liquids (2006) (Poland)

[189] In December 2006, the Polish Competition Authority (“PCA”) issued a decision fining PKN Orlen for the abusive supply of its radiator liquids, based on monoethylene glycol, for which it was the dominant supplier, at excessively low prices close to the cost of production, making it difficult for customers to compete profitably with PKN Orlen in the market for radiator liquids. The infringement finding appears to reflect both predatory pricing and margin squeezing concerns. (12/2006, e-C 13217)

(d) Electrical connection works (2006) (Spain)

[190] In December 2006, the SCA took a decision finding that Endesa, the sole power distributor on the island of Majorca, had abused its dominant position. Endesa was found to have been using the technical information which had been provided to it for connection works to its power supply in order itself to make offers to perform the connection works which involved potentially higher costs. The idea was that Endesa had used its dominant position in power supply abusively to obtain unfair advantages in the market for connection works, where it competed with other electrical installers. (12/2006, e-C 13149)

(e) Metering services (2008-2011) (UK and others)

[191] The competition issues related to metering services (pricing and access) have been well-known for many years. There are various cases reported in e-Competitions. For example, in February 2010 the English Court of Appeal upheld a ruling of the UK Competition Appeal Tribunal that Ofgem had found correctly that National Grid abused its dominant position in the provision of domestic gas meters through agreements restricting the number of National Grid installed meters which a gas provider was allowed to replace with third party meters in a given year. Ofgem’s original fine was £41.6 million. The Court of Appeal reduced that to £15 million, after the High Court had already reduced the fine to £30 million. (2/2010, e-C 31020; 2/2008, e-C 16065)

[192] In January 2007, Ofgem also found that EDF Energy (“EDFE”) had not abused a dominant position by discontinuing the provision of meter data services (collection, processing and aggregation of data from certain types of electricity meter) to other suppliers of electricity.

[193] EDFE was found not to be dominant because, although it had high market share in certain areas, competition from other providers of such services from outside these areas was occurring, so the market appeared wider in geographical scope and potential entry was also a competitive factor. (1/2007, e-C 13221 and e-C 13787)

(f) LPG (2010) (Italy)

[194] In March 2010, the ICA took a decision concerning a ten year long cartel in the supply of liquid petroleum gas (“LPG”) involving ENI, Butan Gas and Liquigas. The case was based on a leniency application by ENI and the ICA’s fact-finding. Initially the case concerned supply in cylinders in Sardinia, but this was later expanded to a nationwide case involving cylinders and small tanks. ENI was given immunity. The fine on Butan Gas was €4.8 million and that on Liquigas was €7.2 million. (3/2010, e-C 32064)

(g) Pipes for gas supply (2011) (Greece)

[195] In March 2011, the Greek Competition Authority (the "GCA") fined the gas supply Company of Thessaloniki, EPA Thessaloniki and the Gas Supply Company of Thessaly, EPA Thessalia for abuse of dominance in the market for licensing of natural gas facilities under Greek Competition law²⁰. The case was brought to the attention of the GCA in December 2008 by a complainant, DIMCO, a company active in the supply of gas pipes.

[196] EPA Thessaloniki and EPA Thessalia have the exclusive right to supply gas to “small” customers located within their concession areas for a period of 30 years starting in 2002. Thus, they also have a monopoly position in the market for licensing of indoor natural gas installations.

[197] The GCA found that, from February 2006 until March 2011, EPA Thessaloniki and EPA Thessalia discriminated without any objective justification against flexible steel gas pipes for indoor gas installations. They would not accept such pipes, but only conventional inflexible pipes and copper pipes, despite the fact that the flexible pipes conformed with the relevant technical regulations. The GCA found that this conduct distorted competition on the neighbouring market for the supply of pipes for internal gas installations, since it put DIMCO, which supplies flexible steel pipes, at a disadvantage. The conduct also harmed final natural gas consumers because it limited their choice.

²⁰ Decision No 516/VI/2011, 3 March 2011. The text is available on the GCA website. With thanks to Lisa Arsenidou for her assistance.

[198] The GCA imposed a €19,781 fine on EPA Thessaloniki and a fine of €201,201 on EPA Thessalia. Further, the GCA threatened daily penalty payments of €5,000 until the two companies cease their anti-competitive practices.

[199] The GCA also imposed on EPA Thessaloniki a fine of €20,000 for late reply to one of GCA's requests (there was a delay of 45 days after the deadline expiry); and a fine of €15,000 for providing incomplete information.

[200] Finally, the GCA forced both companies to inform installation engineers by press release that flexible steel pipes can be used in indoor natural gas installations in accordance with the applicable technical regulations.

16. State measures hampering the development of competition

[201] In March 2008, the EC adopted a decision finding that the Hellenic Republic had infringed Art. 86, in conjunction with Art. 82 of the EC Treaty, by granting and maintaining in force quasi-monopolistic rights giving the public undertaking Public Power Corporation SA ("PPC") privileged access to lignite exploitation, and accordingly to lignite-based electricity. This was found to assure PPC privileged access to the cheapest available fuel for electricity production in Greece. The Hellenic Republic had been systematically granting rights to exploit nearly all medium and large lignite deposits in Greece to PPC. (3/2008, e-C 35237)

[202] The EC found that such conduct gave PPC the possibility to maintain a dominant position in the wholesale electricity market at a level close to monopoly, by excluding or hindering market entry by newcomers. The decision called upon the Hellenic Republic to propose effective measures and ensure that around 40% of exploitable reserves in Greece are made available to competitors of PPC.

[203] In August 2009, the EC adopted a decision making binding the measures proposed by the Hellenic Republic, which included in particular the granting of exploitation rights to new Greek lignite deposits of Drama, Ellassona, Vevi and Vegora through tender procedures to entities other than PPC. These tender procedures were to be launched and implemented at the latest within six months from the notification of the decision, while allocation rights were to be granted to the successful bidders at the latest within 12 months of the notification of the decision.

[204] In January 2011, the EC invited comments on new proposals by the Greek Government to comply with the 2008 Greek Lignite decision²¹. Greece has asked for a review of the EC's earlier decision due to a new energy policy. Greece plans to continue with existing lignite mines and not to open up new mines. As an alternative measure to the previously promised access to new mines, the Greek Government proposes to give competitors of PPC access to 40% of lignite-fired generation through drawing rights in existing lignite-fired power plants of PPC. Further, participants would be offered participation in future power plants using currently available lignite.

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²¹ EC Press Release IP/11/34, 14 January 2011.