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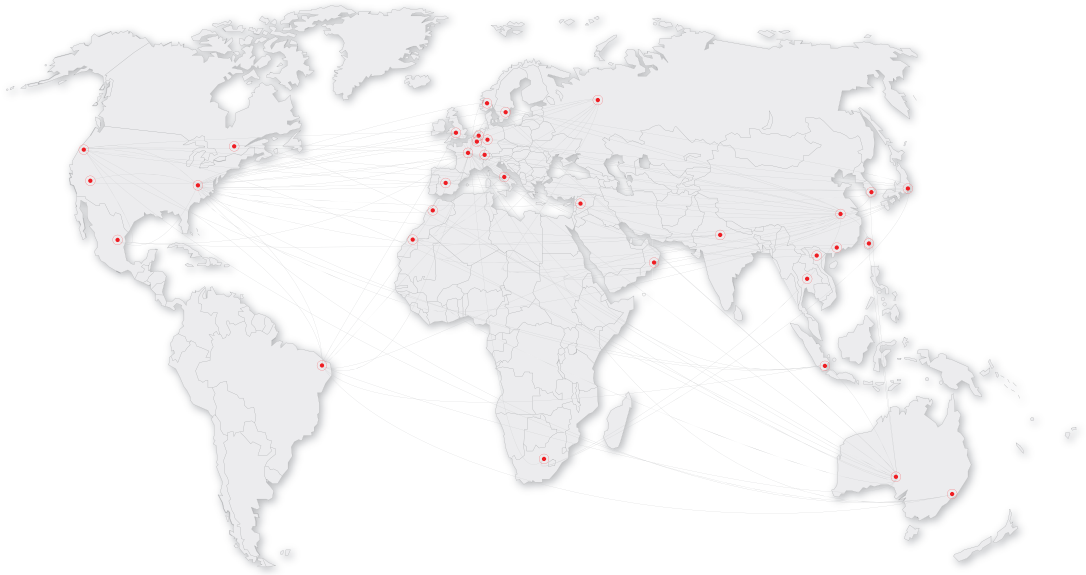

Energy & Dominance

Unilateral conduct in the energy sector: An overview of EU and national case law

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Unilateral conduct in the energy sector: An overview of EU and national case law

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Note from the Editors: although the e-Competitions editors are doing their best to build a comprehensive set of theleading EU and national antitrust cases, the completeness of the database cannot be guaranteed. The presentforeword seeks to provide readers with a view of the existing trends based primarily on cases reported ine-Competitions. Readers are welcome to bring any other relevant cases to the attention of the editors.

Unilateral practices, Abuse of dominance, Essential facility, Excessive prices, Refusal to deal, Tying, Access to facilities, Remedies (antitrust), Barriers to entry,Geographicmarket,Selectiveprice-cutting,Foreword,Marketdefinition, Market power,Energy

Roberto Grasso, John Ratliff, e-Competitions | N° 52021, www.concurrences.com

(1). This chapter provides an overview of the practice of the European Commission ("EC") and European national competition authorities ("NCAs") as regards unilateral conduct in the energy sector [1]. It is based mainly on cases reported in e-Competitions (abbreviated here to "e-C"). There are more than 115 cases covered, including national court judgments and investigations, which were started, settled or did not result in a decision.

(2). The approach taken here is to look at the way that the NCAs and national courts have been applying Article ("Art.") 102 of the Treaty on the Functioning of the European Union ("TFEU") [2], or its national equivalents since Regulation 1/2003 [3], alongside the EC's recent enforcement. To this end, we have organised the material in 17 sections.

(3). The 2007 EU Energy Sector Inquiry [4] ("the EU SI") has prompted much of the EC's enforcement of Art. 102 TFEU in the energy sector. Notably, the EC has adopted eleven decisions since, including significant settlements pursuant to Art. 9 of Regulation 1/2003 [5].

(4). Most of these cases concerned traditional foreclosure issues in relation to infrastructure capacity, access to the infrastructure, capacity hoarding and withholding of generation capacity. Several others dealt with new types of abuse, such as **strategic underinvestment** and **market manipulation**. Several have also involved significant remedies (e.g. divestments).

(5). In 2014, for the first time since the EC SI, the EC did not initiate any new investigation into possible abuses of dominant position in the energy sector. However, energy markets remain a high priority on the agenda of the new Juncker Commission, which recently stressed how energy markets face significant challenges such as incomplete market integration, high retail prices, decarbonisation and security of supply [6].

(6). On the enforcement side, significant steps also have been taken in important investigations, such as: (i) the issue of a Statement of Objections by the EC to **Bulgarian Energy Holding** concerning **access to key gas infrastructures** in Bulgaria [7]; (ii) the market testing of commitments by the same group related to the separate **territorial restrictions** case [8] and (iii) the conclusion of the investigation into OPCOM's discriminatory practices on the day-ahead and intra-day markets in Romania [9]. The EC also appears to be continuing its investigation into **oil and biofuels trading** [10] and has carried out dawn raids concerning **ethanol** in April 2015 [11]. The EC has also issued a Statement of Objections against **Gazprom** [12].

(7). On the other hand, a recent controversial proposal to create a for gas appears to have been abandoned amid trade and competition concerns, as stressed by Commission Vice-President for Energy Union Maroš Šefčovič[13].

(8). With regard to enforcement at national level, in general, several NCAs appear to be addressing 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.

(9). Other national decisions address different concerns. Notably, there are many cases on **exploitative** abuses, such as excessive pricing; or **tying obligations** related to supply or payment. There are also 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).

(10). It is also interesting to see that **some national cases start with national energy regulator ("NER") referrals to the NCA** and that often a NCA also consults a NER on the appropriateness of a proposed commitment. On the other hand, there are also cases (e.g. in Italy and Slovakia) disputing whether competition authorities can intervene, if there is a sector specific energy regulation (an issue addressed so far at EU level in the telecoms sector, with rulings that, in the circumstances concerned, the EC could intervene, even if there had been earlier ex ante telecoms regulator decisions on similar issues) [14].

(11). In the last year, the most notable cases appear to be:

- **the Belgian Antitrust Authority's investigation into Electrabel's** abuse consisting in the withholding of capacity and use of a "margin scale" mechanism which included an "excessive margin" of €60 per megawatt hour applied to the excess capacity sold to the Belpex day-ahead market exchange;

- **the commitments by MOL** Hungarian Oil and Gas Company to the Hungarian Competition Authority to end an alleged pricing abuse on the market for wholesale gasoil (diesel) in Hungary, **with a €500,000 fine for lack of cooperation**; and

- the **French Competition Authority's issue of interim measures requiring GDF Suez to disclose certain customer data** considered necessary for effective competition by third parties.

(12). There is also a **full investigation into energy supply in the UK** by the UK Competition and Markets Authority ("CMA"), after a referral by Ofgem [15].

(13). We now plan to review the recent cases based on the following topics. Some issues will come up under more than one topic heading, as cases are described.

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1. Abuse of strategic underinvestment

(14). The EC has concluded two investigations with commitments related, amongst other things, to alleged **strategic underinvestment**: 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.

(15). 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*" [16].

(16). It could be argued that this just followed from earlier essential facility cases, such as that involving access to the ramp at **Frankfurt Airport** [17]. However, the EC's position was controversial, especially if it was meant to infer a wide duty.

(17). 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

(18). [18] 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.

(a) ENI (2006) (Italy)

(19). 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, the Italian Competition Authority ("ICA") investigated **ENI's decision, as incumbent gas supplier in Italy,** not to pursue its planned investment in pipeline capacity [18].

(20). 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 TTPC/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.

(21). 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 million [19].

(b) GDF Suez (2009) (EC)

(22). In 2009, **GDF Suez** ("GDF"), the French natural gas and electricity supplier, 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** [20]. 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.

(c) ENI (2010) (EC)

(23). ENI was suspected of abuse of strategic underinvestment again, in 2010, this time at the EU level. **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, amongst other things, by **strategically limiting investments** in its international transmission pipeline system, despite short and long-term demand from third-party shippers.

(24). 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.

(25). 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) [21].

2. Commitment to invest in new infrastructure

(a) Svenska Kraftnät (2010) (EC)

(26). 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 [22].

(27). There, the EC closed its investigation alleging that this entity, in fact a government 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.

(28). 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.

(29). 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.

(30). 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.

(31). 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).

3. Access to infrastructure

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

(a) Mainova (2005) (Germany)

(33). 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 [23].

(34). 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.

(35). 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 [24]; 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**) both with debate as regards competition and sectoral regulation jurisdiction [25].

(b) Demasz / DHE (2008) (Hungary)

(36). 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 [26].

(37). 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.

(38). 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.

(39). For another case on **wind farm access** see the note on the **ENEA Operator case (2008) (Poland)** [27].

(c) DESFA (2012) (Greece)

(40). In December 2012, the Greek Competition Authority ("GCA") imposed a fine of €4.2 million on the **Hellenic Gas Transmission System Operator S.A**. ("DESFA") for its refusal to grant Aluminium S.A. ("Aluminium") access to its natural gas transmission network and ordered DESFA not to engage in similar conduct in future [28]

(41). The investigation followed a 2009 complaint from the leading Greek aluminium manufacturer.

Aluminium, also active in the market of electricity production using natural gas, against DESFA and its parent company **Public Gas Corporation S.A. ("DEPA")**, before the national Regulatory Authority for Energy ("RAE"). It appears that Aluminium sought access in order to be supplied with LNG from an alternative supplier.

(42). Following the complaint, RAE imposed a fine of €250,000 on DESFA for breach of the regulatory framework for access to the national natural gas network. In addition, it referred the complaint to the GCA. It may be recalled that the latter dealt with the investigation against DEPA in a separate proceeding, which ended with a commitment decision [29].

(43). The background to the case is that DESFA was established in 2007 and assigned to the management of the National Natural Gas System ("NNGS"), previously part of the DEPA group. The NNGS transmits natural gas from three entry stations and 35 exit stations. Aluminium was a DEPA customer. As a user of the NNGS, however, Aluminium is also DEPA's potential competitor in the market for the supply of natural gas, as it has the right to resell gas.

(44). The NCA found that DESFA held a monopoly in the primary market for access to the NNGS. It also established that, by delaying the release of transmission capacity, DESFA had abused its dominant position by restricting a competitor's access to an essential facility. It appears that Aluminium was denied access to the pipeline entry point dedicated to its facilities and to the LNG terminal in Revithousa, the sole entry point of LNG into the Greek transmission grid.

(45). DESFA put forward two main arguments: (i) its refusal was justified by the lack of a regulatory framework; and (ii) the transmission capacity requested by Aluminium was already contractually allocated to DEPA.

(46). The NCA rejected both arguments. It found that the lack of a regulatory framework in this case did not justify the breach of competition law, because DESFA could have addressed Aluminium's request to access the network (i.e. this was in its discretion). Instead, DESFA simply denied the access. Regarding the second argument, the NCA stressed the fundamental right of third parties to access on a non-discriminatory basis and the obligation of an essential facility operator to take all measures to ensure third party access, whether factual or contractual.

(d) GDF Suez (2014) (France)

(47). In September 2014, the **French Autorité de la Concurrence** ("FCA") issued interim measures ordering GDF Suez to grant its competitors access to certain customers' data contained in the historic file that GDF Suez held as the incumbent [30]. Specifically, in line with the recommendations of the French Energy Regulator ("CRE"), GDF Suez was forced to disclose only the data that is strictly necessary to ensure effective competition among suppliers, i.e. the customer name and address and the technical characteristics of its consumption [31].

(48). The background of the interim measures is the slow development of new entrants in the gas market in France. The French gas supply market has been fully open to competition since July 2007. Consumers could choose between offers at regulated tariffs, which only GDF Suez could offer under the public service regime, and "market offers"; i.e. offers at a price fixed by the operators (including GDF Suez and EDF) in the open competitive market. Despite this, after seven years of full liberalization of the gas supply market, the new entrants' market share in the non-regulated market in 2013 was allegedly only 5% for individual customers and 13% for industrial or commercial customers.

(49). The FCA investigation was triggered by a complaint filed by Direct Energie (an emerging supplier on the non-regulated market) in April 2014. The complaint argued that GDF Suez might have abused its dominant position by using the database of customers on the regulated market to offer deals on gas and electricity on the non-regulated markets. The complaint also argued that GDF Suez had disparaged its rivals and deliberately caused confusion in customers' mind by linking its gas and electricity offers at regulated and non-regulated tariffs, thus preventing them from making rational choices.

(50). The FCA considered that the database and the marketing resources which come from GDF's status of former monopolist constitute necessary tools for new entrants to develop their business. GDF Suez might have abused its dominant position in the gas market by using the infrastructure dedicated to regulated tariffs in order to market its gas and electricity services on the competitive market. This conduct might have caused confusion in the customers' mind, preventing them from making rational choices. Furthermore, the FCA concluded that GDF's use of the regulated tariff database to market its competitive offers was also incompatible with competition on the merits, as it was not the product of GDF's innovation, but merely the result of its former monopolist status [32].

(51). The FCA stressed the importance of an immediate intervention in this area because, following the entry into force of the Consumer Law of 17 March 2014, small industrial and professional customers (with an annual consumption higher than 30 MWh) are not subject to regulated gas tariffs and will be forced to choose a "market offer" at the latest by the end of 2015 [33].

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

(52). 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)

(53). 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 [34]. This meant that competitors could not acquire transport capacities to enter the market.

(54). 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.

(55). 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.

(56). 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)

(57). The EC took a similar position in the **E.ON** case in May 2010 [35]. Controversially, the EC noted that even if E.ON, a German undertaking active in the production, transportation, distribution and supply of energy had used its booked capacities for its own supply business, this could not, in itself, exclude an abuse under Art. 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.

(58). 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/supply issues

(59). 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 / GNL Italia (2007) (Italy)

(60). In March 2007, the Italian Competition Authority closed proceedings by accepting commitments from **ENI,** the Italian incumbent gas supplier, for the alleged abusive conduct of its subsidiary **(GNL Italia**) on the market for liquefied natural gas **(LNG**) [36].

(61). 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 ("capacity hoarding"). 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.

(62). 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 [37].

(63). On access to re-gasification capacity, see also the **Enagas / Gas Natural** case in Spain [38].

(b) RWE (2009) (EC)

(64). The EC's decision in the **RWE** case in March 2009 involved the separation of transport networks from the supply business [39]. 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.

(65). The EC took the preliminary view that RWE, a German-based company primarily active in the production and supply of electricity and gas, and its subsidiaries may have abused its dominant position on its gas transmission network by way of refusal to supply transportation capacity.

(66). 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 im-

portant 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.

(67). 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.

(68). This was a controversial settlement because unbundling was an issue raised in the **Third EU Energy Liberalisation Package.**

(c) ENI (2010) (EC)

(69). In the **ENI** [40] case, the EC alleged that the Italian incumbent had "**hoarded capacity**", refusing to grant access to capacity available on the transport network, and offered capacity in a less useful manner ("**capacity degradation**"), despite significant short and long-term demand from third party shippers.

(70). 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".

(71). 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.

(72). 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.

(73). 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.

(74). 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.

(75). [75] 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.

(d) ENI (2012) (Italy)

(76). ENI was faced with an investigation on transportation capacity again in September 2012. This time, the Italian Competition Authority ("ICA") accepted "capacity release" commitments by ENI, terminating its investigation for abuse of dominance against the Italian incumbent. Following a market test on a first set of commitments, ENI offered to auction transportation capacity for five bcm of gas every year for the next five years regardless of the market conditions [41].

(77). The ICA's investigation was triggered by a complaint against ENI's decision in April 2011 not to auction secondary transportation capacity on the TENP/Transitgas and TAG pipelines. The point was that, even if ENI had transferred **control** over these pipelines (and TENP) pursuant to its commitments to the European Commission, ENI still had long-term contracts for the use of the vast majority of their capacity, between 85% and 95% of the total capacity.

(78). According to the ICA, ENI's decision not to auction off secondary capacity was at odds with the substantial under-utilisation of these two international pipelines, as well as significant demand from competitors and industrial users.

(79). The ICA also stated that ENI decided not to proceed with the auction when industrial users in Italy could have benefited from the positive price differential between the Northern European hubs and Italy (the prevailing price on the European hubs was around €5/MWh, while the cost of transporting this gas to Italy was around €3/MWh). Such industrial customers also had the ability to store large quantities of gas independently [42].

(e) ENI / Snam (2012) (Italy)

(80). In September 2012, the Italian Administrative Court of First Instance ("**TAR Lazio**") annulled a 1999 decision [43] by which the Italian Competition Authority ("ICA") had imposed a €1.8 million fine on Snam Rete Gas ("Snam"), a subsidiary of Italian energy company ENI at the time, for an abuse of dominance on the market for gas transportation [44].

(81). The ICA had found that Snam, which at the time owned and managed the gas transportation infrastructure in Italy, had engaged in two types of abuse:

- An **exploitative abuse** of refusing to re-negotiate the existing transport tariff agreement with the **Associazione mineraria italiana per l'industria mineraria e petro-**

lifera ("AMI", the Italian Association for Minerals and Petroleum Products) and imposing a destination clause on the natural gas transported on behalf of Edison Gas to two new exit points.

● An **exclusionary abuse** of prohibiting AMI to allow private energy producers to access the gas infrastructure for purposes different than those foreseen by the legislation in force at the time (i.e. self-consumption and sale to electricity producers).

(82). Already in 1999, TAR Lazio had quashed the ICA's decision in an action for a preliminary injunction brought by Snam.

(83). With the September 2012 judgment on the merits, the Court found that the ICA had unlawfully applied the general provisions of **competition** law, rather than the specific **regulatory** provisions in force at the time. In this way, the ICA had unlawfully exercised functions attributed to the energy regulator. The regulatory provisions in force in 1999, which governed access to Snam's gas transportation infrastructure, allowed it to limit other companies' access to its infrastructure. Thus the Court concluded that the ICA wrongly held that Snam's gas transportation infrastructure was subject to "essential facilities" rules.

(f) DEPA (2012) (Greece)

(84). In November 2012, the Greek Competition Authority ("GCA") accepted commitments by DEPA, the State-owned gas incumbent, terminating its investigation into DEPA's gas supply terms and practices [45].

(85). The investigation was prompted by a complaint from Aluminium S.A., a metal producer, addressed to the Regulatory Authority for Energy ("RAE"), which referred the case to the GCA. Preliminary evidence collected during the investigation showed that DEPA concluded exclusive contracts, limited access to gas transmission and supply services and failed to ensure free access to the National Natural Gas System ("NNGS").

(86). Faced with these allegations, DEPA addressed the competition concerns by offering commitments. According to the GCA's decision, DEPA committed to:

● Offer to its customers a specific type of natural gas sale contract, which will not include the natural gas transmission service (separation of supply and transmission).

● As regards the price for purchasing natural gas, there will be no difference between separate gas supply contracts and contracts with gas supply combined with services and no incentives to sign combined contracts will be offered.

● Reduce its customers' dependency on DEPA by: (i) informing its customers about an opportunity to freely adjust the annual contract quantity for 2013 and to re-adjust their required annual contract quantity every year; (ii) not concluding new contracts with a duration of more than two years with customers covering more than 75% of their annual needs from DEPA; and (iii) offering every customer the option to sign a one-year contract for every new contract.

● Apply a natural gas disposal scheme through e-auctions and offer for sale a specific quantity of natural gas on an annual basis.

● Submit to the RAE for approval the standard framework agreement for the sale and purchase of natural gas from the LNG facility of Revithousa.

● Assign reserved transmission capacity to its customers at the exit point of their facilities for no monetary or other consideration.

● Assign unused reserved transmission capacity for delivery of natural gas at the entry points of the NNGS to third parties.

● Prefer actual or potential competitors' or customers' requests for any future additional capacity at the entry points of the NNGS; and, with regard to the capacity that may result from upgrading of the capacities at particular entry points, not to reserve it unless the capacity reserved by DEPA per point becomes less or equal to 55% of the entire capacity of the respective entry point [46].

(g) DEPA (2014) (Greece)

(87). Following consultation with DEPA customers and with the RAE, the GCA accepted DEPA's proposal to partly revise its commitments adopted in 2012. The amendments relate to the supply of natural gas through e-auctions, and mainly aim at increasing participation and optimizing the sources of supply of natural gas [47].

(88). Under the revised commitments, DEPA undertakes:

● To make natural gas available through auctions **on an annual basis**. Annual auctions will be realised at the latest by 15th October of each year. In these auctions, 50% of the total quantity that is to be made available through auctions for the upcoming calendar year will be made available, based on estimations for the annual consumption of the previous year. The GCA will investigate the possibility of increasing the amount to be made available to 60%.

● To make available through quarterly auctions the quantities of natural gas that are not disposed through the annual auctions together with the remaining quantity of the total auctionable quantity per year.

● Generally to divide the quantity to be auctioned annually or quarterly into 50.000 shares instead of 10.000.

● To make all quantities disposed through annual or quarterly auctions available solely at the Virtual Trading Point of the Natural Gas Single Market by 1 January 2015.

(89). The GCA might also examine the possibilities of making short term products available through auctions, i.e. on a monthly and/or daily basis [48].

(h) CEZ (2012) (EC)

(90). In June 2012, the EC expressed concerns that, by pre-emptively booking capacity in the electricity transmission network, ČEZ ("CEZ"), the electricity producer incumbent, might have abused its dominant position on the market for generation and wholesale supply of electricity in the Czech Republic. According to the EC, such a conduct might have resulted in competitors being prevented from making new investments in electricity generation, thus preventing their entry into the market.

(91). In order to address those concerns, while denying any abuse of its dominant position, CEZ submitted commitments pursuant to Art. 9 of Regulation No 1/2003. Notably, CEZ offered to divest one of its generation assets in the Czech Republic to a suitable purchaser who would be approved by the EC. In July 2012, the EC invited interested third parties to comment on the proposed commitments [49].

(92). In April 2013 the EC took a decision accepting the commitments offered by CEZ and made them binding [50]. Notably, CEZ's sale of one of its generation assets is to be carried out under the supervision of a monitoring trustee, who will verify that the transaction will not raise new competition concerns.

(i) PGNiG (2012) (Poland)

(93). In July 2012, the Polish Competition Authority ("PCA") imposed a fine equivalent to €14.4 million on PGNiG, Poland's largest domestic gas producer and supplier with a market share of some 98%. PGNiG was found to have refused to conclude a wholesale gas supply contract with NowyGaz, a new gas market entrant and the first undertaking interested in purchasing gas from PGNiG.

(94). During the investigation, the PCA cooperated with the Energy Regulatory Office of Poland in order to assess whether the reasons for that refusal were objectively justified and concluded they were not. The PCA noted also that as a result of the refusal to supply NowyGaz, PGNiG restricted or at least delayed, the development of competition on the retail gas supply market by preventing NowyGaz from providing services to final customers [51].

(j) Bulgarian Energy Holding (2012, 2013, 2014, 2015) (EC)

(95). In November 2012 and July 2013, the EC opened two separate proceedings for alleged infringement of Art. 102 TFEU by **Bulgarian Energy Holding** ("BEH") in the first case; and by BEH together with its gas supply subsidiary **Bulgargaz** and its gas infrastructure subsidiary **Bulgartransgaz**, in the second case.

(96). The proceedings concern different conduct and relevant markets.

(97). In the **November 2012 proceedings,** the EC is investigating whether BEH has been abusing its dominant position in the non-regulated **wholesale electricity** market in Bulgaria. [52] The EC is concerned that BEH might be foreclosing competition on wholesale electricity markets in Bulgaria and neighbouring Member States **through territorial restrictions**. In particular, the EC is investigating certain provisions in the electricity supply agreements entered into by BEH's subsidiaries. The EC indicates that these provisions may restrict their trading partners' freedom to deliver electricity purchased from BEH by prescribing where the electricity has to be delivered. According to these provisions, for example, the electricity supplied by BEH may be resold only within Bulgaria and not exported.

(98). In August 2014 the EC sent a Statement of Objections to BEH, noting that the abusive clauses imposed by BEH also contained control and sanctioning mechanisms, allowing BEH to monitor and punish customers who do not comply with these territorial restrictions [53].

(99). In the **July 2013 proceedings**, the EC expressed concerns that BEH and its subsidiaries might be hindering competitors from **accessing key natural gas infrastructures** in Bulgaria [54]. In particular, the EC is concerned that these companies may be preventing potential competitors from accessing the Bulgarian gas transmission network and gas storage facilities by explicitly or tacitly refusing or delaying access to third parties. Moreover, the EC suspects that these companies may be preventing competitors from accessing the main gas import pipeline by reserving capacity that isconsistently not used. In March 2015, the EC sent a Statement of Objections to BEH [55].

(100). [100] In June 2015, the EC invited interested parties to comment on the commitments which BEH had offered to address the EC concerns. These include the setting up of an independent power exchange in Bulgaria and an obligation to ensure the liquidity of the day-ahead market on that exchange [56].

6. Long-term / exclusive supply contracts

(101). 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 [57]. Both ended with commitments. There have also been several cases at national level.

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

(102). In November 2003, the Italian Competition Authority ("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 [58].

(103). 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.

(104). 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 [59].

(b) DONG (2005) (Denmark)

(105). In December 2005, the **Danish Competition Council** ("DCA") scrutinised a supply agreement of natural gas provider **DONG Naturgas ("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 [60].

(106). 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.

(107). 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.

(c) Distrigas (2007) (EC)

(108). In its 2007 decision, the EC expressed concerns under what is now Art. 102 TFEU that long-term gas supply contracts of Distrigas, a dominant supplier of gas to large customers 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 market [61].

(109). 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.

(110). 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.

(d) EDF / KalibraXE (2007) (France)

(111). In April 2007, the **French Competition Authority** ("**the Conseil de la Concurrence"; "the Conseil"**) closely scrutinized EDF's, the incumbent operator in electricity markets in France, 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 [62].

(112). 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.

(113). 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.

(114). 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.

(e) EDF (2010) (EC)

(115). EDF was investigated again in 2010, this time by the EC [63].

(116). 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 [64]. 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.

(117). 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.

(118). 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.

(119). 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.

(f) PGNiG (2012) (Poland)

(120). In April 2012, the Polish Competition Authority ("PCA") accepted commitments from State-owned incumbent PGNiG, which was accused of drawing up contracts which prevented its industrial customers from switching to another supplier.

(121). PGNiG was found to hold 98% market share in the retail market for natural gas in Poland. The PCA found that the company imposed restrictions on its most prominent business clients. Notably, PGNiG did not terminate contracts that ended after 30 September until the following year, so that there was a 15 month notice period. According to the PCA, such a long notice period might have pressured business customers to refrain from terminating contracts and choosing services rendered by other gas suppliers.

(122). PGNiG voluntarily committed to shorten the notice period until the end of the month in which a withdrawal notice was received. The company also undertook to notify all customers of the change, to prepare new contracts and to report to the PCA on the implementation of these commitments [65].

(g) Geoplin (2014) (Slovenia)

(123). In January 2015, the Slovenian Competition Protection Agency ("SCPA") concluded that Geoplin, the Slovenian incumbent gas importer and supplier, had abused its dominant position on the market for the supply of gas to large industrial customers [66].

(124). The relevant conduct consisted in the inclusion of illegal clauses in the long-term contracts with industrial customers connected to the transmission network. These clauses obliged industrial customers to purchase contracted volumes of gas for the entire contractual period and to take the delivery of minimum volumes (take-or-pay). They also contained penalties and other fees applicable in case the contracted quantities were not reached. Additional contractual provisions prevented the customers from reselling any excess gas.

(125). In the SCPA's opinion, these clauses artificially increased natural gas prices and hindered competition on the relevant market.

(126). Geoplin committed for a period of five years not to conclude contracts with a duration longer than 3 years, not to prevent customers from reselling their excess gas, and to progressively reduce take-or-pay quantities in existing contracts to 55% of the original volume by 2017.

7. Alleged withholding of generation capacity

(a) E.ON (2008) (EC)

(127). In November 2008, the EC brought two cases to an end involving E.ON, accepting commitments offered [67].

(128). 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.

(129). The idea was 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.

(130). 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.

(131). 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. This was a controversial settlement, given the legislative debate on unbundling at the time.

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

(132). In December 2010, the Italian Competition Authority ("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 [68].

(133). 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.

(134). 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.

(135). 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.

(136). In its preliminary assessment, the Italian regulator made explicit reference to the EC investigation into E.ON's market conduct in Germany [69].

(c) Electrabel (2013) (Belgium)

(137). In November 2013, the prosecution body of the Belgian Competition Authority ("BCA") submitted to the President of the BCA a draft decision confirming the report from the College of Competition Prosecutors of 7 February 2013 [70].

(138). It appears that the report alleges that Belgium's largest energy producer Electrabel had abused its dominant position by withholding capacity between 2007 and 2010. The report alleges that the abuse had caused an artificial increase of the prices on the market for generation, wholesale and trading of electricity. It is also reported that the BCA alleges an abuse by Electrabel concerning the supply of tertiary reserve, i.e. reserve electricity produced in cases of very high demand.

(139). The investigation was initiated in 2009, following a study of the Belgian Electricity and Gas Regulator, which examined allegedly abnormal price peaks on Belpex (the short term, physical power exchange for the delivery and off-take of electricity on the Belgian hub), [71] and Electrabel's conduct in this context. It was found that during 2007 and the first half of 2008 Electrabel had not used all its available capacity and had made purchase orders with very high bid prices, which contributed to a global price increase on the Belpex exchange.

(140). The case is currently pending before the Competition College, the decision-making body of the BCA, which will decide on the existence of an infringement of competition law, after hearing the defence.

8. Divestments to resolve conflicts of interest

(141). 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 sector [72]. 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.

(142). It may be useful to recap the three cases where this has come up so far:

- In **E.ON (2008) (EC)** [73]. 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)** [74], 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.
- 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.

(143). 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.

(144). 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).

(145). 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

(146). 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) Union Fenosa, Iberdrola & Others (2006, 2008, 2010, 2012) (Spain)

(147). In Spain in recent years there have been a series of interesting decisions and judgments concerning cases brought by the Spanish Competition Authority ("SCA") as regards the so-called " **market for technical restrictions**". There are many interesting notes on the various stages of these cases in e-Competitions. The cases concern **Union Fenosa** [75], **Viesgo Generación** [76]; Iberdrola Castillon [77]; and **Gas Natural** [78].

(148). We summarise generally here and then focus on the recent rulings of the Spanish Supreme Court concerning the cases against **Union Fenosa** in 2010 and **Iberdrola** in 2012.

(149). By way of background, it should be noted that the SCA 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".

(150). 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.

(151). 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 were 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.

(152). The SCA imposed fines of some €901,520 on each company.

(153). 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).
- 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.
- Whether the high daily spot market price could be **objectively justified** in the circumstances.

(154). 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.

(155). The most recent developments in these cases, which we note here, are as follows:

(156). First, 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.

(157). 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.

(158). Second, in **January 2012,** the Spanish Supreme Court **upheld** the judgment of the Appellate Administrative Court in 2009, itself upholding the SCA's decision concerning **Iberdrola**. On further appeal to the Supreme Court, Iberdrola argued, amongst other things, that the Appeal Court had wrongly found continuous infringements, on a regular basis, over certain periods, whereas the SCA had only found specific infringements on certain days. The Supreme Court disagreed, finding that both

descriptions of the infringement were subsumed within the same set of facts. There had been a change in analysis by the Appeal Court, but not such as to infringe Iberdrola's rights of the defence [79].

(b) RWE (2006) (Germany)

(159). In December 2006, the **Bundeskartellamt** ("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 [80]. 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).

(160). 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.

(161). Since then, in August and September 2007, RWE offered commitments to the BKA, which it accepted. The BKA then declared RWE's commitments binding. RWE committed to auction a total capacity of 6.3000 MW generated by its brown coal and hard coal-fired power stations to industrial customers. The price was not to include any opportunity costs, but only to include production costs. The auctions were to be run by a trustee authorised by the BKA. Buyers were to be able to purchase electricity in small lots of 1 MW. [81].

(c) Ekfors (2007) (Sweden)

(162). 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.

(163). 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.

(164). The municipalities then applied to the Swedish Competition Authority ("SwCA") alleging abuse of dominant position. The SwCA rejected the complaint.

(165). 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** [82].

(166). Clearly a controversial and interesting case.

(d) EDF Direct Energie (2007) (France)

(167). In June 2007, the French Competition Authority, the **Conseil de la Concurrence** (the " **Conseil**) 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 [83].

(168). 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.

(169). 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.

(170). 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.

(e) Elsam (2008) (Denmark)

(171). 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 [84]. 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.

(172). 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 commit-

ments not to submit bids higher than the expected prices in neighbouring countries.

(173). 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. (a) **Gas supply procedures (2008) (Germany)**

(174). 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** [85].

(175). 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%.

(176). 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.

(177). See also the notes on recent **German legislation against excessive prices in the energy sector** [86].

(g) RWE (2009) (EC)

(178). 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** [87].

(179). 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.

(180). 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.

(181). 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.

(182). 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.

(h) Productschap Tuinbouw / GasTerra (2009) (The Netherlands)

(183). 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 GasTerra. [88]. They also claimed that GasTerra discriminated with different prices between large and small scale users and between Dutch and non-Dutch users.

(184). Interestingly, the NMa proceeded by commissioning a study by economists to benchmark the wholesale prices of GasTerra. Considering the results, the NMa then noted that GasTerra'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 GasTerra's prices were excessive.

(185). The NMa also did not consider that price discrimination had been established, given the different natures of the ordering and prices concerned [89].

(i) District heating suppliers (2013) (Germany)

(186). In March 2013, the **Bundeskartellamt** ("BKA") opened an investigation into seven district heating suppliers, [90] alleging that these had engaged in excessive pricing practices [91]. The conduct allegedly affected approximately 30 different areas throughout nearly all German federal states.

(187). The proceedings followed a 2012 sector inquiry, which compared data and revenues of district heating suppliers from 2007 and 2008. The sector inquiry established that the average revenues clearly exceeded those of the respective comparison group.

(188). It is reported that the BKA is now collecting new data for 2010 to 2012.

(189). The BKA notes that the nature of the facts and the sector regulations make this case highly complex. For example, tariffs of the same provider vary between different areas. Hence, concerns about excessively high revenues do not relate to all supply areas. Further, because generation, network operation and distribution are normally integrated in the same district supplier, different structural conditions may justify the differences in revenues. Another important issue to be assessed is whether the economic efficiency of heat generation plants has suffered due to the fall in electricity prices at the exchange and the increasing subsidies for renewable energies.

(j) Endesa Distribution (2014) (Spain)

(190). In July 2014, the Spanish Competition and Markets Authority fined Endesa Distribution €1.2 million for charging excessive prices for connecting new properties to the national grid in violation of Art. 2 of the national competition law, the national equivalent of Art. 102 TFEU [92]. The fine included a 10% increase for recidivism, given that Endesa was sanctioned for the same conduct in 2012.

(191). The investigation was triggered by several complaints, focused especially on Endesa's conduct in the Balearic Islands and Andalusia. The anti-competitive conduct occurred between 2009 and 2012. During this time, Endesa charged companies excessive prices to connect properties to the national grid.

(k) Electrabel (2014) (Belgium)

(192). In July 2014, the Competition College of the Belgian Competition Authority ("BCA") adopted a decision imposing a €2 million fine on Electrabel for abuse of dominant position contrary to Art. 3 of the Belgian Competition Act and Art. 102 TFEU on the market for the generation, wholesale and trading of electricity in Belgium from 2007 until early 2010 [93].

(193). The BCA investigated two different types of conduct, namely Electrabel's withholding of capacity with the aim to keep some capacity out of the market and increase prices; and Electrabel's use of a "margin scale" mechanism which included an "excessive margin" of €60 per megawatt hour applied to the excess capacity sold to the Belpex day-ahead market exchange.

(194). The College did not share the investigation service's finding of abuse in connection with Electrabel's withholding of back-up capacity. Referring to the EC's position that it would only intervene in exploitative abuse cases where "*there is clear and uncontroversial evidence that a very substantial share of demand is being deprived of a service that it manifestly needs*" [94], the College noted that Electrabel's additional reserve capacity with the alleged aim of fulfilling its balancing requirements did not constitute a manifest abuse.

(195). In contrast, the College found that Electrabel's "margin scale" in selling electricity on the Belpex day-ahead market exchange constituted excessive pricing. Specifically, the College noted that the conduct of selling at a price above marginal cost plus a risk premium is not in itself abusive. However, the margins Electrabel charged on the basis of its margin scale were "excessively disproportionate" when compared to the marginal cost of production, and unfair within the meaning of Art. 3(1) of the Belgian Competition Act and Art. 102(a) TFEU.

(196). The College held that there was no need to assess the actual impact of Electrabel's margin scale, or whether it was part of a strategy aimed at increasing electricity prices. The College also pointed out that Electrabel significantly lowered its margins, without claiming that they were insufficient, as from July 2010, following increased intra-day cross-border sales possibilities. This suggested that it was because of a lack of competition that Electrabel was able to charge its excessively high margins from 2007 until early 2010.

10. Discrimination and market partitioning

(197). There were a large number of national decisions with regard to discrimination and market partitioning, some involving high fines.

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

(198). In December 2005, the Lithuanian Competition Authority ("LCA") imposed a fine equivalent to some €9.27 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. [95].

(199). 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).
- Territorial discrimination, as Lithuanian customers had been charged higher prices than those in Latvia and Estonia.

(200). The investigation concerned the period 2002-2004.

(201). 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 [96].

(202). 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 [97].

(203). 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.

(204). 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.

(205). 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.

(206). 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**) [98]

(b) RWE Transgas (2006-2007, 2015) (Czech Republic)

(207). 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 [99].

(208). 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.
- 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.

(209). This was in relation to a period between November 2004 and August 2006.

(210). In March 2007, the appellate body of the CCA (the Chairman) confirmed the abuse of dominant position, but reduced the fine to some €8.4 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) [100].

(211). 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 legislation to one infringement. This was found to amount to an infringement of the **ne bis in idem** (unlawful double jeopardy) principle [101].

(212). The CCA then appealed the Regional Court's decision to the Supreme Administrative Court, which overruled it 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 [102].

(213). In parallel with these proceedings, the CCA had appealed the Regional Court's ruling on the merits of the alleged abuse. In 2014, the Czech Supreme Court ruled on this appeal, overturning the CCA's infringement decision and sending the case back to the CCA. The Supreme Court found that the CCA had not provided sufficient evidence showing that the refusal to supply natural gas outside the balancing zones of individual regional distributors had created artificial barriers that limited a competitor's ability to enter the market.

(214). In December 2014, the CCA reviewed the case and concluded that RWE had prohibited providers of competing regional distribution networks from entering into agreements for the sale or purchase of natural gas between 2004 and 2006. As a consequence, the CCA issued a €1.4 million fine against RWE.

(215). In September 2015, it is reported that the Chairman of the CCA upheld the CCA's December decision [103]. RWE still has the right to appeal to the Regional Court in Brno and the Supreme Administrative Court, with a possible further appeal to the Constitutional Court.

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

(216). 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 Italian Competition Authority ("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.

(217). 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 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 [104].

(218). 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).

(219). 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).

(220). 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)

(221). 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 [105].

(222). 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.

(223). 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.

(e) Gazprom (2012) (EC)

(224). In September 2012, the EC announced the initiation of an investigation against Gazprom, the Russian gas producer and supplier, in Central and Eastern Europe, in particular Bulgaria, Estonia, Latvia, Lithuania, Slovakia, Poland, Hungary and the Czech Republic.

(225). According to the EC, Gazprom might have: (i) imposed unfair prices on its customers by linking the price of gas to oil prices; (ii) divided gas markets by hindering the free flow of gas across Member States; and (iii) prevented diversification of supply of gas [106].

(226). It is reported that in December 2013, Gazprom submitted proposed Art. 9 remedies to the EC, with the aim of settling the investigation [107]. The details are not known.

(f) Gazprom (2015) (EC)

(227). In April 2015, the EC sent a Statement of Objections to Gazprom alleging that certain company's business practices in Central and Eastern European gas markets amount to an abuse of dominant position contrary to Art. 102 TFEU [108].

(228). It appears that the EC's preliminary view is that Gazprom is breaking EU antitrust rules by pursuing an overall strategy to partition Central and Eastern European gas markets. Gazprom has allegedly imposed export bans and so-called "destination clauses", i.e. clauses requiring the purchased gas to be used in a specific territory. Gazprom would have also imposed other restrictions that prevented cross-border sales of gas, e.g. by forcing wholesalers to obtain Gazprom's consent to export gas and, in certain circumstances, by refusing to change the delivery point.

(229). It is reported that these restrictions might have resulted in higher gas prices in five Member States (namely Poland, Latvia, Lithuania, Estonia, and Bulgaria), and allowed Gazprom to charge prices to wholesalers that were significantly higher compared to Gazprom's costs or to benchmark prices. These unfair prices would partly be the result of the price methodology adopted by Gazprom of indexing gas prices to a basket of oil product prices, which would have resulted in an advantage for Gazprom.

(230). Moreover, Gazprom may have abused its dominant market position by making the supply of gas to Bulgaria and Poland conditional on obtaining unrelated commitments from wholesalers concerning gas transport infrastructure. For example, Gazprom would have made certain supplies of gas dependent on the suppliers' investing in its own pipeline projects.

(231). In September 2015, it is also reported that Gazprom submitted its reply to the Commission's Statement of Objections and draft commitments.

(g) PROGAZ (2012) (Romania)

(232). In September 2012, the Romanian Competition Council ("RCA") made legally binding certain commitments by PROGAZ P&D ("PROGAZ"). During the investigation, which was initiated in June 2010, the RCA expressed concerns that PROGAZ, a dominant natural gas distributor in certain local areas, abused its dominant position on the local market for natural gas installations planning and execution between 2006 and 2011.

(233). PROGAZ held exclusive rights to approve natural gas installation plans and to provide natural gas installations. However, technical services related to the installa-

tion itself could be carried out by authorized companies and not only by PROGAZ. According to the RCA, PROGAZ charged higher prices (between 665% - 2 267%) for approval services to which it held exclusive rights when installations were carried out by other companies different from PROGAZ.

(234). PROGAZ committed to: (i) lower prices for services to which held a monopoly; (ii) eliminate discriminatory prices; (iii) modify the methodology for setting prices, which are now cost-based, including a reasonable profit; (iv) implement a mechanism that would adjust prices annually if various parameters such as taxes, raw materials, wages etc. change; (v) make its prices concerned public available on its website [109].

(h) OPCOM (2013) (EC)

(235). In May 2013, the EC issued a Statement of Objections against OPCOM S.A. ("OPCOM") and its parent company CNTEE Transelectrica S.A. According to the EC's Press Release, OPCOM has allegedly infringed Art. 102 TFEU by requiring the participants in the electricity spot market to have a Romanian VAT registration and consequently to establish business premises in and operate from, Romania [110]. The EC's preliminary view is that such practices discriminate against companies on the basis of their nationality/place of establishment [111].

(i) OPCOM (2014) (EC)

(236). In March 2014, the EC imposed a fine of just over €1 million on OPCOM, the Romanian power exchange, and its parent CNTEE Transelectrica S.A., for engaging in discriminatory practices against EU electricity traders wishing to trade on the Day-ahead market and the Intra-day market in Romania, in violation of Art. 102 TFEU [112].

(237). Power exchanges are organized market for trading electricity and environmental certificates, and are considered as "*central to an efficient functioning of electricity markets*" [113]. OPCOM administers the Romanian power exchange on the basis of a license granted by the Energy Regulator in December 2001.

(238). The core issue here was that from June 2008 to September 2013 OPCOM, not the Romanian law, required EU traders on the spot electricity markets to have a Romanian VAT registration, refusing to accept traders that were already registered for VAT in other EU Member States. As a result, EU traders could only enter the Romanian wholesale electricity market through a fixed establishment in Romania, which entailed additional costs and organizational disadvantages for EU traders compared to Romanian traders. Insofar as EU traders established abroad would therefore face increased costs and the practice was not considered to be objectively justified, this was found to be abusive.

(239). This is one of the very few cases of abuse in recent years that has not been closed by way of commitments.

(j) Energo-Pro Networks (2013) (Bulgaria)

(240). In November 2013, the Bulgarian Competition Authority (the "BCA") imposed a fine of approximately €517,400 on Energo-Pro Networks for abusing its dominant position on the market for energy distribution, by managing production facilities connected to the grid in a disproportionate, non-transparent and discriminatory manner [114]. Energo Pro is Bulgaria's largest private producer of electricity from hydro power plants.

(241). The BCA established that Energo-Pro Networks had imposed discriminatory restrictions on companies that relied on its grid system. Along with the fine, the BCA imposed also behavioural remedies, requiring Energo-Pro Networks to treat different electricity producers in a fair manner and to set prices according to transparent and non-discriminatory criteria.

(k) Orlen Lietuva (2013) (Lithuania)

(242). In January 2013, the Supreme Administrative Court of Lithuania issued a final judgment confirming the Lithuanian Competition Council's ("LCC") decision to impose a fine of around €2.3 million on **AB Orlen Lietuva** ("AB Orlen"). The LCC found that latter had engaged in practices aimed at restricting the imports of fuels (petrol and diesel) into Lithuania [115].

(243). It may be recalled that already in 2005 the LCC found that AB Orlen had abused its dominant position. In 2008, however, the Supreme Court overturned the CC's 2005 decision, and required further investigation.

(244). After a new investigation, in 2010, the LCC found that AB Orlen had abused its dominant position in the Lithuanian market for the sale of fuel, by applying discriminatory prices and obligations to purchase fix amounts of fuel. These practices were deemed to tie AB Orlen's customers, thereby restricting the import of petrol and diesel into Lithuania to the detriment of consumers.

(245). The Supreme Court confirmed the arguments of the LCC and notably the qualification of the infringement as severe and repeated. The amount of the fine, however, was decreased by 5% due to the LCC's failure to properly assess the legal regulation in force properly as regards alleged price-fixing for diesel sold for ships.

(l) Slovnaft (2013) (Slovakia)

(246). In April 2013, the Slovak Supreme Court overturned the judgment of the Bratislava Regional Court and upheld the decision by which the Slovak Anti-Monopoly Office ("AMO") found that Slovnaft had abused its dominant position on the wholesale markets for petrol and diesel oil [116].

(247). In 2007, the AMO Council had already confirmed a decision by which the AMO found that Slovnaft had abused its dominant position by applying discounts to the basic wholesale prices of petrol and diesel oil in a way that was not objectively justified, but rather discrimina-

tory against "less attractive" customers (undertakings which normally are unable to readily switch supplier, such as in the agricultural sector).

(248). In 2009, the Bratislava Regional Court annulled the 2007 decision due to ambiguity concerning the classification and duration of the conduct, and the amount of the fine.

(249). In 2010 AMO adopted a new decision, sanctioning Slovnaft for the same conduct and imposing an identical fine. [117]

(250). Again, in March 2012, the Regional Court annulled the AMO decision on the ground that Slovnaft's abuse was novel. The Court found that the AMO could not impose fines for unlawful conduct under the general clause against abuse of dominant position if it was new (Section $8^{(2)}$) of the Slovak Competition Act). Further, the AMO should have classified the conduct under the specificclause prohibiting abusive discriminatory conduct (Section $8^{(2)}$c)).

(251). In April 2013, the Supreme Court concurred with the AMO, dismissed the arguments put forward by the Regional Court **vis-à-vis** the deficiencies of the 2011 Council Decision and upheld the 2011 Council Decision in its entirety. The Court found that if the conduct had the characteristics of an abuse, it had to be prosecuted and sanctioned *ex lege,* even if such conduct was not explicitly listed in the relevant national provision. Furthermore, the Court found that an absolutely precise legal qualification of the conduct is not required in order to establish a breach of competition rules. Finally, the Supreme Court referred to the CJEU's judgment in **Astra Zeneca** to clarify that, as an experienced business undertaking, Slovnaft could have and should have foreseen the illegality of its conduct [118].

(252). It is reported that in July 2013 Slovnaft submitted a constitutional complaint against the Supreme Court's judgment.

(m) EDF Group (2013) (France)

(253). In February 2013, the French **Autorité de la concurrence** ("FCA"), following a complaint from power station operator SUN'R, about certain practices implemented by the **EDF Group** in the solar photovoltaic sector, rejected the application for interim measures against EDF due to the lack of urgency. EDF's allegedly abusive conduct ceased more than two years prior to the complaint. However, in light of information collected (notably through inspections of the EDF subsidiaries ERDF, the grid operator and RTE, the transmission network operator), the FCA has decided to pursue an investigation on the merits of the case [119].

(254). As background, in 2000 the French Government had issued a regulation requiring EDF to purchase solar-generated electricity from its direct competitors at an above-the-market price to boost the sector. Subsequently, in light of the number of operators that entered the market, this price was repeatedly reduced by the French Government. Finally, following a three month moratorium on the purchasing obligation, a considerably lower purchase price was imposed.

(255). SUN'R asked the NCA to assess whether, prior to the moratorium, the EDF Group breached competition rules by giving preferential treatment to its own subsidiaries offering solar power facilities to the detriment of its competitors. In particular, SUN'R alleged that EDF engaged in discriminatory practices in favour of its subsidiaries; and that such practices complicated and delayed the connection of its installations to the grid, thus preventing it from accessing the more favourable tariffs.

(256). In December 2013, the FCA fined EDF €13.5 million for abusing its dominant position, by unfairly promoting its solar-panel subsidiary (see below under Section 15(k)).

11. Failure to provide or late provision of technical information

(257). 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 enhanced [120]. There have been several interesting NCA decisions addressing such lack of transparency and access to information.

(a) SP Manweb (2006) (UK)

(258). 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").

(259). 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 [121].

(b) Distribution Companies (2009/2011/2014) (Spain)

(260). 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.

(261). In April 2009 the Spanish Competition Authority ("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).

(262). 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 [122]].

(263). In 2011, Endesa appealed the SCA's decision to impose a €15.3 million before the Spanish court of appeal, Audiencia Nacional. The court rejected Endesa's appeal. In December 2014, upon further appeal, the Spanish Supreme Court held that Endesa's practices towards Centrica were discriminatory and abusive, and upheld the SCA's decision.

(264). 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.

(c) ENEL / Exergia (2009) (Italy)

(265). In December 2009, the Italian Competition Authority ("ICA") concluded a proceeding accepting commitments from ENEL and two of its subsidiaries, **ENEL Distribuzione** and ENEL **Servizio Elettrico** [123].

(266). 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.

(267). 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.

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

(268). In September and October 2010, the Italian Competition Authority ("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.

(269). 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 basis [124].

(e) Union Fenosa / HidroCantábrico (2011) (Spain)

(270). The Spanish Competition Authority ("SCA") brought two cases, similar to Endesa case explained below, against **Unión Fenosa** and **HidroCantábrico** in September 2011.

(271). In separate administrative proceedings, the companies were fined €375,000 and €1,938,000 respectively for failing to distinguish in offers to customers with estimated budgets between regulated works and non-regulated works, which could be carried out by other service providers. This was found to be confusing, making customers believe that the electricity distributors were the only available providers of the installation services concerned. HidroCantábrico also advertised an appliance maintenance service in its electricity invoices [125].

(f) Italgas (2011) (Italy)

(272). In December 2011, the Italian Competition Authority ("ICA") imposed a €4.67 million fine on Italgas, a major gas service supplier in Italy, for refusing to provide, or delaying the supply to the Municipalities of Todi and Rome of 'essential' information, needed to prepare contract notices for tendering of gas distribution services. It was also needed for competitors to formulate competitive offers and participate in the tenders.

(273). According to the ICA, Italgas sought to preserve its privileged access to the information inherent to its legal monopoly, thus enabling it to exclude potential competitors and to formulate the most competitive offer, exploiting the lack of information of its competitors.

(274). It appears that Italgas' position was, amongst other things, that it was being asked to provide information on its tariffs and costs which was confidential and would allow its competitors to undercut it. Interestingly, this was rejected in the circumstances [126].

(g) Endesa (2012) (Spain)

(275). In September 2011, the Spanish Competition Authority ("SCA") ruled that Endesa Distribución Eléctrica ("Endesa") had committed two distinct abuses of dominant position on the electric installations market and imposed a fine of over €23 million.

(276). The SCA focussed on the market for electrical ins-

tallations, which includes the activities necessary to connect the distribution grid to the facilities of end users (e.g. hook-up, extensions and connections). National regulations distinguished between installation activities which are reserved to distributors and activities which are not reserved. Any authorised installer may carry out installation work which is not reserved to the distributor on a competitive basis.

(277). Regarding the first abuse, the SCA found that Endesa took advantage of its position in the distribution market to distort competition in the related market for electrical installations that are not reserved to the distributor, in which Endesa also operates.

(278). Endesa made use of information about supply applications to which it had privileged access due to its status as distributor (the identity of each customer who needed an installation and all the technical details of the point of supply) in order to offer to carry out the electrical installation work for the largest customers in this market. According to the SCA, this practice made it more difficult for its rivals on the installations market to compete with Endesa for the most attractive part of the market.

(279). With regard to the second abuse, the SCA took the view that Endesa had abusively charged customers for carrying out linking and connection work for the installations. National regulations provide that such work must be done by the distributor **at its own cost**. However, the investigation showed that over a specific period Endesa had charged customers for this work, which the SCA qualified as an exploitative abuse [127].

(h) PEC (2013) (Poland) [128]

(280). In August 2013, the President of the Polish Competition Authority (the "PCA") found that the owner of a municipal heating network in central Poland, **Przedsiębiorstwo Energetyki Cieplnej** ("PEC"), had abused its dominant position on the local market for transmission and distribution of heat. PEC received a €25,000 fine [129].

(281). In 2010, **Bioelektrocieplownia,** a bio combined heat and power plant, requested from PEC certain technical specifications necessary to connect an additional heating source to the local network. PEC provided only part of the necessary information. In 2011, Bioelektrocieplownia made further demands. PEC rejected also these new demands, claiming that Bioelektrocieplownia failed to meet formal requirements and that it had no heating source available at the time. PEC also noted that consumers' needs were sufficiently met in the local market and there was no need to connect an additional heating plant to the network.

(282). The PCA first found that PEC held a natural monopoly on the local market for transmission and distribution of heat. It then concluded that a protracted (two years) denial of access to the necessary technical specifications delayed the development of competition on the downstream market for the sale of heating power and could not be objectively justified. The PCA noted that because the market for sale of heating power is closely linked to the market for transmission and distribution of heat, conduct by an undertaking dominant on the latter can produce anti-competitive effects on the former.

(i) MOL (2014) (Hungary)

(283). In June 2014, the Hungarian Competition Authority ("GVH") accepted commitments by MOL Hungarian Oil and Gas Company ("MOL") to end a possible abuse of a dominant position on the market for wholesale gasoil (diesel) in Hungary [130]. Interestingly, the GVH imposed a fine of 150 million HUF (some €500,000) on MOL for lack of cooperation in the investigation (MOL made its list pricing practices clear to the GVH only one and a half years after the GVH's request) [131].

(284). The GVH found that MOL's control of the only refinery and the vast majority of storage facilities for commercial use in Hungary, along with its 80% share in the gasoil distribution in Hungary, conferred it a dominant position in the fuel wholesale market.

(285). Then the GVH investigated whether MOL's wholesale pricing for gasoil, and in particular the strong fluctuations of MOL's prices, made the entry of potential competitors more difficult. In GVH's view, the predictability of the market price is crucial to enable competing wholesalers to enter the Hungarian market for imported fuel.

(286). MOL determines its wholesale list prices based on an "import price parity" scheme. It essentially uses Platts reference prices and add to them additional cost elements, which would increase in case of import of fuel into Hungary. However, MOL's weekly *announced* wholesale list prices could be higher or lower than the *calculated* (and not announced) list prices.

(287). The GVH noted that retailers and large customers need predictability and security of supply, which MOL could guarantee because it owned the only refinery and the vast majority of the storage facilities. MOL's rivals could either buy the fuel from MOL or import it from a refinery in the region. In the first case, they would have a clear idea of the return on their investment. Not so in the second case. There were (and still are) only a few other (i.e. not owned or controlled by MOL) refineries in the region, and the price to import fuel into Hungary fluctuated significantly not only because of external market conditions such as the exchange rate, but also because MOL's significant price fluctuations from the Platts reference price prevented importers from using MOL's *announced* wholesale price lists as a benchmark.

(288). To remedy the GVH's concerns, MOL committed to calculate its wholesale prices on the basis of the reference prices published by Platts.

(289). The GVH examined the calculated and weekly communicated list prices of MOL and concluded that, while a deviation of MOL's the weekly *announced* prices

from the *calculated* list prices based on Platts reference prices was not in and of itself anticompetitive, MOL could not provide an objective justification for the deviations during a specific period.

(290). The GVH concluded that it was not necessary that the announced and calculated list prices were identical, but that the deviations were marginal (+/-1% range) – i.e. small enough to allow competitors to eliminate the uncertainty originating from deviations from the Platts prices. Thus the risk of using imported gas oil and investing in import would decrease and gas oil from other refineries could be a more realistic source of competition.

12. Making access conditional on unrelated obligations

(291). 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)

(292). 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 [132].

(293). 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.

(294). 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)

(295). A second decision on this sort of abuse was adopted in June 2010 by the Bulgarian Competition Authority ("BCA") [133].

(296). 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.

(297). 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.

(298). 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.

(299). 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.

(c) PGNiG group (2013) (2015) (Poland)

(300). In April 2013, the Polish Competition Authority ("PCA") initiated proceedings against the gas supplier **Polskie Gornictwo Naftowe i Gazownictwo** ("PGNiG"), found dominant on both the wholesale and the retail markets for natural gas supply.

(301). In addition to PGNiG's standard contract forms, the agency scrutinized two types of clause in the agreements between PGNiG and its industrial customers and retailers: (i) clauses which allegedly restrict gas recipients from decreasing the amount of gas they would order for the following year, compared to the volume booked for the previous year; and (ii) clauses which allegedly prevent contractors from reselling the gas purchased from PGNiG. Those clauses are considered harmful to the development of competition on both gas supply markets.

(302). The PCA stated that it would also examine the extent to which the practices may affect trade between Member States and so may fall within the scope of Art. 102 TFEU [134].

(303). In December 2013, the PCA concluded that PGNiG's clauses amounted to an abuse of dominant position and accepted PGNiG's commitments to remove such provisions from its gas contracts with business purchasers.

(304). However, about one year later, the PCA started the review of PGNiG's commitments and found that, while PGNiG had indeed removed the old contractual provisions, it had replaced them with new terms which substantially provided the same result. Thus, if customers were to accept PGNiG's new conditions, they would be

locked into purchasing a fixed minimum amount of gas established at a level defined in the 2014 orders.

(305). As a result, in October 2015, the PCA imposed a fine equivalent to €2.45 million on PGNiG for failure to comply with part of the December 2013 commitments [135].

13. Making supply conditional on the payment of invoices

(306). 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) ENEL Distribuzione (2007) (Italy)

(307). In October 2007, the Italian Competition Authority 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 point [136], 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 [137].

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

(308). Similarly, the Bulgarian Competition Authority 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** [138], **EVN Bulgaria Elektrosnabdiavane** [139].

(c) Union Fenosa (2011) (Moldova)

(309). 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 [140].

(d) Other

(310). 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)** [141].

(e) Energo-Pro Sales (2013) (Bulgaria)

(311). In May 2013, the Bulgarian Competition Authority (the "BCA") imposed a fine of approximately €861,510 on the dominant electricity supplier Energo-Pro Sales ("EP Sales"), for the temporary termination of supply due to the accumulated debts of its customer Water and Sewage Services Dobrich ("VIK") [142].

(312). In September 2012, EP Sales had suspended the supply of electricity to VIK's pump stations for 24 hours, which left the residents of the city of Dobrich without water and sewage services. The reason for the suspension of supply was VIK's outstanding debt of approximately €2.3 million. This decision followed a warning notice and a bilateral meeting, at which the parties were unable to reach an agreement on the outstanding debt. Following the regulatory procedure, EP Sales requested the network operator EP Networks to terminate the supply, which the latter did.

(313). There are at least points in the BCA's decision which are worth mentioning here.

(314). First, EP Sales, the owner of an exclusive territorial licence for the supply of electricity at regulated prices, contested the BCA's relevant product market definition, identified as the supply (sale) of electricity to consumers. EP Sales argued that the supply (sale) of electricity at regulated prices, **as a service of general economic interest,** should be **distinguished from trade in electricity on the open market.** Accordingly, VIK being a commercial purchaser, it had the choice of alternative suppliers, i.e. all the licensed electricity traders connected to the network [143].

(315). The BCA, however, rejected this argument. It referred to the sector regulations, which established an obligation to supply at regulated prices customers who, due to objective circumstances, are unable to switch to an alternative supplier. In this case, the BCA found that the absence of outstanding debt effectively prevented VIK from selecting an alternative supplier.

(316). Accordingly, the BCA found that the termination of supply constituted unilateral conduct of EP Sales, insofar as EP Networks was obliged to follow the supplier's instruction under the sector regulation. The BCA found that EP Sales should not have ordered suspension of electricity supply, given the high social importance of water and sewage services and the serious consequences for consumers.

(317). **Second**, EP Sales contested the BCA's qualification of EP Sales' abuse based on the concept of anticompetitive foreclosure as defined in the **EU Commission's Guidance on its Enforcement Priorities as regards Art. 82 of the EC Treaty, now Art. 102 TFEU** [144]. In particular, EP Sales argued that the temporary suspension of supply could not impair competition by foreclosing its competitors.

(318). The BCA rejected this argument and noted that EP

Sales' conduct caused an anti-competitive effect in that it prevented VIK from conducting its business activities. Regarding the **EC's Enforcement Priorities**, the BCA clarified that these apply to cases where the dominant supplier is in competition with the purchaser and the refusal to deal leads to the restriction, distortion or elimination of competition. At the same time, the BCA concluded, on one hand, that the concept of "anti-competitive foreclosure" was not relevant to this case and on the other, that EP Sales' abuse could be established, since the list of possible anti-competitive conduct under the national equivalent of Art. 102 TFEU is not exhaustive. Notably, the NCA emphasised that the fact that termination of supply complied with the energy regulations did not preclude the establishment of an infringement of the competition rules.

(f) Latvijas Gaze (2013) (2015) (Latvia)

(319). In October 2013, the Latvian Competition Council imposed a fine equivalent to some €2.23 million on the gas supplier Latvijas Gaze for refusing to sign natural-gas supply contracts with new users before they had paid the previous users' debts [145]. It appears that the Competition Council had been faced with more than 500 instances of Latvijas Gaze refusing to sign natural gas supply contracts with new users, until they had paid other users' debts.

(320). In September 2015 the Latvian Regional Administrative Court upheld the fine. Then, in October 2015, Latvijas Gaze filed an appeal before Latvia's Supreme Court against the Latvian Administrative Regional Court's judgement, which upheld the €2.23 million fine imposed by the Latvian Competition Council. In particular, Latvijas Gaze claims that its practices had been approved by the competent national authorities and that they relied on the opinions of regulatory bodies [146].

(g) CEZ Distribution (2014) (Romania)

(321). In October 2014, the Romanian Competition Council ("RCC") closed its investigation into CEZ Distribution's alleged abuse of dominance, accepting the company's commitments [147].

(322). Suspecting that one of its non-household customers had been fraudulently supplied with its energy, CEZ Distribution had issued two invoices amounting to the alleged damages suffered. The customer refused to pay and decided to switch energy supplier. In the meantime, CEZ Distribution interrupted its energy supply.

(323). The RCC considered that the interruption without a prior court decision establishing the fraudulent consumption affected the energy supply, while consumers were deprived of a fundamental resource.

(324). CEZ Distribution committed to, *inter alia,* take measures to identify and provide evidence of cases of energy theft and unrecorded energy consumption and to set up a commission to regularly check compliance with technical regulations on energy consumption, as well as to adopt conciliation procedures with suppliers and consumers to settle this type of cases.

14. Sub-markets of electricity supply

(325). 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) Demasz (2008) (Hungary)

(326). 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.

(327). The Hungarian Competition Authority ("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 [148].

(328). 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. [329] 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.

(329). In September 2008, the HCA's decision was upheld by the Hungarian Court of Appeal.

(b) Ekfors Kraft (2010) (Sweden)

(330). In February 2010, the Swedish Competition Authority ("SwCA") issued an interim order and imposed an obligation on **Ekfors Kraft** to provide access to its elec-

tricity mains supply. [149]. 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.

(331). 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.

(332). 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.

(a) ZSE Distribucia (2012) (Slovakia)

(333). In June 2012, the Council of the Anti-Monopoly Office of the Slovak Republic ("the Council"), a second instance decision-making body, dismissed the appeal brought by ZSE Distribúcia ("ZSE"), a Slovak electricity distribution company, against the decision imposing a fine of €150 000 for abuse of a dominant position.

(334). The Council upheld the decision that between April 2008 and March 2010, ZSE applied unfair pricing conditions by charging its customers excessive fees for electricity meter readings when customers decided to switch to another electricity supplier. The fee was 1,48 times higher than fees charged by other distribution companies and no objective justification was found.

(335). In its appeal, ZSE claimed that the question of the fee for electricity meter reading was a matter solely for the sector specific regulator. The Council dismissed this concluding that the sector specific regulation concerned did not set the **amount** of the fee and that even if a price regulation would have been set by a sector specific regulator, it would not prevent competition enforcement unless an undertaking was deprived of autonomous conduct [150].

15. Specific markets

(336). The NCAs have adopted a number of decisions on specific energy product or service markets.

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

(337). 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 [151].

(b) Electrical connection works (2006) (Spain)

(338). In December 2006, the Spanish Competition Authority 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 [152].

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

(339). 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 [153].

(340). 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.

(341). 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 [154].

(d) Heat measurement services (2014) (Bulgaria)

(342). In May 2014, the Bulgarian Competition Authority ("BCA") found that **Toplofikatsia Sofia AD** had abused its dominant position in the upstream market for the supply of heating energy to end-users by charging iden-

tical prices to its competitors in the downstream market for metering services [155].

(343). The BCA found that Toplofikatsia Sofia's competitors on the downstream market suffered from eliminated price competition to the extent that the uniform prices were not cost oriented and did not integrate the difference in the costs incurred by each undertaking in the downstream market. The BCA also concluded that the imposition of identical prices reduced the incentives for more efficient undertakings to innovate and provide higher quality services.

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

(344). 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** [156], in Croatia [157] and in Lithuania [158].

(f) Motor Fuels (2010) (Russia)

(345). 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.

(346). In May 2010, as regards one of these companies, TNT-BP, this ruling was upheld by the Russian Supreme Commercial Court [159].

(g) LPG (2010) (Italy)

(347). In March 2010, the Italian Competition Authority 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 €17.2 million. (3/2010, e-C 32064)

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

(348). In March 2011, the Greek Competition Authority ("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 law [160]. 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.

(349). 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.

(350). 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.

(351). The GCA imposed a €419,781 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.

(352). 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.

(353). 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.

(i) GasTerra (2011) (the Netherlands)

(354). In July 2011, the Dutch Competition Authority ("NMa") annulled its previous decision imposed on GasTerra, in which it had found that GasTerra had foreclosed competition in the Dutch wholesale gas market by imposing anti-competitive clauses on gas distribution customers.

(355). According to the NMa, by refusing access to the Title Transfer Facility ("TTF" - a virtual market place for gas trading), GasTerra prevented distribution companies from composing their own portfolio of gas products, including gas from alternative wholesalers, or trading any surplus gas they might have.

(356). Following GasTerra's objections, the NMa reopened the case. GasTerra objected that access to the wholesale gas market was not foreclosed by its conduct, but that the limited amount of competition in this market was due to other factors, including a regulatory regime which had only recently been liberalised.

(357). In its final decision in July 2011, the NMa ruled that GasTerra had adduced sufficient evidence to prove that the dependency of gas distributors on GasTerra was not the result of anti-competitive supply conditions, but the lack of alternative wholesale gas sources on the Dutch market in the first few years after the liberalisation.

(358). The NMa also acknowledged the importance of practical and legal obstacles which, at the time of the relevant conduct, contributed to prevent distributors from contracting with alternative gas wholesalers, including high transaction costs and risks attached to switching suppliers.

(j) Lukoil Group (2011, 2012) (Bulgaria)

(359). In March 2011, following a letter from the Minister for Transport, Information Technology and Communications ("The Minister for Transport"), the Bulgarian Competition Authority ("BCA") initiated a sector inquiry into the petrol and diesel production and supply markets. The letter was prompted by the increase in petrol and diesel prices for final consumers all over the country.

(360). Afterwards, the BCA launched investigations (i) against Lukoil Bulgaria, a Bulgarian fuel producer and a leader on both the wholesale and retail markets, for potential abuse of dominant position; and (ii) against OMV Bulgaria, Nafteks Petrol, Rompetrol Bulgaria and Lukoil Bulgaria, companies active on the wholesale fuel market, for potential anti-competitive agreements [161].

(361). Following a letter from the Minister for Transport, the BCA also initiated another investigation against Lukoil Neftochim Burgas, the largest oil refinery in South-Eastern Europe and Lukoil Aviation Bulgaria, a fuel supplier operating at all airports in Bulgaria, ("Lukoil Group") for alleged abuse of dominant position in August 2011 [162].

(362). As regards the Lukoil Group cases, the BCA undertook investigations (i) into Lukoil Group's pricing policy as to whether it involved loyalty discounts and obliging customers to resell fuels at a given minimum price; and (ii) the refusal to supply jet fuel to airports and carriers.

(363). After an investigation lasting almost one year, the BCA concluded that Lukoil Group did not abuse its dominant position [163].

(364). (k) **Toplofikatsia (2013) (Bulgaria)**

(365). In February 2013, the Bulgarian Competition Authority ("BCA") imposed a fine of approximately €170,000 on the local heating company **Toplofikatsia Sofia** ("Toplofikatsia") for delaying the entry of its competitor PMU Inzhenering [164].

(366). The BCA found that Toplofikatsia holds a dominant position on the market for sale and distribution of heating energy for domestic use and that is active on the market for shared distribution of heat to consumers in condominium buildings ("CCB"), where it competes with PMU Inzhenering.

(367). The shared heat distribution service in CBB, which includes metering/accounting services, is not part of the licence for distribution of heat energy (for which only one licence is given per territory), and is entirely open to competition. Both Toplofikatsia and PMU Inzhenering hold licences on the market. Their meters, however, are not substitutable and thus Toplofikatsia's customers on the distribution market cannot use metering services from PMU Inzhenering and **vice-versa**.

(368). Toplofikatsia, as the only provider on the regional market for sale and distribution of energy for domestic use, has an obligation to conclude contracts for shared heat distribution with all companies licensed for the service and chosen as heating accounting providers by CCB.

(369). In December 2011, PMU Inzhenering was chosen as heating accounting provider by 39 CCBs. Toplofikatsia refused to conclude a contract with PMU Inzhenering until March 2012. At the same time, it sent letters to all CCBs using meters from PMU Inzhenering and offered its heating accounting services, without informing them about the need to change their meters at their own expense. The BCA concluded that in this way Toplofikatsia harmed consumers by imposing an undue financial burden.

(l) EDF Group (2013) (France)

(370). In December 2013, the French **Autorité de la concurrence** ("FCA") fined EDF €13.5 million for abusing its dominant position by unfairly promoting its solar-panel subsidiary **Energies Nouvelles Réparties** ("ENR") on the emerging market for photovoltaic services to individuals. The FCA also found that EDF abused its dominant position by using its logo and taking advantage of its customer database to offer such services [165].

(371). **First**, the FCA clarified that a monopoly's use of its logos or reputation is not an antitrust abuse in itself. However, in this case, EDF broke the competition rules by confusing customers between its role as a public-service utility with fixed tariffs and its commercial activity of selling solar panels.

(372). ENR took advantage of the reputation of EDF's trademark "**Bleu Ciel**". Notably, EDF:

- Issued "**Bleu Ciel**" leaflets in more than 20 million copies, jointly with the electricity bills, which ensured the promotion of its solar energy services, by inviting its clients to contact its customer service;

- Created a telephone portal, which gave access to both the electricity supplier's client service and a Solar Energy Counsel, presenting itself as a general and impartial source of information. Its consultants, however, directed customers towards another internal EDF service, which acted on behalf of ENR, but sold photovoltaic services under the EDF trademark "**Bleu Ciel**".

(373). **Second**, in 2009 the FCA had already ordered EDF, by way of preliminary injunction, to cease the promotion and commercialisation of ENR's offers with the trademark "**Bleu Ciel**". The trademark EDF ENR, however, maintained a number of similarities with EDF's logo. This was considered to give it an unfair commercial advantage, in particular due to customers' concerns related to the important investments and the "reassuring"

effect of the historical supplier's reputation. The impact was particularly strong because the investments are irreversible and block the market for future competitors.

(374). Finally, the FCA stated that EDF's use of its customer database, privileged information owned exclusively by EDF under its old monopoly, in order to promote the marketing of ENR's offers on a related market, open to competition, also constituted an abuse of EDF's dominant position.

(375). All these practices, the NCA concluded, had the effect of considerably weakening the position of ENR's competitors, SMEs with unknown trademarks, which in many cases disappeared from the market.

16. State measures hampering the development of competition

(a) Greek Lignite (2008-2011) (EC)

(376). It may be recalled that 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", in Greek **Dimosia Epicheirisi Ilektrismau**) privileged access to **lignite** exploitation, and accordingly to lignite-based electricity [166]. 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 [167].

(377). 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.

(378). 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, Elassona, 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 [168].

(379). In **January 2011**, the EC invited comments on new proposals by the Greek Government to comply with the 2008 Greek Lignite decision [169]. Greece asked for a review of the EC's earlier decision due to a new energy policy. Greece planned 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 proposed 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.

(b) Greek Lignite (2012) (GC EU)

(380). However, in **September 2012**, the General Court of the European Union ("GC EU") ruled on two appeals by PPC against the EC's decisions (i) finding that the Hellenic Republic had unlawfully awarded exploration and exploitation rights over lignite deposits to PPC, contrary to Art. 86, in combination with Art. 82 of the EC Treaty; and (ii) requiring the Hellenic Republic to award certain deposits to others than PPC, unless no other serious offer for them was submitted, pursuant to Art. 86(3) of the EC Treaty [170].

(381). The EC's reasoning had been that, through this preferential award to PPC, Greece was denying competitors **an equal opportunity** to compete and thereby **reinforcing PPC' s dominant position**. PPC argued that the case-law went further than this and required the EC to show precisely how PPC would abuse its dominant position, the mere creation or strengthening of a dominant position not being enough.

(382). Interestingly, the GC EU agreed with PPC and went through the main case-law, showing in each case the abuse which the public or entrusted undertaking concerned could do as a result of the State measure.

(383). The Court also noted that the abuse could arise from the possibility of exercising the exclusive or special right given in an abusive way, or be a direct consequence of the right.

(384). Applying that case-law, the Court found that the EC had not made such specifications and therefore annulled the EC decision based on Art. 86 (1) of the EC Treaty and the subsequent EC remedy decision based on Art. 86(3) of the EC Treaty. The Court also stressed that the impossibility to obtain lignite could not be imputed as conduct to PPC, since that was **the Greek State's** measure.

(c) Greek Lignite (2014) (ECJ)

(385). Then in July 2014, the European Court of Justice ("ECJ") issued its judgment, reversing the GC EU's ruling [171].

(386). The ECJ noted that a Member State is in breach of Art. 106(1) TFEU read in conjunction with Art. 102 TFEU

if it confers preferential rights on a dominant company, thereby creating a situation where that company would abuse or be led to abuse its position, merely by exercising those rights [172]. It is enough that a State measure creates the risk of abuse. The ECJ found that a State measure constitutes an infringement when it institutes "inequality of opportunity" between economic operators, by enabling the dominant undertaking to maintain, strengthen or extend its dominant position over another market. It is not necessary to prove the existence of actual abuse.

(387). Thus the ECJ held that there was an infringement of Art. 106 (1) read in conjunction with Art. 102 TFEU irrespective of whether an abuse actually occurred. The EC is only obliged to identify a potential or actual anti-competitive consequence which is liable to result from the State measure in question.

(388). The ECJ referred the case back to the GC EU, but ruled on two pleas.

(389). Under the first plea, DEI claimed that the EC, in order to apply the theory that the dominant undertaking extends its position from one market to another, must show that the measure grants or reinforces exclusive or special rights. The ECJ disagreed and held that it is sufficient that the State measure creates a situation in which the dominant undertaking is led to abuse its dominant position [173]. There was no limitation to cases where exclusive or special rights had been conferred.

(390). Under the second plea, DEI claimed that the exercise of the lignite exploitation did not have the effect of extending DEI's dominant position from the lignite supply market to the wholesale electricity market. The ECJ stated that the extension of a dominant position to a neighbouring market amounts to an abuse under Art. 102 TFEU. The Court held that when the extension results from a State measure, it is "as such" abusive [174].

(391). The ECJ judgment is important in light of the fact that the test for an Arts. 102/106 TFEU infringement is wide. Advocate General Wathelet's Opinion is also useful, as it explains why no abuse has to be showed under the Court's case-law, being enough that a State measure enables the State-owned company to have a competitive advantage which its rivals cannot match.

17. Other types of abuse

(a) Bulgargaz (2014, 2015) (Bulgaria)

(392). In July 2014, the Bulgarian Competition Authority ("BCA") found that **Bulgargaz EAD**, a subsidiary Bulgarian Energy Holding and the sole supplier of natural gas in Bulgaria, had abused its dominant position through the imposition of unfair trading conditions on its customers. Bulgargaz was fined approximately €12 million [175].

(393). The BCA concluded that between August 2010 and 2011 Bulgargaz had forced its customers to extend the term of their gas supply contracts without giving them the opportunity to re-negotiate and discuss the trading conditions.

(394). Furthermore, the competition authority found that Bulgargaz had imposed contractual terms without reciprocal rights whereby a contract could be terminated by Bulgargaz, unilaterally. This condition forced customers to accept Bulgargaz's demands in order to avoid a breach of contact.

(395). The BCA also objected to Bulgargaz's methodology to calculate gas supply orders for the next year, which were set unilaterally by Bulgargaz, and forced customers to provide exact orders. As a result, they risked either to not fulfil their agreements or not being supplied enough volumes.

(396). In October 2015, it is reported that the Bulgarian Supreme Administrative Court reversed the BCA's decision, finding no evidence of Bulgargaz's abuse of dominant position. The Supreme Administrative Court ruling is not subject to appeal.

(b) Tauron (2015) (Poland)

(397). In August 2015, the Polish Competition Authority ("PCA") ended with commitments an investigation into some alleged anti-competitive practices in the electricity market in Southern Poland by Tauron SprzedaČ and Tauron SprzedaČ GZE, both subsidiaries of the Tauron Group, accepting related commitments.

(398). According to Polish energy law and regulations, when a supplier is unable to deliver electricity, as was the case in 2013 in Southern Poland, other companies may have to supply "reserve sales".

(399). In this case, Tauron SprzedaČand Tauron SprzedaČ GZE stepped in when the main supplier became unable to deliver electricity to its power consumers. However to these customers' surprise, they were required to provide significant collateral at very short notice for the supplies. The Tauron Group also reserved what the PCA called a one-sided right to terminate supplies, if it considered that a customer was under threat of bankruptcy.

(400). The Authority found that the conditions required by the reserve energy companies from the Tauron Group were overly rigorous and excessive. The demanded collateral amounted to up to 2.5 times the predicted monthly electricity usage, paid up front, at a few days' notice. Tauron has offered commitments, proposing that the required collateral be reduced to a one-month equivalent of the predicted electricity usage [176].

[1] With thanks to Geoffroy Barthet and Katrin Guéna for their assistance. 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/competitio.... Abbreviations for NCAs are repeated in each section of the chapter as appropriate, insofar as readers may only look at particular sections.

[2] Previously Art. 82 of the EC Treaty.

[3] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ EU L1/1, 4 January 2003.

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

[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; **E.ON**, Cases 39388 and 39389, IP/08/1774, 26 November 2008; OJ EU C36/8, 13 February 2009; **RWE**, Case 39402, IP/09/410, 18 March 2009, see **Oliver Koch, Karoly Nagy, Ingrida Pucinskaite-Kubik, Walter Tretton**, The European Commission adopts a commitment decision concerning a possible abuse of a dominant position in the German gas transmission markets (RWE), 18 March 2009, e-Competitions Bulletin March 2009, Art. N° 35038; OJ EU C133/10, 12 June 2009; **E.ON/GDF**, Case 39401, IP/09/1099, 8 July 2009, see **Alexander Gee, Jasmin Battista, Ulrich Von Koppenfels**, The European Commission imposes heavy fine on two European gas companies for operating a market-sharing agreement (E.ON, E.ON Ruhrgas, GDF Suez), 8 July 2009, e-Competitions Bulletin July 2009, Art. N° 35024; 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; **EDF**, Case 39386, IP/10/290, 17 March 2010; OJ EU C 133/5, 22 May 2010; Svenska Kraftnät, IP/10/425, 14 April 2010; OJ EU C142/28, 1 June 2010; E.ON, Case 39317, IP/10/494, 4 May 2010; OJ EU C278/9, 15 October 2010; **ENI**, Case 39315, IP/10/1197, 29 September 2010; OJ EU C352/8, 23 December 2010, see **Ulrich Von Koppenfels, Frank Maier-Rigaud**, The European Commission adopts a commitment decision addressed to Italian energy company regarding potential abuse of its dominant position in the market for gas transportation services(ENI), 29 September 2010, e-Competitions Bulletin September 2010, Art. N° 47955; and **CEZ**, Case AT.39727, IP/13/320, 10 April 2013, OJ EU C251/4, 31 August 2013; **OPCOM**, Case AT.39984, IP/14/214, 5 March 2014, OJ EU C314/7, 13 September 2014. The EC's decisions are all available on its website.

[7] EC Press Release IP/15/4651, 23 March 2015. Case AT.39849.

[8] EC Press Release IP/15/5234, 19 June 2015. Case AT.39767.

[9] EC Press Release IP/14/214, 5 March 2014.

[10] EC Memo 13/435, 14 May 2013.

[11] EC Memo/15/4822, 21 April 2015.

[12] EC Press Release IP/15/4828, 22 April 2015.

[13] See MLex of 4 Feb 15, EU energy chief weakens support for common gas purchasing.

[14] See Case T-336/07, Telefonica **Hendrik Auf'mkolk**, The EU General Court dismisses Spanish telecom incumbent's appeal against a Commission decision that imposed a €151 million fine on the company for a margin squeeze in the regulated national broadband market (Telefónica/Commission), 29 March 2012, e-Competitions Bulletin April 2012, Art. N° 45020and Case T-398/07, Spain, **Tristan Jones**, The EU General Court establishes the responsibility of a dominant undertaking to prevent the margin squeeze within the limits imposed by ex-ante regulation (Telefónica), 29 March 2012, e-Competitions Bulletin March 2012, Art. N° 57436 judgments of 29 March 2012; and Case C-280/08P, Deutsche Telekom, [2012] ECR I-9555.

[15] See generally, http://www.gov.uk/cma-cases/energy-....

[16] Case 39.315, ENI, see footnote 43 in the EC decision, available at: http://ec.europa.eu/competition/ant....

[17] Case 34.801, FAG Flughafen Frankfurt, OJ EU L72/30, 11 March 1998.

[18] See **Luciano Vasques, Silvio Nobili**, The Italian Competition Authority fines gas supplier with the highest fine ever imposed to a single company in Italy for abuse of dominant position in wholesale supply of natural gas on the basis of Art. 82 EC (Trans Tunisian Pipeline Company-Eni), 15 February 2006, e-Competitions Bulletin February 2006, Art. N° 501

[19] ENI/Trans-Tunisian Pipeline, Judgment No 9306 of 20 December 2010.

[20] See **Ricardo Cardoso de Andrade, Oliver Koch, Sandra Kijewski, Patrick Lindberg, Karoly Nagy,** The European Commission renders legally binding commitments offered by French and German incumbent gas operators concerning long-term capacity bookings (GDF, E.ON), 3 December 2009, e-Competitions Bulletin December 2009, Art. N° 34851

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

[22] Case 39.351, Swedish Interconnectors, OJ EU C142/28, 1 June 2010. See **Philippe Chauve, Elzbieta Glowicka, Martin Godfried, Edouard Leduc, Stefan Siebert**, The European Commission accepts commitments offered by Swedish incumbent electricity operator in the electricity transmission market (Svenska Kraftnät), 14 April 2010, e-Competitions Bulletin April 2010, Art. N° 34860

[23] See **Florian Wagner-von Papp**, The German Federal Court of Justice clarifies that access to an essential facility does not require a dominant position in the up- or downstream market in the electricity sector (Arealnetze), 28 June 2005, e-Competitions Bulletin June 2005, Art. N° 488

[24] 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)**. See **Aleksander Stawicki**, The Polish Supreme Court decides on the validity of the refusal of the gas network access (Bartimpex), 15 July 2009, e-Competitions Bulletin July 2009, Art. N° 27843

[25] See **Remy Fekete**, The Turkish Competition Board fines 5 M euro an abuse of dominant position by applying the "essential facility" doctrine in the energy distribution sector (Enerjisa and Toros/CEAS), 8 February 2007, e-Competitions Bulletin February 2007, Art. N° 13997. See also the short note concerning a case of access to essential facilities in Spain **Aitor Montesa Lloreda, Angel Givaja Sanz**, The Spanish Competition Authority fines the leading gas supplier for an abuse of dominant position (Gas Natural 2), 26 March 2009, e-Competitions Bulletin March 2009, Art. N° 28367

[26] See **Attila Komives, Tünde Gönczöl**, The Hungarian Competition Office accepts objective justification defence in an abuse of dominance case in the electricity sector (DÉMÁSZ/DHE), 14 February 2008, e-Competitions Bulletin February 2008, Art. N° 24112

[27] See **Aleksander Stawicki, Bartosz Turno**, The Polish Competition Authority imposes a financial penalty on the electricity distributor for the delay in issuance of the connection conditions for wind farms' access to electricity grid (ENEA Operator), 30 September 2008, e-Competitions Bulletin September 2008, Art. N° 26197

[28] See **Stefanos Merikas, Athanassios Skourtis**, The Greek Competition Commission fines the Hellenic gas transmission system operator for abusing its dominant position in the primary market of natural gas transmission (DESFA), 20 December 2012, e-Competitions Bulletin December 2012, Art. N° 54261 and **Article from European Competition Network Brief**, The Hellenic Competition Commission imposes fine on operator for abuse of dominant position in primary market of natural gas transmission (DESFA), 25 April 2013, e-Competitions Bulletin April 2013, Art. N° 53277

[29] See below, Section 5(f).

[30] French Competition Authority's decision of 9 September 2014, n°14-MC-02, available at

http://www.autoritedelaconcurrence....

[31] See **French Competition Authority**, The French Competition Authority orders interim measures against a gas provider and enjoins it to grant its competitors access to some of the data in its historic file (GDF Suez / Direct Energie), 9 September 2014, e-Competitions Bulletin September 2014, Art. N° 68877

[32] The FCA referred to an analysis by the CRE according to which GDF had recently (2013) started marketing more aggressively its non-regulated gas supply services to customers in the regulated markets. The FCA believes that this creates a high risk of pre-emption of the market, with negative consequences for energy customers.

[33] In October 2014, the Paris Court of Appeal upheld the FCA decision on the interim measures. See Judgment of Paris Court of Appeal of 31 October 2014, n° 2014/19335, available at http://www.autoritedelaconcurrence.....

[34] See **Ricardo Cardoso de Andrade, Oliver Koch, Sandra Kijewski, Patrick Lindberg,**

Karoly Nagy, The European Commission renders legally binding commitments offered by French and German incumbent gas operators concerning long-term capacity bookings (GDF, E.ON), 3 December 2009, e-Competitions Bulletin December 2009, Art. N° 34851

[35] Case 39.317, E.ON Gas, OJ EU C278/9, 15 October 2010, see **Ricardo Cardoso de Andrade, Oliver Koch, Sandra Kijewski, Patrick Lindberg, Karoly Nagy**, The European Commission renders legally binding commitments offered by French and German incumbent gas operators concerning long-term capacity bookings (GDF, E.ON), 3 December 2009, e-Competitions Bulletin December 2009, Art. N° 34851

[36] See **Francesca Morra**, The Italian Competition Authority accepts commitment from the energy incumbent to remedy concerns about its position in gas markets (ENI), 6 March 2006, e-Competitions Bulletin March 2006, Art. N° 13672

[37] See **Valerio Torti**, The Italian Competition Authority closes proceedings against the gas incumbent for alleged breach of Art. 82 EC by accepting commitments in the sector of regasification facilities without imposing sanctions (ENI), 12 March 2007, e-Competitions Bulletin March 2007, Art. N° 13342

[38] See **Margarita Fernandez Alvarez-Labrador**, A Spanish court annuls the NCA's decision having imposed on the basis of Art. 82 EC an EUR 8 M fine for impeding third parties access to regasification capacities (Gas Natural), 13 March 2007, e-Competitions Bulletin March 2007, Art. N° 14012 ; **Luis Agosti**, A Spanish Court revokes the NCA's decision on an abuse of dominant position due to the absence of anticompetitive effects on the market regarding access to liquid natural gas importing infrastructures (Gas natural), 13 March 2007, e-Competitions Bulletin March 2007, Art. N° 14793 and **Carolina Luna**, The Spanish Supreme Court holds that the national High Court erred in law as regard the concept of dominance (Enagás, Gas Natural Comercializadora), 1 June 2010, e-Competitions Bulletin June 2010, Art. N° 33575

[39] Case 39.402, RWE Gas Foreclosure, OJ EU C133/10, 12 June 2009. See **Oliver Koch, Karoly Nagy, Ingrida Pucinskaite-Kubik, Walter Tretton**, The European Commission adopts a commitment decision concerning a possible abuse of a dominant position in the German gas transmission markets (RWE), 18 March 2009, e-Competitions Bulletin March 2009, Art. N° 35038

[40] EC Press Release IP/10/1197, 29 September 2010.

[41] The ICA's decision accepting ENI's commitments is available in Italian at: http://www.agcm.it/concorrenza/conc....

[42] For the ICA market test for ENI's commitments, see **Article from European Competition Network Brief**, The Italian Competition Authority publishes for market test the commitments of the incumbent electricity operator (Eni), 12 June 2012, e-Competitions Bulletin June 2012, Art. N° 48355

[43] ICA decision No 6926 of 25 February 1999. The ICA's decision is available in Italian at http://www.agcm.it/concorrenza/conc....

[44] See judgment by the Italian Administrative Court of First Instance (Tar Lazio) No. 7481/2012 of 3 September 2012.

[45] See **Article from European Competition Network Brief**, The Hellenic Competition Commission accepts commitments from dominant incumbent gas company (DEPA), 12 November 2012, e-Competitions Bulletin November 2012, Art. N° 50269

[46] Commitments proposed by DEPA available in English at: http://www.depa.gr/templates/depa//....

[47] See **Hellenic Competition Authority**, The Hellenic Competition Commission accepts a proposal to revise partly commitments adopted in a previous decision concerning the supply of natural gas through electronic auctions (DEPA), 21 July 2014, e-Competitions Bulletin July 2014, Art. N° 68542

[48] Press release of the Hellenic Competition Commission of 22 July 2014, available at http://www.epant.gr/main.php?Lang=en

[49] EC Press Release IP/12/766 and the EC market testing notice in OJ EU C202/1, both dated 10 July 2012. The Commitments are available on the EC website at: http://ec.europa.eu/competition/ant.... See **Tim Kasten, Sean Gerlich**, The European Commission initiates proceedings against the Czech electricity incumbent for possible abuse of dominant position (CEZ), 11 July 2011, e-Competitions Bulletin July 2011, Art. N° 41076

[50] EC Press Release IP/13/320, 10 April 2013, Case COMP/AT. 39727. The EC summary is available at OJ C EU 251/4, 31 August 2013.

[51] Further information is available at http://www.uokik.gov.pl/news.php?ne....

[52] EC Press Release IP/12/1307, 3 December 2013.

[53] EC Press Release, IP/14/922 of 22 August 2014.

[54] EC Press Release IP/13/656, 5 July 2013.

[55] EC Press Release IP/15/4651 of 23 March 2015.

[56] EC Press Release IP/15/5234 of 19 June 2015 and EC OJ C202/2, 19 June 2015. The proposed commitments are available on the EC website.

[57] See **Nicolas Bessot, Maciej Ciszewski, Augustijn Van Haasteren**, The European Commission makes legally binding commitments proposed by French incumbent electricity operator in long term contracts case (EDF), 17 March 2010, e-Competitions Bulletin March 2010, Art. N° 34858

[58] See **Michele Giannino**, The Italian Competition Authority fines the incumbent for abusing its dominant position in the electricity markets (Enel Trade-Clienti Idonei), 27 November 2003, e-Competitions Bulletin November 2003, Art. N° 14764

[59] Tribunale Amministrativo Regionale, Judgment No 10678 of 20 October 2006.

[60] See **Gry Hoirup**, The Danish Competition Council approves natural gas supply agreement under Art. 81 and 82 EC with commitments to an early termination of the exclusive supply clause and prohibition of such clause in future contracts (DONG and HNG/MN), 21 December 2005, e-Competitions Bulletin December 2005, Art. N° 418

[61] EC Press Release IP/07/1487 and MEMO/07/407, 11 October 2007. Case 37.966, Distrigas, OJ EU C9/8, 15 January 2008.

[62] See **Charles Saumon**, The French Competition Council imposes interim measures to the incumbent to safeguard competition on the electricity supply market requesting modification of termination of exclusivity clause (KalibraXE/EDF), 25 April 2007, e-Competitions Bulletin April 2007, Art. N° 13746; **Charles Saumon**, The French Competition Council imposes interim measures to the incumbent to safeguard competition on the electricity supply market requesting modification of termination of exclusivity clause (KalibraXE/EDF), 25 April 2007, e-Competitions Bulletin April 2007, Art. N° 13746

[63] Case 39.386, Long Term Electricity Contracts France, OJ EU C133/5, 22 May 2010.

[64] See **Nicolas Bessot, Maciej Ciszewski, Augustijn Van Haasteren**, The European Commission makes legally binding commitments proposed by French incumbent electricity operator in long term contracts case (EDF), 17 March 2010, e-Competitions Bulletin March 2010, Art. N° 34858

[65] See **Article from European Competition Network Brief**, The Polish Competition Authority opens formal proceedings against the leader in crude oil and natural gas production concerning alleged abuse of dominance in gas sector (PGNiG), 4 July 2011, e-Competitions Bulletin July 2011, Art. N° 40446; **Article from European Competition Network Brief**, The Polish Competition Authority accepts commitments in the natural gas market (PGNiG), 13 April 2012, e-Competitions Bulletin April 2012, Art. N° 46703

[66] See Slovenian Competition Protection Agency's press release of 14 January 2015, available at http://www.varstvo-konkurence.si/en.... See **Slovenian Competition Authority**, The Slovenian Competition Protection Agency fines an incumbent gas importer and supplier for abuse of dominance by imposing prohibited contractual clauses on the market of gas supply to large industrial customers (Geoplin), 14 January 2015, e-Competitions Bulletin January 2015, Art. N° 70996

[67] Case 39.388, German Electricity Wholesale Market and Case 38.389, German Electricity Balancing Market, OJ EU C36/8, 13 February 2009. See **Karoly Nagy, Philippe Chauve, Martin**

Godfried, Stefan Siebert, Kristóf Kovács, Gregor Langus, The European Commission approves structural remedies offered by German electricity operator in order to remove suspected infringements of EU Article 102 concerns in the German electricity wholesale and balancing markets (E.ON), 26 November 2008, e-Competitions Bulletin November 2008, Art. N° 35136

[68] See **Ernesto Razzano**, The Italian Competition Authority accepts and enforces commitments offered by the main energy companies active in the Sicily electricity wholesale market (Enel, Tolling Edipower), 22 December 2010, e-Competitions Bulletin December 2010, Art. N° 34257

[69] See **Karoly Nagy, Philippe Chauve, Martin Godfried, Stefan Siebert, Kristóf Kovács, Gregor Langus**, The European Commission approves structural remedies offered by German electricity operator in order to remove suspected infringements of EU Article 102 concerns in the German electricity wholesale and balancing markets (E.ON), 26 November 2008, e-Competitions Bulletin November 2008, Art. N° 35136

[70] Belgian Competition Authority Press Release, 29 November 2013 available at: http://economie.fgov.be/en/binaries..., and **Tim Kasten**, The Belgian College of Competition Prosecutors finds that energy company abused its dominant position on the market for the generation, wholesale and trading of electricity (Electrabel), 7 February 2013, e-Competitions Bulletin February 2013, Art. N° 58196

[71] Belpex: http://www.belpex.be/about-us/about....

[72] EU SI, cited above, p.11, para. 11.

[73] See **Karoly Nagy, Philippe Chauve, Martin Godfried, Stefan Siebert, Kristóf Kovács, Gregor Langus**, The European Commission approves structural remedies offered by German electricity operator in order to remove suspected infringements of EU Article 102 concerns in the German electricity wholesale and balancing markets (E.ON), 26 November 2008, e-Competitions Bulletin November 2008, Art. N° 35136

[74] See **Oliver Koch, Karoly Nagy, Ingrida Pucinskaite-Kubik, Walter Tretton**, The European Commission adopts a commitment decision concerning a possible abuse of a dominant position in the German gas transmission markets (RWE), 18 March 2009, e-Competitions Bulletin March 2009, Art. N° 35038

[75] See **Jaime Garcia-Nieto, Hervé Ajouc**, The Spanish Supreme Court annulls a judgment of the Appellate Administrative Court and quashes a decision of the Spanish Competition Authority that imposed a substantial fine on several power generating companies for abusing their dominant position in the Spanish electricity market for technical restrictions (Unión Fenosa), 27 January 2010, e-Competitions Bulletin January 2010, Art. N° 30709

[76] See **Casto Gonzalez-Paramo**, The Spanish Competition Court fines a power generating company for abusing its dominant position by artificially raising the prices of the Spanish electricity pool (Viesgo Generación), 28 December 2006, e-Competitions Bulletin December 2006, Art. N° 13144 and **Luis Agosti, Atilano Jorge Padilla**, The Spanish NCA fines € 2,5 M an electricity producer for abusive prices in the electricity generation schedules adjustment market (Viesgo Generación), 28 December 2006, e-Competitions Bulletin December 2006, Art. N° 13219

[77] See **Aitor Montesa Lloreda**, The Spanish Competition Authority fines for the third time an electricity utility for excessive high prices (Iberdrola Castellón), 8 March 2007, e-Competitions Bulletin March 2007, Art. N° 13345 ; **Luis Moscoso Del Prado**, The Spanish Competition Authority fines electric company for abusing pricing in the electricity technical restrictions market (Iberdrola), 14 February 2008, e-Competitions Bulletin February 2008, Art. N° 16059

[78] See **Casto Gonzalez-Paramo**, The Spanish Competition Authority fines a power company for excessive pricing in the technical restrictions market (Gas Natural), 25 April 2008, e-Competitions Bulletin April 2008, Art. N° 18720

[79] See **Carolina Luna**, The Spanish Supreme Court changes stance and rules that an isolated conduct in the daily energy market constitutes a continuous abuse of dominance (Iberdola Generación), 30 January 2012, e-Competitions Bulletin January 2012, Art. N° 49215

[80] See **Frank Röhling**, The German Federal Cartel Office regards the inclusion of more than 25% of the market prices of CO2 emission certificates within the electricity prices as an abuse of dominant position pursuant to Art. 82 EC (CO2 National Allocation Plans), 20 December 2006, e-Competitions Bulletin December 2006, Art. N° 12732

[81] BKA Annual Report on Competition Policy to the OECD, 2006-2007, p.10, para 52. See **Petra Linsmeier, Moritz Lichtenegger**, The German Federal Cartel Office declares binding the commitments of RWE to cease the abuse proceedings for factoring CO2 certificates into its electricity tariffs (RWE), 26 September 2007, e-Competitions Bulletin September 2007, Art. N° 21241

[82] See **Anders Flood, Andreas Jasper**, The Swedish Market Court rejects action for alleged abuse of dominant position in the electricity sector (Ekfors), 15 November 2007, e-Competitions Bulletin November 2007, Art. N° 15760 **Jakob Lundström, Mina Lindgren**, The Swedish Market Court holds that the electricity network for municipalities street and road lighting is not an essential facility and rejects alleged abusive refusal to supply and price increase (Ekfors), 15 November 2007, e-Competitions Bulletin November 2007, Art. N° 16061

[83] See **David Sevy**, The French Competition Authority imposes an obligation upon the electricity incumbent to offer a wholesale contract to new entrants (Direct Energie/EDF), 28 June 2007, e-Competitions Bulletin June 2007, Art. N° 14000

[84] See **Jens Munk Plum**, The Danish Competition Appeals Tribunal partly confirms and partly annuls a decision of the NCA's on excessive pricing in the wholesale market for physical electricity in Western Denmark (Elsam III), 3 March 2008, e-Competitions Bulletin March 2008, Art. N° 21224

[85] See **Sebastian Peyer**, The German Federal Cartel Office settles a number of proceedings against gas suppliers for alleged abuse of dominance and accepts commitments offering compensation to consumers worth € 127 M (Gas price procedures), 1 December 2008, e-Competitions Bulletin May 2009, Art. N° 26132

[86] See **Frank Röhling, Bertrand Guerin**, The German Parliament reforms the Competition's Restraints Act in order to fight against price abuses in the energy and food trade sectors, 21 December 2007, e-Competitions Bulletin December 2007, Art. N° 15530 ; **Frank Röhling**, The German legislative targets excessive pricing by energy suppliers in a new draft law, December 2006, e-Competitions Bulletin December 2006, Art. N° 12643

[87] See **Oliver Koch, Karoly Nagy, Ingrida Pucinskaite-Kubik, Walter Tretton**, The European Commission adopts a commitment decision concerning a possible abuse of a dominant position in the German gas transmission markets (RWE), 18 March 2009, e-Competitions Bulletin March 2009, Art. N° 35038

[88] See **Sarah Beeston**, The Dutch Competition Authority clears a natural gas supplier of allegations of abusive pricing for the supply of gas (Productschap Tuinbouw / GasTerra), 26 June 2009, e-Competitions Bulletin June 2009, Art. N° 32022

[89] See also the Latvian case of excessive pricing of liquefied gas to apartment houses. (Propana Gas (2008) (Latvia). See **Debora Pavila**, The Latvian Competition Council fines a dominant liquified gas provider for excessive pricing (Propana Gaze), 10 December 2008, e-Competitions Bulletin December 2008, Art. N° 25688

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[91] See the press release from the German Cartel Office, available at: http://www.bundeskartellamt.de/Shar....

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[93] See **Daniel Muheme, Michael Kinyentama**, The Belgian Competition Authority condemns the incumbent operator for abuse of a dominant position for excessive pricing on the Belgian electricity market (Electrabel), 18 July 2014, e-Competitions Bulletin July 2014, Art. N° 70053

[94] P&I Clubs, IGA and P&I Clubs, Pooling Agreement Commission Decision (IV/D-1/30.373 and IV/D- 1/37.143) 1999/329/EC [1999] OJ L125/12, §128.

[95] See **Sarņnas Keserauskas**, The Lithuanian Competition Authority fines the national oil refinery for abuse of dominant position under Art. 82 EC (Mazeiki nafta), 22 December 2005, e-Competitions Bulletin December 2005, Art. N° 426

[96] See **Sarņnas Keserauskas**, The Vilnius District Administrative Court annuls the NCA's first Art. 82 EC case in Lithuania on both legal reasoning and procedural grounds and, inter alia, for not having informed the EC Commission, in an excessive fuel prices case (Maeikiu nafta II), 28 June 2007, e-Competitions Bulletin June 2007, Art. N° 13786

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[100] See **Jana Jichova**, The Czech Office for the Protection of Competition confirms in appeal the abuse of dominant position of the natural gas incumbent althought reducing the fine imposed to EUR 8.5 M (RWE Transgas), 12 March 2007, e-Competitions Bulletin March 2007, Art. N° 13612; **Adela Horakova**, The appellate body of the Czech Office for Protection of Competition confirms abuse of dominant position by the energy incumbent (RWE Transgas), 12 March 2007, e-Competitions Bulletin March 2007, Art. N° 13659

[101] See **Adela Horakova**, A Czech Court quashes the NCA decision having imposed the highest fine ever to a single undertaking for anti-competitive practices on the natural gas wholesale market (RWE Transgas), 22 October 2007, e-Competitions Bulletin October 2007, Art. N° 14824

[102] See **Roman Barinka**, The Czech Supreme Administrative Court rules that a concurrent application of EC law and national law by the NCA to one anticompetitive conduct does not violate the ne bis in idem principle (RWE Transgas), 31 October 2008, e-Competitions Bulletin October 2008, Art. N° 22673

[103] GCR, 10 September 2015.

[104] See **Valerio Torti**, The Italian Competition Authority accepts commitments from the Italian electricity incumbent and closes proceedings for alleged breach of art. 82 EC without imposing sanctions (Comportamenti Restrittivi sulla Borsa Elettrica), 20 December 2006, e-Competitions Bulletin December 2006, Art. N° 14765

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[106] See **Marianela López-Galdos**, The European Commission investigates Russian producer and supplier of natural gas for allegedly abusing its dominant position in the European markets (Gazprom), 4 September 2012, e-Competitions Bulletin September 2012, Art. N° 48792

[107] See Mr. Almunia's speech available at http://ec.europa.eu/commission_2010.... See also the Financial Times of 4 December 2013, available at http://www.ft.com/cms/s/0/40ba595c-....

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[110] See EC's Press Release IP/13/486, of 30 May 2013, available at http://europa.eu/rapid/press-releas....

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[113] Statement by Vice-President Joaquín Almunia on antitrust decisions on power exchanges

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[118] Case C-457/10 P, AstraZeneca v. Commission, judgment of 6 December 2012.

[119] See **French Competition Authority**, The French Competition Authority refuses to issue interim measures regarding alleged practices in the photovoltaic electricity sector (SUN'R / EDF), 14 February 2013, e-Competitions Bulletin February 2013, Art. N° 58483

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[123] See **Article from European Competition Network Brief**, The Italian Competition Authority accepts commitments proposed by the historical electric operator and its subsidiaries to put an end to an abuse of dominant position (ENEL), 10 December 2009, e-Competitions Bulletin December 2009, Art. N° 33435

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[132] See **Michal Miko, Michal Volný**, A Slovak Regional Court confirms the NCA decision holding as abusive a request of the gas transmission network operator to obtain ownership of the interconnection system build by a gas distribution company (Eustream), 30 June 2010, e-Competitions Bulletin June 2010, Art. N° 32223

[133] See **Alexandr Svetlicinii**, The Bulgarian Competition Authority fines an electricity supplier for exploitative abuse of dominant position (EVN Bulgaria Elektrorazpredelenie), 3 June 2010, e-Competitions Bulletin June 2010, Art. N° 31626

[134] See **Article from European Competition Network Brief**, The President of the Polish Office of Competition and Consumer Protection opens proceedings against gas supplier (PGNiG), 3 April 2013, e-Competitions Bulletin April 2013, Art. N° 52259

[135] Further information is available at https://uokik.gov.pl/news.php?news_....

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

[137] See **Michele Giannino**, The Italian Competition Authority closes investigations on the conclusion of new electricity supply contracts by imposing remedies to the incumbent operator (Enel), 21 August 2007, e-Competitions Bulletin August 2007, Art. N° 14860

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[140] See **Alexandr Svetlicinii**, The Moldovan Competition Authority finds an exploitative abuse of dominant position in the invoicing practices of an electricity distributor (RED Union Fenosa), 22 February 2011, e-Competitions Bulletin February 2011, Art. N° 34942

[141] See **Alexandr Svetlicinii**, The Macedonian Supreme Court upholds the NCA's decision finding an abuse of dominance on the electricity distribution market (Elektrostopanstvo), 6 September 2010, e-Competitions Bulletin September 2010, Art. N° 33282 ; Alexandr Svetlicinii, The Macedonian Administrative Court upholds the NCA's decision establishing abusive charges on the electricity distribution market (Elektrostopanstvo), 10 December 2009, e-Competitions Bulletin December 2009, Art. N° 30927

[142] See **Alexandr Svetlicinii**, The Bulgarian Competition Authority sanctions electricity supplier for an abuse of dominance in the form of temporary suspension of supply for accumulated debts (NERGO PRO Sales AD), 8 May 2013, e-Competitions Bulletin May 2013, Art. N° 56412

[143] In this respect, EP Sales argued that, whilst its dominance on the electricity supply market was undisputed, the BCA failed to investigate its position on the open market, where part of its customers had the choice to switch to alternative suppliers.

[144] OJ EU C45/7, 24 February 2009.

[145] Decision of the Latvian Competition Authority: http://kp.gov.lv/files/pdf/BXDT6x2t..., see **Latvian Competition Authority**, The Latvian Competition Council fines sole supplier of natural gas for refusal to conclude new contracts (Latvijas GČze), 10 February 2014, e-Competitions Bulletin February 2014, Art. N° 63544

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http://www.consiliulconcurentei.ro/...

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[149] See **Carl Wetter, Helena Höök, Emil Fahlén Godö**, The Swedish Market Court upholds the Competition Authority's interim order imposing an obligation on an electrical company to provide a potential customer access to its electricity mains (Ekfors Kraft), 26 February 2010, e-Competitions Bulletin February 2010, Art. N° 32044

[150] See **Katerina Schenkova**, The Slovak Competition Authority confirms competence with regard to regulated fees in energy sector (ZSE Distribúcia), 29 June 2012, e-Competitions Bulletin June 2012, Art. N° 49034

[151] See **Anna Dec**, The Polish Competition Authority fines the dominant petrochemical operator for applying excessively low prices (PKN Orlen), 29 December 2006, e-Competitions Bulletin December 2006, Art. N° 13217

[152] See **Aitor Montesa Lloreda, Angel Givaja Sanz**, The Spanish Competition Tribunal fines a major electricity distribution company for offering services to clients in a liberalised market on the basis of information obtained from a monopolised market (Endesa/Anisem), 14 December 2006, e-Competitions Bulletin December 2006, Art. N° 13149

[153] See **Simon Barnes**, The UK Court of Appeal upholds abuse of dominance finding against incumbent gas provider but reduces the size of the fine imposed (National Grid/Gas and Electricity Markets Authority, Capital Meters, Siemens, Meter Fit), 23 February 2010, e-Competitions Bulletin February 2010, Art. N° 31020 ; **Yasmin Arshed**, The UK Gas and Electricity Markets Authority finds that the network operator has abused its dominant position in the market for the provision and maintenance of domestic-sized gas meters (National Grid), 21 February 2008, e-Competitions Bulletin February 2008, Art. N° 16065

[154] See **Justin Coombs**, The UK energy regulator finds no abuse of dominance in the refusal to supply meter data services to competing electricity suppliers (EDF Energy), 24 January 2007, e-Competitions Bulletin January 2007, Art. N° 13221 and **Pierre-Hugues Vallée**, The UK Gas and Electricity Market Authority rejects alleged abusive data withdrawal in the electricity market (EDFE, Energywatch), 24 January 2007, e-Competitions Bulletin January 2007, Art. N° 13787

[155] The CPC had initially investigated Toplofikatsia Sofia AD and its downstream competitors under the national equivalent of Art. 101 TFEU. The CPC suspected that the application of identical prices to end-users by Toplofikatsia Sofia AD and its competitors was the result of illegal collusion. After an initial investigation, however, the CPC concluded that the identical prices were unilaterally imposed by Toplofikatsia Sofia AD. See **Anton Dinev**, The Bulgarian Competition Authority sanctions as abusive the uniform prices that a monopolistic supplier of heating energy used to charge on its downstream competitors in the heat-measurement sector of Sofia (Toplofikatsia Sofia) , 14 May 2014, e-Competitions Bulletin May 2014, Art. N° 68781

[156] See **Axel Reidlinger, Heinrich Kühnert**, The Austrian Federal Competition Authority settles a dispute regarding jet fuel supply at the Vienna International Airport (OMV), 4 April 2008, e-Competitions Bulletin April 2008, Art. N° 19526 and **Axel Reidlinger, Marlen Grillmayer**, The Austrian Federal Competition Authority refers to the Cartel Court a case of alleged excessive pricing in the jet fuel market pursuant to both Art. 82 EC and national provisions (Austrian Airlines/OMV),12 June 2007, e-Competitions Bulletin June 2007, Art. N° 14065

[157] See **Alexandr Svetlicinii**, The Croatian Competition Authority finds discriminatory pricing practices on the market for jet fuel supplied in Croatian airports (INA – Industrija nafte, Dubrovnik Airline), 19 May 2011, e-Competitions Bulletin May 2011, Art. N° 37377

[158] See **Article from European Competition Network Brief**, The Lithuanian Supreme Administrative Court upholds Competition Authority's decision on abuse of dominance by an airport operator (Vilnius International Airport - Naftelf), 15 March 2010, e-Competitions Bulletin March 2010, Art. N° 33462

[159] See **Vitaly Pruzhansky, Jan Peter van der Veer**, The Russian Supreme Commercial Court upholds a €28.5 M fine on a British-Russian oil company for abuse of dominance (TNK-BP), 25 May 2010, e-Competitions Bulletin May 2010, Art. N° 31901

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

[161] See **Article from European Competition Network Brief**, The Bulgarian Competition Authority adopts conclusions from fuel sector inquiry and opens proceedings against four undertakings (Lukoil Bulgaria, OMV Bulgaria, Nafteks Petrol, Rompetrol Bulgaria), 27 July 2011, e-Competitions Bulletin July 2011, Art. N° 40553

[162] See **Article from European Competition Network Brief**, The Bulgarian Commission on Protection of Competition initiates ex officio investigation into aviation fuel market (Lukoil), 4 August 2011, e-Competitions Bulletin August 2011, Art. N° 40442

[163] See Press Release of the BCA of 30 July 2012. The investigation for alleged anti-competitive agreements falls outside the scope of this unilateral conduct review. For completeness, we would just note that the BCA looked at parallel pricing patterns on the fuel markets. In particular, the BCA focused on public price announcements made on the wholesale fuel market. The BCA closed the investigation by making legally binding, commitments proposed by the companies concerned in July 2012. Amongst other things, the four wholesale players committed to set up a price system available on their websites and accessible only for current customers of the company concerned. See ECN Brief 04/2012, available at: http://ec.europa.eu/competition/ecn....

[164] Decision of the Bulgarian Competition Authority, 21 February 2013, available on the following website: http://reg.cpc.bg/Decision.aspx?Dec....

[165] Press Release of the Autorité de la concurrence, 17 December 2013, available at:

http://www.autoritedelaconcurrence..... The decision is avilable at:

http://www.autoritedelaconcurrence....

[166] Case 38.700 Relating to a proceeding under Art. 86(3) of the EC Treaty on the maintaining in force by the Hellenic Republic of rights in favour of Public Power Corporation SA for the extraction of lignite, OJ EU C93/3, 15 April 2008.

[167] See **Philippe Chauve, Polyvios Panayides**, The European Commission finds that Greece has infringed art. 86(1) in conjunction with art. 82 of the EC Treaty by maintaining the preferential access to lignite in favour of the incumbent Greek electricity provider (PPC), 5 March 2008, e-Competitions Bulletin March 2008, Art. N° 35237

[168] Case 38.700, Establishing the specific measures to correct the anti-competitive effects of the infringement identified in the Commission Decision of 5 March 2008 on the granting or maintaining in force by the Hellenic Republic of rights in favour of Public Power Corporation S.A. for extraction of lignite, OJ EU C243/5, 10 October 2009.

[169] EC Press Release IP/11/34, 14 January 2011.

[170] Cases T-169/08 and T-421/09, Dimosia Epicheirisi Ilektrismau, judgments of 20 September 2012.

[171] Case C-553/12 P EC v DEI, judgment of 17 July 2011. See also Case C-554/12 P EC v DEI, 17 July 2014. See **Hans Vedder**, The EU Court of Justice attempts to clarify its own case law on whether actual abuse by the public undertaking must be shown in Article 106 TFEU-cases (Greek Lignite case), 17 July 2014, e-Competitions Bulletin July 2014, Art. N° 68878

[172] Para 41.

[173] Para 59.

[174] Para 67.

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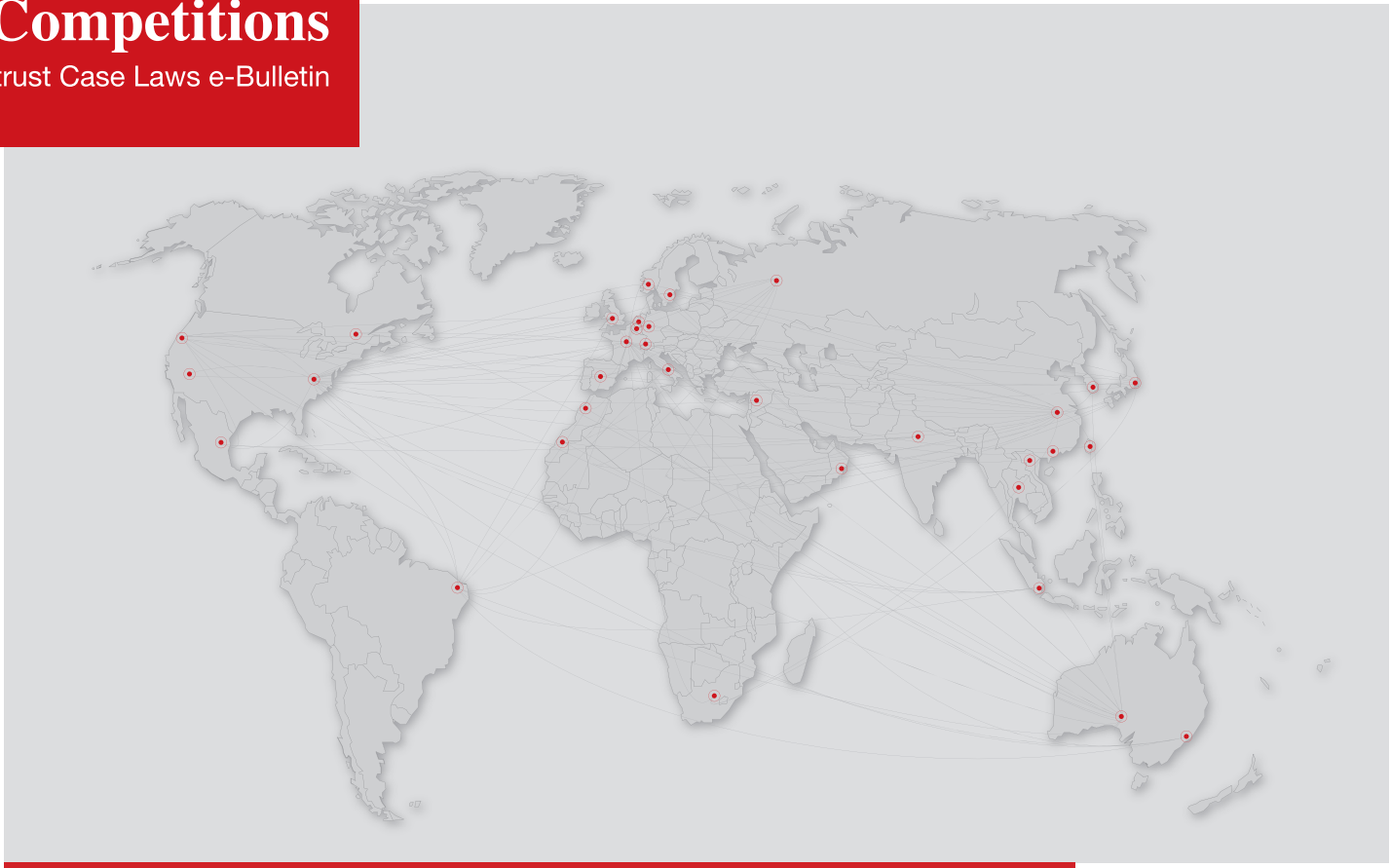

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