THE APPLICATION OF EC COMPETITION LAW TO THE LIBERALISED ENERGY MARKETS

VASSILIKI KOUMPLI*

I. INTRODUCTION

The initiative of the Commission of the European Communities (hereinafter referred to as 'the Commission') to begin the liberalisation process for the European energy markets in the early 1990s aimed at introducing competition in the monopolistic energy markets of the Member States and to create an internal market replacing the existing national and regional markets. At a first step, in 1990 and 1991 the Council of Ministers adopted two Directives on electricity and gas transit[1] and another Directive on price transparency for gas and electricity prices[2]. In a next step, the European Parliament and the Council adopted Directives 96/92/EC[3] and 98/30/EC[4] concerning common rules for the internal market in electricity and gas respectively (hereinafter referred to as 'the first Electricity

---

* Ph.D. cand. (Athens), LL.M. (London, Athens), LL.B. (Athens); Associate, Hellenic Institute of International and Foreign Law; Member of the Athens Bar.

[1] Council Directive 90/547/EEC of 29 October 1990 on electricity transit through transmission grids [1990] OJ L313/30; Directive 91/296/EEC of 31 May 1991 on natural gas transit through grids [1991] OJ L147/37.

[2] Council Directive 90/377/EEC of 29 June 1990 on the transparency of gas and electricity prices charged to industrial end-users [1990] OJ L185/16.

[3] Directive 96/92/EC of the European Parliament and of the Council of 19 December 1996 concerning common rules for the internal market in electricity [1997] OJ L27/20.

[4] Directive 98/30/EC of the European Parliament and of the Council of 22 June 1998 concerning common rules for the internal market in natural gas [1998] OJ L204/1.

and Gas Directives'), which were repealed respectively by Directives 2003/54/EC[5] and 2003/55/EC[6] so as to extend and accelerate the liberalisation process (hereinafter referred to as 'the Acceleration Directives'). The Directives, which were accompanied by regulations and guidelines with regard to cross-border tariffs and the allocation of available interconnection capacities[7], abolished exclusive rights, required unbundling of network activities from generation and supply activities, and provided for a gradual opening-up of the market (at the beginning for certain and gradually for all customers), for a liberal procedure to authorise new generation capacities, and for better third party access to networks by implementing, finally, a system of regulated third party access to transmission and distribution systems[8].

---

[5] Directive 2003/54/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity and repealing Directive 96/92/EC [2003] OJ L176/37.

[6] Directive 2003/55/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in natural gas and repealing Directive 98/30/EC [2003] OJ L176/57.

[7] E.g. Regulation 1228/2003 of the European Parliament and of the Council of 26 June 2003 on conditions for access to the network for cross-border exchanges in electricity [2003] OJ L176/1; Decision 1229/2003 of the European Parliament and of the Council of 26 June 2003 laying down a series of guidelines for trans-European energy networks and repealing Decision 1254/96/EC [2003] OJ L176/11.

[8] For an overview of the liberalisation of the European electricity and gas markets, see, *inter alia*, R. Eccles & D. Marks, Electricity, *in* P. Freeman & R. Whish (eds), *Butterworths Competition Law* (LexisNexis UK, London, Issue 58, October 2004) [1824] *et seq*.; D. Hardiman, Energy, *in* V. Korah (ed.), *Competition Law of the European Community* (2nd edition, vol. 2, LexisNexis Matthew Bender, New Jersey-California 1989, Release 14-9/04) 16-37 *et seq*.; L. Ritter & W.D. Braun, *European Competition Law: A Practitioner's Guide* (3rd edition, Kluwer Law International, The Hague 2004) 918 *et seq*.; S. Schlezinger & R. Owen, Gas, *in* P. Freeman & R. Whish (eds), *Butterworths Competition Law* (LexisNexis UK, London, Issue 58, October 2004) [1606] *et seq*.; I. Van Bael & J.F. Bellis, *Competition Law of the European Community* (4th edition, Kluwer Law International, The Hague 2005) 1368 *et seq*.; and in depth, A.M. Klom, Effects of Deregulation Policies on Electricity Competition in the EU, *Journal of Energy and Natural Resources Law* (= J Energy Nat Resources L) 1997, 1; D. Geradin, L'ouverture à la concurrence des entreprises de réseau – analyse des principaux enjeux du processus de libéralisation, *Cahiers de droit européen* 1999, 13; *idem* (ed.), *The Liberalisation of State Monopolies in the European Union and Beyond* (Kluwer Law International, The Hague 2000); *idem* (ed.), *The Liberalisation of Electricity and Natural Gas in the European Union* (Kluwer Law International, The Hague 2001); P.D. Cameron, *Competition in Energy Markets: Law and Regulation in the European Union* (OUP, Oxford 2002); M Papantoni, *Energy Law* (Nomiki Vivliothiki, Athens 2003) [in Greek]; P.D. Cameron (ed.), *Legal Aspects of EU Energy Regulation: Implementing the New Directives on Electricity and Gas across Europe* (OUP, Oxford 2005). For an overview of the competition rules as applied in the liberalised electricity market, see H.P. Synodinos, Liberalisation of the Electricity Market

However, State barriers that are being removed by the liberalisation directives (*ex ante* regulation) should not be replaced by anti-competitive behaviour of market operators having the same effect. A strict application of competition law is therefore necessary (*ex post* regulation). The application of the competition rules under the EC Treaty has become an increasingly important aspect of the Community's energy policy[9]. In order to achieve the realisation of the internal energy market, competition law must ensure that consumers are free to choose and switch suppliers while suppliers are free to enter into competition with each other and, above all, to access the networks in a transparent, cost-reflective, efficient, and non-discriminatory way. In this respect, the Commission's competition policy relies on four instruments: (a) control of State monopolies; (b) State aid control; (c) antitrust; and (d) merger control[10].

The aim of this paper is to provide an overview of the way the EC Treaty competition rules have been applied to the liberalised electricity and gas industries, trying to identify whether the aforementioned goals of the competition policy in this sector have been achieved. Its overall structure takes the form of four chapters, including this introductory chapter. The second chapter treats the application of "public" competition law, namely Articles 86 and 87 EC, as regards the grant of exclusive rights and State aid by the Member States to the energy companies. The third chapter analyses the application of "private" competition law, namely Articles 81 and 82 EC and merger control rules. Purpose of the paper is not to exhaustively describe every case, but to highlight the developments that are of most interest, illustrating the role of EC competition law in the liberalisation of the energy sector and the results of its implementation. Finally, the conclusion gives a brief summary and critique of the findings.

---

and Competition Rules, *in* Centre of International and European Economic Law (ed.), *The Liberalisation of the Electricity Market* (Research Texts 10, Ant. N. Sakkoulas, Athens 2001) 71 *et seq*. [in Greek].

[9] European Commission Working Document "The Internal Energy Market", COM(88) 238 final, 2 May 1988; European Commission's Proposal for a Council Directive Concerning Common Rules for the Internal Market in Electricity [1992] OJ C65/4; European Commission's Proposal for a Council Directive Concerning Common Rules for the Internal Market in Natural Gas [1992] OJ C65/14.

[10] M. Albers, Energy Liberalisation and EC Competition Law, 25 *Fordham International Law Journal* 2002, 909, 912; A. Schaub, Liberalisation of the Energy Markets: The Perspective of Competition Policy, *in* A. von Bogdandy, P.C. Mavroidis & Y. Mény (eds), *European Integration and International Co-ordination – Studies in Transnational Economic Law in Honour of Claus-Dieter Ehlermann* (Kluwer Law International, The Hague 2002) 403, 406.

II. LIBERALISATION, COMPETITION, AND THE STATE

A. Exclusive rights in the energy sector

At the beginning of the energy markets liberalisation process, the widespread existence of public enterprises and enterprises to which governments had granted exclusive import and export rights were distinctive features of the sector[11]. Initially, the granting of this kind of rights was justified by the European Court of Justice (hereinafter referred to as the 'ECJ') under Article 30 EC[12], but later this gave rise to concerns in the context of Article 86(2) EC, which provides an exception to the rule prohibiting exclusive rights, when it refers to undertakings entrusted with the provision of services of general economic interest.

More specifically, in *Campus Oil*[13] the ECJ upheld the granting of exclusive rights following the introduction by the Irish government of legislation requiring importers of petroleum products to buy a certain proportion of their requirements from the national refinery at a price to be set by the relevant Minister on the basis of the running costs of the refinery. Although this was a measure having equivalent effect to a quantitative restriction and thus fell under Article 28 EC, it could be justified on the basis of Article 30 EC on grounds of public security in light of Ireland's heavy dependence on imports for its oil supplies and the importance of oil for the life of the country[14].

This initial approach was followed by the judgment in *Almelo*[15], where the ECJ held that the continuous provision of electricity throughout a territory, to all consumers, and at affordable prices constituted a task of general economic interest within Article 86(2) EC. The exclusivity could be justified if it was necessary for the performance of that task having regard

---

[11] Except for the UK, where the electricity and gas sector had already been privatised.

[12] Article 30 EC provides that Articles 28 and 29 EC shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified, *inter alia*, on grounds of public policy and security.

[13] Case 72/83 *Campus Oil v The Minister for Industry and Energy* [1984] ECR 2727.

[14] For a comment on the case as well as an analysis of the concept of public security see Y.D. Drossos, "Public Order" and "Public Security": Concepts of the National Constitution, in the Framework of the European Communities, *Επιθεώρηση Δημοσίου Δικαίου και Διοικητικού Δικαίου* (= Epitheorissi Dimossiou Dikaiou kai Dioikitikou Dikaiou – EDD) 1991, 183, 190 *et seq*. [in Greek]. Similar was the ECJ's approach in the *Greek Oil Monopolies* case (Case 347/88 *Commission v Greece* [1990] ECR I-4747).

[15] Case C-393/92 *Gemeente Almelo v Energiebedrijf IJsselmij* [1994] ECR I-1477.

to the obligations imposed on the undertaking, including the protection of the environment, and the costs which these may entail. This approach is in line with the landmark judgment in *Corbeau*[16], which referred to the postal sector and introduced the "necessity test". According to this test, the grant of an exclusive right having the effect of limiting or even excluding competition will be compatible with Treaty rules if it is granted to an undertaking entrusted with a task of general economic interest and provided it is necessary to enable the company to carry out its task. The ECJ's conclusions in *Almelo* were consolidated and clarified subsequently in the Electricity and Gas Directives[17].

In this framework, in 1991 the ECJ assessed the exclusive import and export rights granted by four Member States (Netherlands, Italy, France, and Spain) after Commission's applications pursuant to Article 226 EC[18]. Even though it found that the exclusive rights in question infringed Article 31 EC and considered Article 86(2) EC to be inapplicable, in examining the arguments put forward by the Members States it accepted that the uninterrupted supply of electricity throughout a territory in sufficient quantities to meet demand at any given time at uniform tariff rates, which may not vary save in accordance with objective criteria applicable to all customers, is a task of economic interest. Therefore, an undertaking entrusted with the particular task provided services of general economic interest within the meaning of Article 86(2) EC[19]. "Particular tasks" in this sense may be considered the obligations to supply all customers throughout the national territory, to supply all customers in the areas served, to ensure continuity of supply, to observe equal treatment between customers, to ensure the proper functioning of the public national electricity supply system at costs that are as low as possible and in socially responsible manner, to ensure at minimum management cost the availability of electrical energy of a quantity and at a price appropriate to

---

[16] Case C-320/1991 *Corbeau v Procureur belge de la République* [1993] ECR I-2533.

[17] P.J. Slot, Energy and Competition, *Common Market Law Review* (= CML Rev.) 1994, 511, 532-533; S. Ktistaki, Competition Law and Public Service in the Light of the European Integration: Thoughts by Reason of the European Court of Justice Judgments in *Corbeau* and *Almelo*, *Ελληνική Δικαιοσύνη* (= Helliniki Dikaiossyni – HellDni) 1995, 1479, 1484 *et seq*. [in Greek]; F. Blum, The Recent Case Law of the European Court of Justice on State Monopolies and its Implication for Network Industries, *Journal of Network Industries* (= JNI) 2000, 55, 60-62, 72; V. Hatzopoulos, The ECJ Case Law on Energy, 2 *Ενέργεια & Δίκαιο* (= Energeia & Dikaio) 2004, 7, 12-13 [in Greek].

[18] Cases C-157/94 *Commission v The Netherlands* [1997] ECR I-5699; C-158/94 *Commission v Italy* [1997] ECR I-5789; C-159/94 *Commission v France* [1997] ECR I-5815; C-160-94 *Commission v Spain* [1997] ECR I-5851.

[19] *Cf. Ijsselcentrale and others* (Case 91/50) [1991] OJ L28/32.

the requirements of balanced economic development of the country etc. The necessity test was applied so as to be examined to what extent the performance of those particular tasks could be achieved only through the grant of exclusive rights. The Court stated that for Article 86(2) EC to apply it was sufficient for the Member State to show that the application of the Treaty rules would obstruct the performance of the public service obligations entrusted to it, but it did not have to show that the application of the free movement rules would threaten the survival of the undertakings in question. It was incumbent upon the Commission to show that the exclusive rights exceeded the degree required for the fulfilment of the public service obligations, to provide specific alternatives, and to show that they would work, which required substantial and legal evidence. In the specific case, each Member State had provided detailed considerations as to the indispensability of the exclusive rights, while the Commission had hardly considered the economic aspects, but concentrated on the legal issue of the inapplicability of Article 86(2) EC to State measures infringing the Treaty rules on free movement of goods. The ECJ, therefore, held that it was not in the position, in these proceedings, to consider whether, by maintaining the exclusive rights at issue, the Member States had in fact gone further than was necessary to enable the public undertakings to perform under economically accepted conditions the tasks of general economic interest assigned to them. The absence of a clear statement as to the compatibility of the exclusive rights with Article 86(2) EC led to the dismissal of the Commission's application.

It has been argued that the "Energy" judgments put paid to the Commission's hopes that, apart from secondary legislation, proceedings based on Articles 226 and 31 EC could also play an important complimentary role towards the realisation of the internal energy market. On the basis of the large degree of discretion afforded to Member States by the judgments and the large burden of proof imposed on the Commission, it was considered unlikely that Article 31 EC could ever provide the Commission with a useful instrument by which to advance its programme for the realisation of the internal energy market[20]. Moreover, it has been doubted whether the judgments were compatible with the secondary energy legislation on the grounds that they resulted in the derogation of rules aiming at protecting competition in the electricity markets and thus in hindering the development of trade in an important area of the Community trade policy. In this view, secondary legislation and EC trade and energy policy suggest that,

[20] L. Hancher, Delimitation of Energy Law Jurisdiction: The EU and its Member States: From Organisational to Regulatory Conflicts, *J Energy Nat Resources L* 1998, 42, 51.

concerning liberalised energy markets, Article 86(2) EC should be interpreted far more narrowly and applied far more strictly[21].

One should bear in mind, however, that liberalisation is aiming not only at the opening-up of the energy markets and the introduction of competition, but also at ensuring the provision of a public service. Indeed, the first Electricity and Gas Directives listed the obligations that States might impose upon companies in the general economic interest, such as security, regularity, quality, and pricing of supply, protection of the environment, and long term planning. These obligations are strengthened and given a greater emphasis by the Acceleration Directives, which clearly allow Member States to grant exclusive rights for the fulfilment of public service obligations, insofar this is done in a non-discriminatory and transparent way. Based on this reason, the liberalisation in the energy sector is accompanied by increased control and regulation. Besides, the fact that to date no Member State has found it necessary to uphold or grant any exclusive rights in the sector demonstrates that competition and public service are compatible with each other[22].

The judgments in question position the public service as a counterbalance to liberalisation and the application of common legislation due to the unique characteristics of the sector, continuing the evolution that began by the *Almelo* judgment in favour of the progressive and reasonable adaptation to competition rules[23]. Community control will have its place, but the ECJ, when applying Article 86(2) EC, recognises its scope as a criterion to be taken into account on a case by case basis for each public sector on the path to liberalisation. In this sense, the "Energy" judgments, given also the date they were issued[24], complement the secondary legislation and are in line with the evolutionary process[25].

---

[21] F.B. Krieglstein, *The Application of EC Competition Rules to the Liberalised Electricity Markets* (KMEnergR 11, Nomos Verlagsgesellschaft, Baden-Baden 2000) 22.

[22] See P.D. Cameron, *in* Cameron (ed.), *supra* note 8, [2.14] and [2.47] *et seq*.

[23] J.L. Buendia Sierra, *Exclusive Rights and State Monopolies under EC Law* (OUP, Oxford 1999) [8.201].

[24] It is possible that the ECJ may have felt unwilling to interfere in Member States' regulation of services of general economic interest because of the adoption of the first electricity directive between the instigation of the actions and the judgments.

[25] *Cf.* P. Blanchard, French Electricity Sector: ECJ Decision on Monopolies for the Import and Export of Electricity, *J Energy Nat Resources L* 1999, 265, 278-279; Hatzopoulos, *supra* note 17, 13.

B. State aid policy in relation to stranded costs

Another important competition issue arising from the liberalisation process is that of stranded costs. Prior to liberalisation, many electricity companies had given commitments or guarantees of operation to their governments that could not be tenable under conditions of competitive market. For instance, they had invested in assets or entered into contracts concerning e.g. purchases of electricity at a higher than average cost on a long-term basis or construction of power plants so as to secure employment in structurally underdeveloped regions. The existence of a fixed price tariff established by the State gave them the insurance that these investments would be in any event financed by their customers. Following the liberalisation and the expected drop in electricity prices, some of these investments and contractual commitments could lose all prospects to be recovered and become "stranded"[26].

The problem was recognised by the European Parliament and the Council, which provided for a transitional regime that would allow the electricity companies concerned to obtain relief for their commitments or guarantees. The first Electricity Directive foresaw the possibility to allow special exceptional provisions in case past commitments would make it difficult for incumbents to make it through the liberalisation. In particular, Article 24 provided that "those members in which commitments or guarantees of operation given before the entry into force of this Directive may apply for a transitional regime which may be granted to them by the Commission…"[27]. Whereas some Member States notified requests for a temporary derogation from specific obligations of the Directive, most Member States did not wish to delay market opening in order to compensate for stranded costs, but opted for the grant of financial compensation schemes. The Commission considered that Article 24 of the Directive was not sufficient a legal basis to allow such State supports since most of them would have been State aid within the meaning of Article 87 EC[28].

---

[26] Schaub, *supra* note 10, 413; C. Quingley & A. Collins, *EC State Aid Law and Policy* (Hart Publishing, Oxford 2003) 208-209.

[27] This would mean, for instance, derogation from the obligation of the incumbent to grant third party access to the network.

[28] See Commission decisions 1999/791/EC, 1999/792/EC, 1999/793/EC, 1999/794/EC, 1999/795/EC, 1999/796/EC, 1999/797/EC and 1999/798/EC [1999] OJ L319-1 *et seq*., concerning measures taken respectively by the United Kingdom, France, Germany, Luxemburg, Austria, the Netherlands, Spain, and Denmark. For an analysis of the cases and the particular schemes proposed by the Member States, see Cameron, *supra* note 7, [7.99] *et seq*.; C. Markus, Stranded Costs of Former Electricity Monopolies under EU Law: Part

Given that the existence of stranded costs might affect certain electricity companies and jeopardise the liberalisation process, the Commission considered that State aid to compensate stranded costs might be authorised under the derogation of Article 87(3)(c) EC in circumstances where such aid favours the transition of its beneficiary to the liberalised sector. In this sense, aid aiming at offsetting stranded costs should be viewed as facilitating economic activity in the electricity sector. However, whilst such financial compensation may be justified under certain circumstances, it can also endanger emerging competition on recently opened-up markets and seriously distort trade in the developing internal energy market. Therefore, it must be compatible with the Common Market to the extent that it does not affect trading conditions, that is, the development of fair and efficient competition to an extent contrary to the common interest.

The criteria for the grant of this aid have been published in the Commission's Communication relating to the methodology for analysing State aid linked to stranded costs[29]. This provides that the alleged stranded cost must be a real cost and not only a risk. Furthermore, a causal link must exist between a stranded cost which will be compensated and the opening-up of energy markets. A compensation for all turnover losses since February 1999, the date of the opening-up of the electricity markets, will not be acceptable. The actual amount of State aid must be fixed in view of actual price developments after liberalisation and it cannot be fixed *ex ante*. Payments may be effected beforehand, but provision must be made for the return of payments if price reductions are smaller than expected. It must also be assured that the financial support really is limited to what is necessary to compensate for stranded investments; otherwise, the distortion of competition would not be acceptable. In addition, the methods of financing aid to offset stranded costs that are chosen by Member States must not have the effect of deterring new market entry.

1, 6 *International Energy Law & Taxation Review* (= IELTR) 2000, 144; *idem*, Stranded Costs of Former Electricity Monopolies under EU Law: Part 2, 7 *IELTR* 2000, 167.

[29] Commission Communication relating to the methodology for analysing State aid linked to stranded costs, Adopted by the Commission on 26 July 2001, Commission letter SG [2001] D/290869 of 6 August 2001, available at <http://europa.eu/comm/competition /state_aid/legislation/stranded_costs/en.pdf. Under paragraph 6 of the Communication, the methodology for stranded costs does not prejudice the guidelines on regional aid in the regions covered by Article 87(3)(a) EC and it applies independently of whether undertakings are in public or private ownership. For an analysis of this methodology, see B. Allibert, Compensation of Stranded Costs in the European Union Electricity Sector, 2 *European State Aid Law Quarterly* (= EStAL) 2003, 6 *et seq*.

The Communication has been used by the Commission in decisions concerning the Netherlands, Spain, Austria, Belgium, Greece, Italy, and Portugal[30]. It seems that in the future the stranded costs compensation analysis will focus on countries that will enter the EU. By contrast with the first Electricity Directive, the right of Member States to apply for a transitional regime is absent in the Acceleration Directive. Therefore, State aid rules and the Commission's Communication will be the only instrument to ensure the smooth transition to a competitive electricity market and prevent the negative impact of stranded costs on the companies.

In tackling stranded costs issues in the electricity sector, the Commission endeavoured to find the right balance between promoting effective liberalisation and respecting legitimate interests. Given that in relation to other sectors, such as telecommunications, liberalisation has not been accompanied by a speedier technological progress or by increased demand, the aid granted enabled electricity undertakings to reduce the risks relating to their historic commitments increasing the likelihood that they will maintain their investments in the long term and to avoid passing on the entire cost of their non-economic commitments or guarantees to their captive customers[31].

III. Liberalisation, competition, and the energy companies

A. Contractual relationships in the energy sector in light of Article 81 EC

Article 81 EC prohibits as incompatible with the common market all agreements between undertakings and concerted practices that may affect trade between Member States and have as their object or effect the prevention, restriction, or distortion of competition within the common market. Such agreements may not, however, fall within the scope of this prohibition as long as they contribute to improving the production or distribution of goods or to promoting technical or economic progress, provided that they do not impose on the undertakings concerned restrictions that

---

[30] Cases N 597/98 [2001] OJ C268-6; N 49/99 [2001] OJ C268-7; N 34/99 [2002] OJ C5-2; N 149/2001 [2002] OJ C222-2; N 133/2001 [2003] OJ C9-6, N 490/2000, and N 161/2004, available at http://ec.europa.eu/comm/secretariat_general/sgb/state_aids/industrie_2000.htm, concerning respectively the Netherlands, Spain, Austria, Belgium, Greece, Italy, and Portugal. For a comment on the application of the Communication, see C. Markus, Face-Lift for Former National Electricity Monopolies: The Stranded Costs Saga Continues, 4 *IELTR* 2002, 82, 86.

[31] Cameron, *supra* note 8, [7.115].

are not indispensable to the attainment of these objectives and do not afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question[32].

Energy companies are "undertakings" within the meaning of Article 81 EC even if they are still owned by the State[33]. However, given that many energy companies have been vertically integrated the question whether parent and subsidiary are different undertakings or form one economic unit has been of great importance as to the implementation of Article 81 EC. In this case, general common features like acting within the same sector of electricity or gas supply are not enough to make an economic unit. Under the Commission's approach in the *Ijsselcentrale* case[34], the structure of the subsidiary as well as the process of its decision-making have to be examined. This approach is in line with previous ECJ's judgments ruling that there is one economic unit only as far as the subsidiary has no real freedom to determine its course of action on the market and the agreements or practices in question are merely concerned with the internal allocation of tasks as between undertakings[35].

The Commission had dealt with a number of cases concerning contractual relationships in the energy sector even before the entry into force of the first Electricity and Gas Directives. Agreements relating mainly to the restructuring of the energy industries in England and Wales, Scotland, and Northern Ireland in the early 1990s and the use of the network[36] as

---

[32] For an analysis of Article 81 EC, see R. Whish, *Competition Law* (5th edition, Butterworths, London 2003) 79 *et seq*.; V. Korah, *An Introductory Guide to EC Competition Law and Practice* (Hart Publishing, London 2004) 39 *et seq*.; M. Dabbah, *EC and UK Competition Law* (CUP, Cambridge 2004) 55 *et seq*. and 233 *et seq.*

[33] *Cf.* Case C-41/90 *Höfner and Elser v Macrotron* [1991] ECR I-1979; Joined Cases C-159/91 and C-160/91 *Poucet and Pistre v AGF and Cancava* [1993] ECR I-637; Case C-364/92 *Fluggesellschaft mbH v European Organization for the Safety of Air Navigation (Eurocontrol)* [1994] ECR I-43; Joined Cases C-264/01, C-306/01, C-354/01, and C-355/01 *AOK Bundesverband v Ichtyol-Gesellschaft Cordes* [2003] ECR I-2493; Case T-319/99 *Fenin* [2003] ECR II-360, and also Buendia Sierra, *supra* note 23, 58-59; V. Louri, "Undertaking" as a Jurisdictional Element for the Application of EC Competition Rules, *Legal Issues of Economic Integration* 2002, 143; K.P.E. Lasok, When is an Undertaking not an Undertaking, *European Competition Law Review* (= ECLR) 2004, 383.

[34] *Supra* note 19.

[35] Case 15/74 *Centrafarm BV and Adriaan De Peijper v Sterling Drug Inc*. [1974] ECR 1147; Case 30/87 *Bodson v Pompes Funèbres des Régions Libérées* [1984] ECR 2999.

[36] *Reorganisation of the electricity industry in England and Wales* (Notice pursuant to Article 19(3) of Regulation 17) [1990] OJ C191/9; *Reorganisation of the electricity industry in Scotland* (Notice pursuant to Article 19(3) of Regulation 17) [1990] OJ C245/9; *Privatisation of the electricity industry in Northern Ireland* (Notice pursuant to Article

well as long-term and exclusive supply agreements between monopoly generators and new entrants[37] had been subjected to scrutiny as to their compatibility with Article 81 EC. After the liberalisation of the energy sector, independent producers are no longer obliged to sell the totality of the energy they produce to incumbent monopoly generators, but they are able to sell it directly to final eligible customers. The Commission, therefore, has to examine horizontal agreements between generators or suppliers in case of prevalent market shares. In this field, the most significant cases giving rise to competition concerns are the joint selling agreements in the gas sector (1). In most cases, however, the restriction of competition may arise from vertical agreements, namely contracts between generators and distributors and between suppliers and eligible customers, which must be examined in light of the European Community's policy dealing with vertical restraints (2).

1. Horizontal agreements: Joint marketing between competitors in the gas sector

On an oligopolistic market, such as the energy market, companies may try to increase their profits by cooperating, be it in form of a straight forward cartel, be it in form of a joint venture arrangement. The formation of such agreements may be easier in this sector, where the firms involved are few and the industry concerned still concentrated. In the upstream gas sector, the joint development of gas fields and the joint selling arrangements among gas producers have traditionally been common due to a number of economic and technical characteristics of gas exploration, such as the instability of regions where gas deposits are found, the geological nature of the particular gas fields, the reluctance of many licence regimes to divide gas fields up between individual operators, the fact that usually only one pipeline is built from one gas field so that it must be arranged how different producers will not take more than their share of reserves etc., which make gas exploration a capital-intensive activity with a high risk factor[38].

19(3) of Regulation 17) [1992] OJ C92/5; *British Gas Network Code* (Notice pursuant to Article 19(3) of Regulation 17) [1996] OJ C93/5.

[37] *Scottish Nuclear, Nuclear Energy Agreement* (Case IV/33.473) Commission Decision 91/329/EEC [1991] OJ L178/31; *Electricidade de Portugal/Pego project* (Notice pursuant to Article 19(3) of Regulation 17) [1993] OJ C265/3; *REN/Turbogàs* ISAB Energy (Notice pursuant to Article 19(3) of Regulation 17) [1996] OJ C118/7; *ISAB Energy* (Notice pursuant to Article 19(3) of Regulation 17) [1996] OJ C138/3 etc.

[38] Hardiman, *supra* note 8, [16.05(5)].

Obviously, such arrangements attracted the attention of all competition authorities including the Commission, which considered that in many cases such joint selling arrangements had lead to the reduction of the number of independent players on the market. Due to their impact on third parties, joint selling agreements were first examined by the Commission even before the entry into force of the first Gas Directive in the *Britannia* case[39], which concerned the joint marketing of gas from the Britannia gas field. However, the specific agreement was cleared on the basis that it could not affect intra-community trade in gas since there was no interconnector facility between the United Kingdom and another Member State capable of transporting gas in significant quantities. This analysis is no longer justified after the development of the UK-Belgium interconnector. After the liberalisation of the gas sector, the Commission intervened, for instance, against an agreement on the joint sale of gas produced in the Corrib gas field by Enterprise Oil, Statoil, and Marathon[40] because the joint marketing reduced competition among the parties and the access of customers to low-priced sources. The case was settled following commitments by the parties to remove anti-competitive provisions, such as exclusivity, in the supply contracts. In the *GFU* case[41], which concerned the joint sale of Norwegian natural gas (accounting for 10% of the EU gas consumption) by Statoil and Norsk Hydro through a single seller, the Gas Negotiation Committee (Gassvorhandlingsutvalget – GFU), the Commission closed the case only after accepting commitments by the parties to discontinue joint marketing and instead to market the gas individually and to reserve certain gas volumes for new customers. Similarly, in *DONG/DUC*[42], the Commission investigated the joint marketing of three Danish gas producers (Shell, AP Moller, and ChevronTexaco), members of the Danish Underground Consortium (DUC), to the incumbent wholesaler DONG. DUC argued that the joint marketing arrangement fell under the Specialisation Block Exemption[43], but the Commission rejected this analysis on the basis that the arrangements between DUC partners amounted to "joint coordination of sales between

---

[39] *Britannia Gas Condensate Field* (Notice pursuant to Article 19(3) of Council Regulation 17/62) [1996] OJ C291/5; Commission Press Release [1996] IP/96/1214.

[40] *Corrib* (Case COMP/37.708) [2001] Commission Press Release IP/01/578.

[41] *GFU – Norwegian Gas Negotiation Committee* (Case COMP/36.072) [2002] Commission Press Release IP/02/1084.

[42] *DUC/DONG* (Case COMP/38.187) [2003] Commission Press Release IP/03/91.

[43] EC Regulation 2658/2000 on the application of Article 81(3) of the Treaty to categories of specialisation agreements [2000] OJ L304/3.

independent producers" rather than "joint distribution", as provided for in the block exemption in question.

Joint selling of gas may be considered a necessary outgrowth of the co-ownership of a gas field, which is usually deemed to be outside the scope of Article 81(1) EC prohibition as long as it does not directly affect third parties. Joint selling, however, does indeed directly affect third parties violating the very core of the prohibition. And despite its inclusion in the joint venture comprising the joint operation agreement, it could not really be considered part of it since the parties are still selling separately. Even if they negotiate together and there is a single contract, each sells its "seller's share" of the designated capacity[44]. In light of these considerations and as Commission officials have remarked, it seems that joint marketing arrangements need to be shown absolutely "indispensable" for the development of the gas field in order to be justifiable[45].

US antitrust law approach, which does not prohibit the joint selling of gas[46], had often been invoked by representatives of European gas producers, especially at the beginning of the liberalisation process and the first decisions on the matter, in order to argue against the strict application of Article 81 EC. This does not mean, of course, that US antitrust law could apply directly to the European gas industry given the lack of the physical means to trade gas between the US and Europe. However, this different approach could be explained if the US and States' regulatory regimes were taken into account. US gas producers, for instance, sell separately overcoming the difficulties of fluctuating demand or inability to sell gas as produced through borrow and loan contracts[47].

All things considered, the Commission's approach towards joint selling of gas is consistent with the European Community's competition policy and enables the liberalisation process in the sector as illustrated in both Gas Directives. Joint selling of gas in Europe might be approached differ-

---

[44] J.D. Dinnage, Joint Activities among Gas Producers: The Competition Man Cometh, *J Energy Nat Resources L* 1998, 249 *et seq*.

[45] A. Schaub, Competition Policy and Liberalisation of Energy Markets, European Utilities Circle 2000, Brussels, 23 November 2000, 9, available at <http://ec.europa.eu/comm/competition/speeches/index_theme _13.html>.

[46] Horizontal agreements between electric utilities too have often been allowed in the US although there is no express exemption from the application of antitrust law. In most cases they are considered to be in the public interest or necessary to the successful and efficient evaluation of the pooling agreement. See E.W. Kintner & J.P. Bauer, *Federal Antitrust Law: A Treatise on the Antitrust Laws of the United States* (Vol. IX, Antitrust Exemptions – Specific Industries and Activities, Anderson Publishing, Cincinnati, 2005 Cumulative Supplement) 58-59, note 133, 134.

[47] Dinnage, *supra* note 44, 260.

ently in the case of the formation by the owners of a field of a full function joint venture, such that gas is sold by the joint venture rather than individually by the owners of the field. This would probably be examined in accordance with the criteria applied to co-operative joint ventures and, therefore, an exemption for such an arrangement might be easier to obtain[48].

2. Vertical restraints: Exclusive and long-term energy agreements

Traditionally, the generation of electricity or the extraction of gas offshore and the development of the related distribution infrastructure have required large-scale financing based on long-term supply contracts, which frequently are concluded on an exclusive basis[49] and often contain resale, territorial, or use restrictions and non-compete clauses[50]. Such agreements are likely to have a market foreclosure effect hindering customers from choosing and switching suppliers and therefore must be examined under Article 81 EC and the rules on vertical restraints, and particularly EC Regulation 2790/1999, the "Vertical Restraints Block Exemption" (the "VERBE")[51].

As regards the latter, there has been a debate as to whether it is applicable to energy operators. It should be noted that, unlike previous block exemption regulations[52], this one covers all economic sectors (that is why it is referred to as "Umbrella Block Exemption Regulation") applying to vertical agreements for the purchase or sale of goods or services concluded between undertakings that generally have no competitive relationship. Incited by a less negative evaluation of vertical restraints in recent competition theory and policy approaches, the VERBE is pervaded by a relative tolerant attitude towards vertical restraints on competition. This tendency gave rise to discussion on the applicability of the VERBE to this sector given the European Union's policy to establish competition as the prime policy instrument in the European energy industry. However, nothing on the motivating considerations of the Commission implies that

---

[48] Dinnage, *supra* note 44, 284.

[49] On competitive markets with sufficient liquidity, such as Sweden or Great Britain, which are more advanced in terms of liberalisation than other markets, such contracts are rather the exception than the rule.

[50] See Hardiman, *supra* note 8, [16.05(1)-(4)]; Ritter & Braun, *supra* note 8, 926 *et seq*.

[51] Commission Regulation 2790/1999 [1999] OJ C366/21. In 2000, this regulation was supplemented by the Guidelines on Vertical Restraints [2000] OJ C291/1, which interprets its provisions.

[52] See Regulation 1983/83 on exclusive distribution agreements [1983] OJ L173/1 and Regulation 1984/83 on exclusive purchasing agreements [1983] OJ L173/5.

the VERBE does not apply to the energy sector. Indeed, its application would seem logical since the liberalisation process aims at the equal treatment of energy with other goods or services[53].

According to the VERBE, purchasing arrangements may be exclusive and agreed for five years provided the supplier's market share does not exceed 30% of the relevant market. In the case of market shares exceeding 30%, the assessment of long-term arrangements depends on balancing of the extent of exclusivity and the duration of the arrangement in the light of the economic circumstances of each case. The VERBE does not apply where the buyer has a dominant position or where the parties are actual or potential competitors, except where the competitors enter into non-reciprocal agreements and the buyer has a total annual turnover of not more than EUR 100 million. If a contractual vertical restriction in an energy supply contract does not meet the requirements for an exemption under the VERBE there is always the possibility for an individual exemption under Article 81(3) EC without any presumption of illegality[54], in cases involving, for example, significant investments.

Under Article 81 EC, the Commission intervened against exclusive supply contracts between the Russian gas producer Gazprom and the Italian wholesaler ENI, which prevented Gazprom from supplying other wholesalers and ENI from reselling the gas outside the Italian territory[55]. The case was settled only after the parties committed to amend significantly the agreement, so that Gazprom is free to sell to other customers in Italy without having to seek ENI's prior approval and ENI is free to resell outside Italy. ENI, furthermore, agreed to increase the capacity of the pipeline via Russia and Slovakia to the Italian border and to grant access to third parties. Accordingly, the Commission intervened against agreements among Gazprom and the Algerian gas company Sonatrach[56], the Austrian gas company OMV[57], and the German gas company Ruhrgas[58],

---

[53] K. Markert, Langfristige Bezugsbindungen für Strom und Gas nach deutschem und europäischem Kartellrecht, *Europäische Zeitschrift für Wirtschaftsrecht* (= EuZW) 2000, 427; F. Baur, Energielieferverträge unter europäischem Kartellrecht, *Recht der Energiewirtschaft* (= RdE) 2001, 81; G. Kuhne, Energy Supply Contracts and European Antitrust Law, 1 *IELTR* 2002, 13-14; Schaub, *supra* note 10, 417; Ritter & Braun, *supra* note 8, 923.

[54] See Guidelines on Vertical Restraints, *supra* note 51, [62].

[55] *Gazprom/ENI* [2003] Commission Press Release IP/03/1345.

[56] *Gazprom/Sonatrach* (Case COMP/37.811) [2003] Commission Press Release IP/03/1345.

[57] *OMV/Gazprom* (Case COMP/38.085) [2005] Commission Press Release IP/05/195.

which contained similar "destination clauses", securing significant changes to them. Indeed, such restrictions preventing wholesalers from reselling the gas into neighbouring territories or, in the case of liquefied natural gas (LNG), into terminals located in a different Member State constitute a severe restriction on competition because such wholesaling or arbitraging could significantly contribute to the creation of a more integrated European gas market fostering both competition and security of supply. In the same view, use restrictions preventing the customer from using energy supplies for other purposes than e.g. power production as well as clauses allowing the supplier to reduce the quantities supplied if the customer were to start selling gas to competitors are considered tantamount to resale restrictions and clearly infringe Article 81 EC[59]. Besides, under Article 4 of EC Regulation 2790/1999 the customer may not be prevented from using the gas supplied for other production sites or for other fields[60] than the sites or fields imposed by the supplier and may not be prevented from establishing new production facilities or from developing and using their own alternative energy sources, in particular from becoming a producer of energy for its own consumption[61].

However, the Commission's approach has not been so harsh as regards long-term supply contracts in the energy sector, which are not considered *per se* incompatible with the EC competition rules, especially if they are necessary to amortise significant investments. Based on this approach, long-term contracts for supplying a high-capacity power station, for instance, are legal as long as a stable and sufficiently sizeable outlet is guaranteed and the market is not unduly foreclosed[62]. At the beginning of the liberalisation process and in anticipation of the market opening envisaged by the first Electricity and Gas Directives, the Commission held in a number of cases that exclusive supply and purchasing arrangements may be concluded for a maximum duration of ten to fifteen years as long as

---

[58] *E.ON Ruhrgas/Gazprom* (Case COMP/38.307) [2005] Commission Press Release IP/05/710.

[59] *Cf. Gas Natural/Endesa* (Case COMP/37.542) [2000] Commission Press Release IP/00/297; *Wingas/EDF Trading* (Case COMP/36.559) [2002] Commission Press Release IP/02/1293.

[60] E.g. chemicals rather than generation of electricity.

[61] Ritter & Braun, *supra* note 8, 928; *cf.* Council Recommendation to promote cooperation between public utilities and auto-producers of electricity [1988] OJ L335/29.

[62] See European Commission, XXVI Report on Competition Policy 1996 [103]; European Commission, XXVII Report on Competition Policy 1997 [93] *et seq.*; European Commission, XXXII Report on Competition Policy 2002 [80].

they are strictly necessary to amortise important investments[63]. In this framework, the Commission intervened against agreements between coal and electricity producers, under which the latter undertook to buy a certain quantity of coal rather than other primary energy sources (such as oil) on a long-term basis exceeding fifteen years, stating that they may restrict competition by tying the purchaser to the supplier for longer than is necessary for the purpose of amortising important investments, long-term planning of deliveries and supply, and ensuring security of supply[64].

It is remarkable that the Commission has been too willing to grant exemptions in respect of supply contracts for durations long in excess of that tolerated under the VERBE on the grounds that such long-term contracts are necessary to facilitate the opening-up of national energy markets. Indeed, both electricity and gas producers are unlikely to have a wide choice of potential customers and the stability provided by long-term contracts on the spot market can provide encouragement for investors, since it may reduce the effect of externalities as well as the transaction costs of their engaging in this activity[65]. Given their potential positive effects, such vertical restraints are not considered invalid *per se* under US antitrust law and their effects are investigated individually taking into account the particular facts of the case[66]. However, if exclusive purchasing arrangements last for a very long contractual period they are likely to lead to market foreclosure raising barriers to new entries. In examining the aforementioned agreements, the Commission systematically imposed the fifteen-year duration as a standard in this matter although

---

[63] See, for instance, *Electricidade de Portugal/Pego project*, *supra* note 36; *REN/Turbogàs*, *supra* note 36; *ISAB Energy*, *supra* note 36; *Gas Natural/Endesa*, *supra* note 58; *Synergen* (Case COMP/37.732) [2002] Commission Press Release IP/02/792.

[64] *Jahrhundertvertrag* (Case IV/33.151) and *VIK-GVSt* (Case IV/33.997) [1993] OJ L50/14; *Electrabel/ Intermixt* [1997] Commission Press Release IP/97/351. In case of a dominant supplier, such agreements may infringe Article 82 EC too (see *infra*, B).

[65] *Cf.* O.E. Williamson, Transaction Cost Economics: The Governance of Contractual Relations, *Journal of Law and Economics* 1979, 233 *et seq.*; P.L. Joskow, The Role of Transaction Cost Economics in Antitrust and Public Utility Regulation, *Journal of Law, Economics, and Organization* 1991, 51 *et seq.*; R.K.J. Crocker & S.E. Master, Regulation and Administered Contracts Revisited: Lessons from Transaction-Cost Economics for Public Utility Regulation, *Journal of Regulatory Economics* 1996, 24-28; R.J. Van den Bergh & P.D. Camesasca, *European Competition Law and Economics: A Comparative Perspective* (Intersentia, Antwerpen 2001) 214, 230; J.A. Gómez-Ibáñez, *Regulating Infrastructure – Monopoly, Contracts, and Discretion* (Harvard University Press, Cambridge-Massachusetts 2003) 20-36.

[66] Even though Section 1 of the Sherman Act prohibits every contract in restraint of trade, in practice this broad prohibition is relaxed and most antitrust claims are analysed under a “rule of reason”. See Van den Bergh & Camesasca, *supra* note 65, 231.

there is no apparent objective legal or economic justification for the choice of that figure. The fifteen-year figure seems to represent the Commission's compromise between what is necessary in order to provide long-term security for heavy stand-alone investments and what is an unacceptable restriction of competition in a manner contrary to the Treaty[67]. This, however, seems to be an important reason why the European energy markets are still characterised by a high level of concentration and vertical foreclosure. Through long-term contracts, incumbents are still controlling both electricity and gas markets, while new entries are undermined[68].

Clearly, the monitoring of the existing contracts is of great importance and appropriate action must be taken should the degree to which such long-term contracts are used be considered to be no longer satisfactory. In any case, the Commission has shown that it will not tolerate contracts that are so long as to foreclose the market and inhibit competition in the long term.

B. The application of Article 82 EC to network access issues

Open access to transmission and distribution networks is a prerequisite for effective competition in the electricity and gas sectors and thus has been considered the cornerstone of the liberalisation of these markets. It can be achieved by means of both *ex ante* sector-specific regulation and *ex post* competition law regulation. Indeed, even though the first and second Electricity and Gas Directives contain provisions requiring Member States to ensure that there is an open and non-discriminatory access to networks, competition rules, and particularly Article 82 EC, have an important role to play (1). According to Article 82 EC, any abuse by one or more undertakings of a dominant position within the Common Market or in a substantial part of it shall be prohibited as incompatible with the Common Market insofar as it may affect trade between Member States. This rule of law imposes direct duties on an incumbent company towards

---

[67] J. Faull & A. Nikpay, *The EC Law of Competition* (OUP, Oxford 1997) 711; Cameron, *supra* note 8, [5.86].

[68] See European Commission, Communication from the Commission to the Council and the European Parliament: Report on progress in creating the internal gas and electricity market, COM(2005)568 final, available at <http://ec.europa.eu/energy/electricity/report_2005/doc/2005_report_en.pdf>; European Commission, Energy Sector Inquiry – Issues Paper, 15 November 2005, available at <http://ec.europa.eu/comm/competition/antitrust/others/ sector_inquiries/energy/issues_paper15112005.pdf>.

its competitors as well as on Member States in their regulatory activities[69] and applies to cases concerning transmission charges, refusal to give access, allocation of transmission capacity, and long-term capacity reservation contracts in the energy sector (2).

1. The scope of Article 82 EC: Competition law v sector-specific regulation?

More specifically, in terms of sector-specific regulation the Electricity and Gas Directives require Member States to give responsibility for a number of decisions to designated authorities, including in relation to ensuring non-discrimination, effective competition, and the efficient functioning of access to networks. By contrast with the first Directives, under which Member States could choose between negotiated and regulated third party access, the Acceleration Directives[70] firmly adopt regulated third party access as the basic model, obliging Member States to take the necessary measures to give energy undertakings and eligible customers either inside or outside the territory covered by the interconnected system a right of access to the system on the basis of published tariffs and/or other terms and obligations for the use of that system. The Directives provide also for reasons of refusal to give access. These consist mainly in the lack of capacity or the lack of connection and the risk of obstructing the performance of the public service obligations in the case of both electricity and gas and in serious difficulties with take-or-pay contracts in the case of gas.

The co-existence of these rules with competition law in the regulation of the transparent and non-discriminatory access to energy networks may raise problems of overlap or even conflicts. An electricity or gas supplier, for instance, facing a third party access refusal could often have to seek to enforce his claim: (a) before a national authority under sector-specific regulation as implemented in the national legislation; (b) before a national competition authority or a national court under national competition law; or (c) before the Commission, a national competition authority, or a national court under EC competition law. Clearly, in a case like this certain basic principles, such as the supremacy of Community over domestic law and the hierarchy of sources of law, have to be considered by

---

[69] In combination with Articles 10 and 86(1) EC. For an analysis of Article 82 EC, see Whish, *supra* note 32, 175 *et seq*.; Korah, *supra* note 32, 91 *et seq*.; Dabbah, *supra* note 32, 327 *et seq*.

[70] Article 20 of Directive 2003/54/EC; Articles 18 *et seq*. of Directive 2003/55/EC.

the authorities involved[71]. However, the interaction between sector-specific regulation and competition rules in the energy sector has not attracted as much attention as in the telecommunications sector, where the Commission has already expressed its approach. These conclusions could possibly be transposable to the energy sector[72].

Under the Commission's Notice on the application of the competition rules to access agreements in the telecommunications sector[73], competition law and sector-specific regulation represent different sets of rules, applying independently of each other, with specific objectives and enforcement methods. At the same time, however, they are closely linked so that in making an assessment under competition rules the Commission will seek to build as far as possible on the principles established in the harmonisation legislation. Similarly, Community legislation adopted in the sector in question is to be interpreted in a way consistent with competition rules[74]. In this context, the Commission ruled in its decision in *Deutsche Telekom AG*[75] that as regards the interface between sector-specific regulation and competition law the existence of a regulatory remedy in the German Telecommunications Act 1996, under which the German telecommunications markets have been liberalised, does not prevent the application of competition law. The case concerned the margin squeeze between the prices Deutsche Telekom AG, the German incum-

---

[71] See L. Hancher, Delimitation of Energy Law Jurisdiction: The EU and its Member States: From Organisational to Regulatory Conflicts, *J Energy Nat Resources L* 1998, 42 *et seq*.; G. Goeteyn & A. Ramos, Access to Energy Networks: The Combination of Directives and Competition Policy, *Utilities Law Review* (= ULR) 2001/2002, 149, 153 *et seq*.; A. Palasthy, Third Party Access in the Electricity Sector: EC Competition Law and Sector-Specific Regulation, *J Energy Nat Resources L* 2002, 1, 8; M.Th. Marinos, *The Access to Energy Network: The Liberalisation of the Electricity Market* (Ant. N. Sakkoulas, Athens 2003) 233 *et seq*., 268 *et seq*. [in Greek]; N. Petit, The Proliferation of National Regulatory Authorities alongside Competition Authorities: A Source of Jurisdictional Confusion, Global Competition Law Centre Working Papers Series, GCLC Working Paper 02/04, 2004, available at <http://gclc.coleurop.be/documents>; J. Ashe-Taylor & V. Moussis, EU Competition Law and Third Party Access to Gas Transmission Networks, *ULR* 2004/2005, 105.

[72] See, *inter alia*, D. Geradin & R. O'Donoghue, The Concurrent Application of Competition Law and Regulation: The Case of Margin Squeeze Abuses in the Telecommunications Sector, Global Competition Law Centre Working Papers Series, GCLC Working Paper 04/05, 2005, available at <http://gclc.coleurop.be /documents>

[73] European Commission Notice on the application of the competition rules to access agreements in the telecommunications sector – Framework, relevant markets, and principles [1998] OJ 265/2.

[74] *Ibid*., particularly at [13], [58], and [59].

[75] *Deutsche Telekom AG* (Case COMP/C-1/37.451, 37.578, 37.579) [2003] OJ L263/9.

bent telecommunications operator, charged new operators for unbundled access to local loops in Germany and the prices it charged end-users for access to its fixed network. The wholesale charges were fixed by the regulatory authority at a level exceeding the retail charges so that new entrants were not enabled to compete with Deutsche Telekom AG in order to provide end-users access over local networks. According to the Commission's decision, this margin squeeze constituted imposition of unfair selling prices and, therefore, violation of Article 82 EC.

Different is the approach of the US Supreme Court on the same matter. Under its judgment in *Trinko*[76], once a sector-specific regime has been established there is no place for competition law remedies. More specifically, Verizon Communications Inc. was the exclusive local exchange carrier for New York until 1996 Telecommunications Act sought to introduce competition in the local telecommunications market compelling local exchange carriers to share some of their local networks with new entrants. After complaints of new operators to regulatory authorities that Verizon had violated its obligation to provide access to operator support systems functions, a series of orders and a consent decree were issued. The day after Verizon entered its consent decree, the Law Offices of Curtis V. Trinko, a law firm that bought services from one of the new entrants, filed an antitrust claim, alleging that Verizon had violated Section 2 of the Sherman Act by filling rivals' orders in a discriminatory manner to discourage customers from becoming customers of the new entrants. The District Court dismissed Trinko's claim, but the Court of Appeal reversed this decision. Under the Supreme Court's judgment, the Section 2 of the Sherman Act is not applicable in the case of Verizon's insufficient assistance to its competitors. As stated in the final part of the decision, the scope of intervention on the basis of antirust law is strictly limited in the presence of a sector-specific regulatory structure designed to deter and remedy anticompetitive harm. Once such a structure exists, the additional benefits to competition provided by antitrust enforcement will tend to be small and it will be less plausible that the antitrust laws contemplate such additional scrutiny.

The opposite approaches of the Commission and the US Supreme Court should be considered in the light of the different legal framework concerning the application of competition law and the regulation of electronic communications in Europe and the US. The US regulatory regime applying to telecommunications is much more detailed than the EC regulatory framework on electronic communications, which consists of a

---

[76] *Verizon Communications Inc. v Law Offices of Curtis V. Trinko*, LLP, 540 US, 682 (2004).

small number of directives[77] imposing a limited number of obligations on operators holding significant market power. The application of competition rules is, thus, more necessary in the EC than in the US[78]. Furthermore, in the US both telecommunications and antitrust rules are embodied in legislation, namely in the 1996 Telecommunications Act and the Sherman Act respectively. On the contrary, in the EC the new regulatory framework on electronic communications is contained in a set of directives, while competition rules are mainly in the Treaty, which enjoys hierarchical superiority and can not be ignored by the ECJ in competition matters concerning a regulated sector[79].

Despite these dissimilarities, it could be argued that the Commission is not prevented from establishing priorities and deciding not to intervene in cases where a sector-specific regime provides appropriate solutions to competition matters and this regime is successfully applied by the national regulatory authority, without violating EC competition rules. Besides, one should bear in mind that cases on issues concerning network access, pricing etc. require technical expertise and information that the Commission may not possess[80].

However, it can be hardly contested that the Commission should intervene once there is a sector-specific regime that is designed to protect competition in the market, but for any reason it has not been applied by the regulator. A possible solution would be that once the Commission has initiated the procedure, it should transfer the case to the competent national regulatory authorities so that they take a decision on the basis of the sector specific rules[81]. In any case, it remains to be seen whether and

[77] Directive 2002/19/EC on access to and interconnection of electronic communications networks and associated facilities [2002] OJ L108/07; Directive 2002/20/EC on the authorization of electronic communications networks and services [2002] OJ L108/21; Directive 2002/21/EC on a common regulatory framework for electronic communications networks and services [2002] OJ L108/33; Directive 2002/22/EC on universal service and users' rights to electronic communications and services [2002] OJ L108/21; and Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sectors [2002] OJ L201/37.

[78] D. Geradin & M. Kerf, *Controlling Market Power in Telecommunications – Antitrust vs. Sector Specific Regulation* (OUP, Oxford 2003) 70 *et seq.*

[79] N. Petit, Circumscribing the Scope of EC Competition Law in Network Industries? A Comparative Approach to the US Supreme Court Ruling in *Trinko*, *URL* 2003/2004, 185; D. Geradin, Limiting the Scope of Article 82 EC: What Can the EU Learn from the U.S. Supreme Court's Judgment in *Trinko* in the Wake of *Microsoft*, *IMS* and *Deutsche Telekom*?, *CML Rev* 2004, 1519, 1547.

[80] *Ibid.*, 1547, 1549, 1550.

[81] *Ibid.*

to what extent the Commission will be influenced by the judgment in *Trinko*.

2. Cases on abuse of dominant position

Incumbent electricity and gas operators will usually be dominant in the market controlling the relevant facilities, whose duplication would be inefficient due to the large costs involved. Transparent and non-discriminatory access to the network constitutes therefore the cornerstone of the liberalisation of these markets. However, the Commission has made limited use of Article 82 EC to stop abusive practices occurring in the energy sector, which may be considered to be another reason for the current concentration and market foreclosure in the sector. The most important cases illustrating Commission's approach are the following:

i. Pricing

The setting of prices for using transmission facilities is one of the crucial issues as regards the access to networks. Discriminatory, excessive, or generally unfair prices constitute an abuse of the dominant position and must be dealt by competition authorities. The Commission dealt with this matter in the *Verbändevereibarung I* and *Verbändevereibarung II* cases, which concerned electricity transmission tariffs agreed by Germany industry associations[82]. The first agreement was based on a price model that was transaction and distance-based. This means that the price for the transmission depended among others on the distance between the location of the generation and the load. Taking account of the ECJ's jurisprudence on unfair prices, under which a price can be considered unfair if it is excessive in relation to the economic value of the provided service (e.g. costs plus a reasonable margin of profits)[83], the Commission held that transmission pricing should reflect actual physical flows and be cost-based. This can be determined by comparing the selling price with

[82] These associations were able to do so because Germany opted for the system of negotiated third party access to networks in implanting the first Electricity Directive. See, *inter alia*, Competition Policy Newsletter No 3, October 1998; M. Albers, Competition Law Issues Arising from the Liberalisation Process, *JNI* 2000, 269, 272 *et seq*.; A.R. Börner, Negotiated Third Party Access in Germany: Electricity and Gas, *J Energy Nat Resources L* 2001, 32; I. Zenke, Germany's Electricity and Gas Markets Stand Alone: Negotiated Third Party Access, *J Energy Nat Resources L* 2003, 143.

[83] Case 26/75 *General Motors v Commission* [1975] ECR 1367; Case 27/76 *United Brands v Commission* [1978] ECR 207.

the costs of production. Therefore, transmission tariffs determined according to components not reflecting the cost can be regarded as unfair within the meaning of Article 82 EC. The Commission's considerations were taken into account and the second agreement was based on connection charges levied from network users depending on the consumed electricity. But it contained a clause under which two trading zones were created (north and south) and an extra levy was imposed when crossing from one zone to the other (the 'T-component'). The Commission held that this clause, too, constituted an entry barrier established in order to avoid long distance transmission and to protect local power production[84].

ii. Refusal to grant access

Article 82 EC applies also if access to the existing network is refused in the absence of any realistic alternatives[85]. As the ECJ has ruled, such refusal may have the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition[86]. A refusal will only be abusive if it has exclusionary or exploitative effects that are considered anti-competitive. It is to be noted that the Commission can allow a refusal to grant access to facilities if it is based on an objective justification such as lack of physical capacity or refusal to comply with reasonable terms by the party requesting access. In a network industry such as the electricity and gas industry, the owner or operator of an electricity grid, a gas pipeline, storage facilities, or other infrastructure may be forced to give access to suppliers where it is necessary to enable them to compete with him under the essential facilities doctrine. This theory finds its origin in the US and requires that if a facility essential for development of competition can not be duplicated those in possession of it must allow it to be shared on fair terms[87]. The ECJ has rec-

---

[84] The 'T-component' with an amended system of calculating balancing energy and a statement of electricity prices was considered to improve the ground rules governing transmission through network during the investigation of the VEBA/VIAG merger (*infra*, C).

[85] It should be borne in mind that in case of agreements or concerted practices among energy utilities to divide liberalised markets, institutionalise coordination and supplies between the networks, to avoid competing in each other's territories or to discourage third parties from gaining access to their markets for purposes of import or export, Article 81 EC is applicable. See Ritter & Braun, *supra* note 8, 929.

[86] Case 85/76 *Hoffmann-La Roche & Co AG v Commission* [1979] ECR 461.

[87] See *US v Terminal Railroad Association of St. Louis* 224 US 383 (1912); *Associated Press et al. v US* 326 US 1 (1945); *Otter Tail Power Co v US* 410 US 366 (1973); *Aspen Skiing Co v Aspen Highlights Skiing Corp*. 472 US 585 (1985); *MCI Communication v*

ognised that the essential facilities doctrine can be applied under Article 82 EC[88]. However, a generous application of the essential facilities doctrine may lead to unsatisfactory results when aiding only competitors in catching up on their more efficient counterparts instead of them investing to develop competing facilities themselves and truly benefit consumers[89]. Therefore, those cases where the anti-competitive effects are of such magnitude as to require firms to provide competitors with access to their monopoly assets should be rare and, as concluded by Professor *Areeda*, essential facilities should be "less a doctrine than a epithet indicating some exceptions to the right to keep one's creations to oneself, but not telling us what those exceptions are"[90]. It has been argued, moreover, that granting access through essential facilities should be limited to natural monopolies because in other industries, the application of the doctrine will undermine the incentives for dynamic efficiency[91].

In the context of the aforementioned considerations, the Commission dealt with a joint refusal to grant access to continental European gas pipelines in the *Marathon/Thyssengas* case[92]. which concerned the joint refusal of five major European gas companies to grant the Norwegian gas producer Marathon access to their continental European pipelines. The case as regards the German gas company Thyssengas, the Dutch Gasunie, the French Gaz de France, and the German Rurhgas and BEB was settled

---

American Telephone & Telegraph Co. 708 F2d 1081 (7th Cir. 1983) and 512 US 218. In its judgment in *Trinko*, *supra* note 75, the US Supreme Court seems to dismiss the essential facilities doctrine by noting that it was crafted by lower courts and by referring to the Areeda's law review article criticising this doctrine (*infra* note 90). See Geradin, *supra* note 78, 1524 *et seq*.

[88] See Joined Cases 6/73 and 7/73 *Instituto Chemioterapico Italiano SpA* and *Commercial Solvents Corpn* v *Commission* [1974] ECR 223; Case 27/76 *United Brands Co and United Brands Continental BV v Commission* [1978] ECR 297; Case 311/84 *CBEM v CLT and IPB* [1985] ECR 3261; Case T-504/1993 *Tiercé Ladbroke SA v Commission* [1997] ECR II-923; Joined Cases T-374/94, T-375/94, and T-388/94 *European Night Services and others v Commission* [1998] ECR I-141; Case C-7/97 *Oscar Bronner GmbH & Co KG v Mediaprint* [1998] ECR I-7791. For an overview of the application of the essential facilities doctrine in the US and the EU, see A. Capobianco, The Essential Facility Doctrine: Similarities and Differences between the American and the European Approach, *European Law Review* (= ELR) 2001, 548.

[89] See the Opinion of the AG Jacobs to *Bronner*, *ibid.*, at [57] and [58].

[90] P.E. Areeda, The Essential Facilities Doctrine: An Epithet in Need on Limiting Principles, *Antitrust Law Journal* (= Antitrust LJ) 1989, 841. See also Van den Bergh & Camesasca, supra note 65, 274.

[91] G.J. Werden, The Law and Economics of the Essential Facilities Doctrine, *St. Louis University Law Journal* (= St. Louis ULJ) 1987, 433, 476.

[92] *Marathon/Ruhrgas/GDF et al.* (Case COMP/36.246) [2001] Commission Press Release IP/01/1641 and [2003] Commission Press Release IP/03/547.

after they promised to improve their respective third party access regime facilitating third parties to use their pipelines. It is to be noted, however, that this improvement to third party access has not followed in the storage market, where negotiated access seems to remain in place.

iii. Interconnectors capacity allocation

Allocation of network capacity granted in a discriminatory way by a dominant operator will also fall within the scope of Article 82 EC. In cases where demand exceeds supply, the method used to allocate capacity must be consistent with competition law. The method that is most likely to raise doubts under competition law is "first-come-first served" since it may be used to favour former monopolists over new entrants and result in foreclosure of downstream supply markets to competitors. Pro-rata rationing, though it has the advantage of keeping costs of transmission relatively low while allowing imports to exercise a control on prices in the import market, it will not function well when the demand for capacity exceeds the available supply and may result in individual allocations being so small as to make them commercially worthless. Capacity auctions provide a transparent mechanism for allocating capacity facilitating the lowest cost supplier obtaining transmission capacity. However, they may allow operators to gain windfall profits on top of their ordinary income from transmission and may remove any incentive to remove capacity. Moreover, an operator's auction income is likely to be affected by the electricity price on the import market, which may be regarded as a further disincentive to reduce prices[93]. The Commission's approach is illustrated in its advice to the Irish Government regarding the UK-Ireland gas interconnector on how spare capacity could be allocated. In the Commission's view, if increased electricity demand could not be met through other means, then the principle of non-discrimination would not be violated if the power plants were favoured over other gas users in the allocation process. However, no additional capacity ought to be allocated to the incumbent Irish electricity operator[94].

Access to the network does not necessarily mean the use of the network for a physical flow of third parties, but there is also the possibility of capacity reservations by booking the capacity. Under the Commission's

---

[93] A. Tradecete, The Role of EC Competition Policy in the Liberalisation of EU Energy Markets, Brussels, April 2000, 10 *et seq*., available at <http://ec.europa.eu/comm/competition/speeches/index_theme _13.html>; Albers, *supra* note 10, 931; Cameron, *supra* note 8, [7.83] *et seq*.; Hardiman, *supra* note 8, [16.05(6)(c)].

[94] European Commission, XXIX Report on Competition Policy 1999, 165.

approach, the assessment of reservation contracts under EC competition rules depends on the particular circumstances of each case. A long-term contract may enable the transmission system operator to make the construction of the interconnector commercially possible and viable, for instance in the case of submarine cables linking two national electricity systems for the first time. Such contracts will normally be compatible with the EC competition rules since these interconnectors obviously increase competition, at least in the long term. The only issue arising in this context is for how long the contracting parties are allowed to use the new line exclusively, which will mainly depend on the period of time required to ensure the parties a proper return on their investment[95]. Another case would be a contract for an existing interconnector through which two dominant suppliers reserve the available transmission capacity for imports into their respective supply area exclusively for themselves[96]. This agreement would appear to fall under Article 82 of the Treaty, in particular in situations where the most likely source of competition would be the supplier on the neighbouring geographic market[97]. All other cases of long-term reservation contracts will most probably fall in between these two extreme cases, so that a refusal to grant access has to be objectively justified in a situation where the refusal has a negative impact on competition in the downstream market for electricity. Otherwise, the requested transmission has to be carried out[98].

However, the Commission's inquiry that took place recently in the energy sector has shown that the inadequate capacity allocation rules as well as long-term capacity reservations in the sector have lead to the creation of barriers to efficient market integration. Incentives to increase capacity and reduction of administrative burdens to build new interconnectors are therefore of great importance. In the Commission's view as regards the findings of the latest inquiry, unless more efficient use of revenues is available, congestion fees should be ringfenced with a view to using the revenues for reinforcing the existing interconnectors[99].

---

[95] *Viking Cable* (Case COMP/E-3/37.921) [2001] OJ C247.

[96] See, for instance, the case of the *Skagerrak Cable* [2001] Commission Press Release IP/01/30.

[97] The reservation contract may even be regarded as a vehicle to exclude potential competition among the two contracting parties, so that Article 81 EC may apply, too.

[98] Tradecete, *supra* note 93, 12.

[99] *Supra* note 68.

C. Merger control in the energy sector

Even though in light of the foregoing considerations it seems that the Commission has not been interested in imposing fines on undertakings in the energy sector making a limited use of competition rules, the numerous merger control cases, on the other hand, show its willingness to reach an agreement that will further open the market. Indeed, almost all concentrations in the energy sector notified to the Commission to date under both Council Regulations 4064/1989 and 139/2004[100] have been cleared, the majority having been approved at the end of Phase I proceedings. The Commission's approach towards the increased merger activity in the last seven years, which has been leading to a restructuring of the European energy industry, is depicted in two broad categories of cases, namely concentrations between undertakings of the same energy sector (1) and concentrations between undertakings of different energy sectors or 'multi-energy mergers' (2), which are subsequently assessed (3).

1. Concentrations between undertakings of the same energy sector

The liberalisation of the energy sector has created opportunities for energy companies to grow, which can often be achieved only in cooperation with other energy providers. The numerous concentrations between electricity or gas suppliers have been considered to be pro-competitive if they allow them to enter the new geographic markets, particularly if these are highly concentrated, as well as if they enable small suppliers, such as municipal companies, to better compete for large industrial customers challenging the incumbent operators. However, concentrations between former monopolists, which have become direct competitors after the liberalisation of the sector, may strengthen their dominant position giving rise to serious competition concerns. In this case, the Commission usually assesses elements such as the actual and future conditions for supply competition, the percentages of market opening, the degree of unbundling of the operators, and the actual conditions for third party access to the

[100] Council Regulation 4064/1989 on the control of concentrations between undertakings [1989] OJ L395/1; Council Regulation 139/2004 on the control of concentrations between undertakings [2004] OJ L24/1. For an analysis of the regulations, see, *inter alia*, I. Kokkoris, The Reform of the European Control Merger Regulation in the Aftermath of the *Airtours* Case – The Eagerly Expected Debate: SLC v Dominance Test, *ECLR* 2005, 37, *passim.*; Dabbah, *supra* note 32, 448 *et seq.*, 624. For an overview of the merger control regulation see E. Navarro, A. Font, J. Folguera & J. Briones, *Merger Control in the EU* (2nd edition, OUP, Oxford 2005).

networks, so that competing suppliers have real opportunities to enter the supply territory of the merging companies[101].

The Commission gave the first detailed decision for mergers in this sector in the *VEBA/VIAG* case[102], which concerned the merger of the two major German electricity companies PreussenElektra AG and Bayernwerk AG to create E.ON. It considered that, together with the merger between RWE AG and VEW AG, which was investigated at the same time by the *Bundeskartellamt*[103], the merger in question would result in a jointly dominant duopoly created on the German electricity market with VEBA/VIAG and REWE/VEW supplying over 80% of the market. So as to avoid the prohibition of the merger, the parties offered a number of commitments, which were regarded by the Commission as sufficient to remove the competition concerns. They consisted in the selling of the interests of VIAG in the VEAG and other energy companies so as to weaken its dominant position, in the abolition of certain tariffs charged for transmission from North to South Germany, in ensuring the use of third parties of VEBA/VIAG's interconnector capacities etc. This is considered to have allowed for the entry of new (foreign) players, such as the Swedish Vattenfall, into German market, which is Europe's largest electricity market.

Similarly, the Commission cleared the entry of EdF, the French incumbent in the electricity sector, in Germany's EnBW[104]. The case caused concerns since EdF originated from a Member State with a minimalist approach to liberalisation and seemed to benefit from its protected home market so as to acquire competitors active in countries with a market opening of 100% and with a more pluralistic supply structure. In addition, EdF was a State-owned company that might take advantage of the fact that its shareholders did not expect returns on investments as high as private shareholders would. In return for the disappearance of a potential entrant into the French market, the Commission accepted EdF's withdrawal from Compagnie Nationale du Rhône (CNR) to establish an independent player. Furthermore, EdF has had to release a significant amount of its generation capacity in the form of auctions. This auction firstly created more liquidity and has contributed to the development of the French electricity market.

---

[101] Albers, *supra* note 82, 279; *idem*, *supra* note 10, 920; Schaub, *supra* note 10, 410.

[102] *VEBA/VIAG* (Case M.1672) [2000] OJ L188/1. For an overview of the case, see Krieglstein, *supra* note 32, 59-63; *idem*, Implications of the *VEBA/VIAG* Decision on Future Electricity Mergers, *ECLR* 2001, 47, *passim.*

[103] The German competition authority.

[104] *EdF/EnBW* (Case M.1853) [2001].

After the approval of the aforementioned acquisition, the Commission cleared the acquisition involving EnBW as one of the jointly controlling parties in respect of the Spanish electricity company Hidrocantábrico[105]. It concluded, however, that EdF's (a jointly controlling party in respect of EnBW) entry into the Spanish electricity market would strengthen the existing collective dominant position on the Spanish electricity wholesale market held by Endesa and Iberdrola (neither of which was involved in the notified concentration), because EdF would no longer have the incentives existing beforehand to expand the electricity interconnection capacity between France and Spain. In order to eliminate these concerns, the Commission required EdF and EdF/RTE (part of EdF group operating the French national electricity grid and French interconnector) to increase the capacity of the French-Spanish interconnector[106]. Interestingly, in this case the Commission extracted undertakings to ensure competition from EdF, a company that was not direct party to the notified transaction, even though this is not clearly determined by the Merger Control Regulations. In principle, such intervention of the Commission requiring commitments from a third party could be justified on the ground of the protection of competition and consumer welfare[107]. It should be noted, however, that in case of prohibition of a merger (and not a mere imposition of commitments, as in the case in question) due to the creation or strengthening of the dominant position of a third party, both customers and shareholders of the parties may be deprived of the efficiency gains a merger may have[108].

---

[105] *Grupo Villar Mir/EnBW/Hidroeléctrica del Cantábrico* (Case COMP/M.2434) [2001] Commission Press Release IP/01/1320.

[106] The Commission, using the same arguments, required the same undertakings to be given again by the same parties in the case *EnBW/EDP/Cajastur/Hidrocantábrico* (Case COMP/M.2684) [2002] Commission Press Release IP/02/438, concerning a change of joint control of Hidrocantábrico.

[107] *Cf.* A. Lindsay, *The EC Merger Regulation: Substantive Issues* (Sweet & Maxwell, London 2003) 41.

[108] As to other concentrations cleared by the Commission, see, *inter alia*, *EnBW/ENI/GVS* (Case COMP/M.2822) [2002] Commission Press Release IP/02/1905; *EdF/EdF Trading* (Case COMP/M.3210) [2003] Commission Press Release IP/03/1176; *Verbund/EnergieAllianz* (Case COMP/M.2974) [2003] Commission Press Release IP/03/825 (under Council Regulation 4064/1989); *Total/GdF* (Case COMP/M.3410) [2004] Commission Press Release IP/04/1200; *GdF/Centrica/SPE* (Case COMP/M.3883) [2005] Commission Press Release IP/05/1109 (under Council Regulation 139/2004).

2. Concentrations between undertakings of different energy sectors

Another trend that seems to take place after the liberalisation of the energy sector is the creation of companies selling electricity together with other energy sources. Companies with an established distribution network may see a competitive advantage in marketing electricity in addition to gas or other fuels. At the same time, it is possible that consumers with more complex energy requirements, such as industrial customers, find more convenient to purchase all their energy from one single supplier. Such mergers can be considered pro-competitive, too, if they lead to new market entry. However, it must be taken into account that the fact that for some uses electricity is, at least potentially, substitutable with other energy sources may give rise to competition problems. In this case, it seems that it will depend on the particular circumstances of each individual case whether the concentration is compatible with competition law[109].

Competition problems may also arise when a dominant electricity producer intends to merge with a dominant gas importer and wholesaler. Given that gas is one of the energy sources from which electricity may be produced, its use seems to offer high efficiency, flexibility, relatively low investment costs, and environmental advantages. However, a concentration between the dominant electricity supplier and the dominant gas wholesaler would allow the electricity supplier to gain control over the most important source of competition in electricity generation. Competing electricity producers intending to enter a new geographic market on the basis of a gas-fired plant would most probably have to purchase the fuel from the incumbent dominant electricity supplier. Furthermore, the dominant electricity producer would be able to influence the choice of industrial consumers whether to engage in own production of electricity or to purchase from the incumbent[110].

In this framework, the Commission's approach is illustrated in *Neste/Ivo*[111], which concerned the merger between IVO, Finland's leading electricity supplier, and Neste Oy, an energy company holding a 50% shareholding in Gasum, Finland's *de facto* gas monopolist, to create IVO-Neste. In the Commission's view, the operation as notified would lead to a situation where IVO-Neste would take over (via Neste Oy) the *de facto* monopoly held by Gasum on the market of natural gas, and also sell (via IVO) electricity generated by itself on the open market to third parties. For

---

[109] Albers, *supra* note 82, 280; Tradecete, *supra* note 93, 16.

[110] *Ibid*.

[111] *Neste/Ivo* (Case M.931) [1998] Commission Press Release IP/98/504.

this reason, it was feared that the merger would leave the merged entity in a position to exert significant influence over both electricity and gas prices in Finland. The Commission noted that most investments in new electricity generation capacity in Finland are based on natural gas, whereas the concentration in its original form would have resulted in any competitive electricity producer having to base his future investment decisions on the fact that in investing in a gas plant, he would effectively become dependent on his largest competitor for supplies or fuel. The merger projects were only approved after the parties had undertaken to divest their industrial gas sales business to a third party.

3. Overall assessment of the Commission's approach

As an overall assessment, one could say that the Commission seems to have adopted a dynamic rather than a static market analysis in examining the concrete state of development of the liberalised supply and transmission markets as well as the likelihood of new market entry. Foreseeable and imminent improvements of the conditions of competition as well as substantial remedies offered by the merging parties in order to either eliminate or compensate for negative competition effects are considered and may lead to the approval of an operation that would have been prohibited under a static view of existing market conditions[112].

Moreover, the types of remedies accepted have been in fact behavioural and far-reaching, requiring further monitoring, even though the Commission in its Notice on Remedies[113] stresses its preference for structural as opposed to behavioural commitments. Despite that under the same Notice the parties are required to demonstrate clearly that the remedies "restore conditions of effective competition in the common market on a permanent basis", an examination of the remedies accepted in this sector reveals that their purpose will generally be to develop competition rather than to restore it. The Commission's practice is often subject to criticism on the grounds that it has gone beyond what is strictly necessary to resolve the

---

[112] Albers, *supra* note 82, 270; *idem*, *supra* note 10, 920; M. Monti, The Relationship between Competition Policy and Regulation, Rome 2002, quoted by Hardiman, *supra* note 8, [16.07]; Eccles & Marks, *supra* note 8, [1891] *et seq*.

[113] Commission Notice on remedies acceptable under Council Regulation (EEC) No 4064/89 and under Commission Regulation (EC) No 447/98 [2001] OJ C68/3.

competition issues at stake and has used the merger clearance regime as a means to impose quasi-regulation in the sector[114].

On the other hand, one should consider that the Commission has been faced with a sector with little or no competition, where incumbents had traditionally extensive monopoly power. Due to the existence of few powerful companies, this sector seems to be prone to oligopolistic organisation. In this framework, behavioural remedies may provide more scope for eventual new entry and competition. In this context, quasi-regulatory type behavioural remedies may constitute a necessary substitute for national regulation, particularly in Member States with no sufficient regulatory framework[115]. However, the disappointing findings of the recent inquiry in the energy sector[116] indicate that a stricter merger policy may be required. The new merger Regulation is indeed considered more obviously suited to dealing with anti-competitive mergers in this sector due to its clearer focus on the effects of mergers and consumer harm[117]. And it will not be surprising if the EU merger regulation is reviewed and amended in order that any possible inconsistency in the treatment of merger cases scrutinised at national level is avoided[118].

This stricter approach is depicted in the recent Commission's decision in *EDP/ENI/GDP*[119], which was upheld by the CFI[120]. The case concerned the acquisition of joint control over GDP, the incumbent gas company in Portugal, by EDP, the incumbent electricity company in Portugal, and ENI, an Italian energy company. The concentration was considered to significantly reduce or pre-empt the effects of liberalisation of the electricity and gas markets, and increase prices for domestic and industrial customers. In particular, the Commission analysed the possible impact of the proposed operation on the gas and electricity supply markets in Por-

---

[114] See e.g. the tariff and interconnection remedies in *VEBA/VIAG* or the expansion of grid capacity between Spain and France in *Grupo Villar Mir/EnBW/Hidroeléctrica del Cantábrico*, *supra* note 105.

[115] L. Hancher & R. de Vlam, Merger Remedies in the Electricity Sector, *in* D. Geradin (ed.), *Remedies in Network Industries: EC Competition Law vs. Sector-Specific Regulation* (Intersentia, Antwerp 2004) 183, 221.

[116] *Supra* note 68.

[117] M. Monti, Energy Liberalisation: Moving towards Real Market Opening, Brussels 2004, available at <http://ec.europa.eu/comm/competition/speeches/index_theme _13.html>.

[118] See N. Kroes, Towards an Efficient and Integrated European Energy Market – First Findings and Next Steps, Brussels 2006, 7, available at <http://ec.europa.eu/comm/competition/speeches/index_theme _13.html>.

[119] *EDP/ENI/GDP* (Case COMP/M.3440) C(2004)4715 final [2004] Commission Press Release IP/04/1455.

[120] Case T-87/05, *EDP v Commission* [2005] ECR II-1.

tugal and concluded that the transaction would strengthen EDP's dominant position in the electricity wholesale and retail markets in Portugal and remove GDP's potential to compete in the electricity markets. Furthermore, since gas is now one of the most efficient ways to produce electricity, the concentration would have made current and possible future power producers in Portugal dependent on their main competitor, namely EDP. The concentration would also strengthen GDP's dominant position in the relevant gas markets in Portugal, through the foreclosure of a significant part of the gas demand (controlled by EDP) and the elimination of EDP as most likely entrant in the gas markets. The remedies proposed by EDP and ENI were considered insufficient to satisfy the competition concerns. The subsequent analysis of the CFI is a reaffirmation that behavioural commitments are not *ipso facto* less well suited to address competition concerns, notwithstanding the contrary suggestion in the Commission's Notice. Nevertheless, parties must take special care to structure behavioural commitments in a way that guarantees their effectiveness.

IV. CONCLUDING REMARKS

This paper has given an account of how EC competition law has complemented so far sector-specific regulation in order to ensure the opening-up of the energy markets in Europe. The justification of exclusive import and export rights in the energy sector on grounds of public security or in order to ensure the provision of services of general economic interest as well as the justification of State aids to incumbent energy companies so that they overcome the difficulties arising from stranded costs depict that the application of "public" competition law has been consistent with the secondary legislation on the liberalisation of the energy markets enabling the transition of the energy companies to a competitive market and at the same time the continuity of the provision of a public service to consumers within the limits of competition rules. However, the few Article 81 or 82 EC decisions have hardly stopped restrictive or abusive practices occurring in the energy sector. Merger control, on the other hand, has been used extensively in order to open up the market, exceeding thus its original purposes and undermining legislative prerogatives of other bodies.

The recent findings indicate that the goals of regulation and competition law, namely the free choice and switch of suppliers, the free market entry, and the transparent and non-discriminatory access to the networks, are far from being achieved. Market concentration due to the remaining dominance of the incumbents, vertical foreclosure due to the existing

long-term contracts under the tolerance of competition authorities, lack of market integration and transparency, and the increase in prices for electricity and gas are some of the problems that have to be solved.

Control of State aid that may not fulfil the competition law requirements, meticulous scrutiny of future merger operations, as well as individual antitrust investigation in cases where there are indications of vertical foreclosure due to long-terms contracts or barriers to third party access are required. Moreover, price-settings mechanisms should be also scrutinised so that prices are set according to market factors. It is optimistic that the Commission seems determined to deal with these problems in the near future[121].

Besides, it should be taken into account that the Acceleration Directives have recently been implemented by the Member States and the results of this implementation have not yet come into view. Issues such as the lack of transparency or the increase in prices may be due to this delay too. As a result, further investigation on the regulators' side is also required.

In conclusion, it should be kept in mind that the passage from monopoly to fully competitive energy markets is a process involving certain phases. The earlier the phase, the more important the role of sector-specific regulation and the less effective the role of competition law is[122]. According to former Commissioner in charge of competition policy *Monti*, "achieving effective liberalisation is like running a marathon: it is demanding and requires patience"[123]. Indeed, both waves of Electricity and Gas Directives following the British example of electricity liberalisation have allowed Member States to opt for a gradual opening-up of their markets. And one should not forget that it took the UK approximately 10 years, form 1986 to mid 1990s, before a fully competitive energy market is established, while in most Member States the liberalisation process only begun in 1999 for electricity and in 2000 for gas[124]. Persistence in the application of both sector-specific regulation and competition law could ensure effective provision of energy to European consumers in the future.

---

[121] *Ibid.*, 5.

[122] *Cf.* R. Baldwin & M. Cave, *Understanding Regulation: Theory, Strategy, and Practice* (OUP, Oxford 1999) 222 *et seq*.

[123] *Supra* note 117, 10.

[124] *Ibid*. As to the gradual opening of the European energy markets and its similarity to the UK regime, see also Albers, *supra* note 10, 913.