From Energy Sector Inquiry to Recent Antitrust Decisions in European Energy Markets: Competition Law as a Means to Implement Energy Sector Regulation in EU

Michael Diathesopoulos, University of Cambridge
From Energy Sector Inquiry to Recent Antitrust Decisions in European Energy Markets: Competition Law as a Means to Implement Sector Regulation

CONTENTS

A. ENERGY SECTOR INQUIRY
B. THE THIRD INTERNAL ENERGY MARKET PACKAGE
C. KEY FEATURES OF RECENT CASES CONCERNING THE APPLICATION OF COMPETITION LAW IN ENERGY MARKETS
D. ARTICLE 9 OF EU REGULATION 1/2003 AND ITS APPLICATION TO COMPETITION CASES
E. 2 CASES ABOUT LONG-TERM CONTRACTS
   1. Distrigas Case
      a. The theory of harm
      b. The Commitments
      c. Issues
   2. EDF electricity case
      a. The theory of harm
      b. The Commitments
      c. Issues
F. FOUR DIFFERENT CASES: RWE, ENI, GDF, E.ON
   1. RWE and ENI cases
      a. The theory of harm
      b. The commitments
      c. Issues
      i. Unbundling
      ii. Essential Facilities Doctrine
   2. GDF and E.ON gas foreclosure cases
      a. The theory of harm
      b. The Commitments
      c. Issues
G. GERMAN ELECTRICITY CASES
   1. German Electricity Balancing Market Case
      a. The theory of harm
      b. The commitments
   2. German Wholesale Electricity Market Case
      a. The theory of harm
      b. The commitments
      c. Issues
H. OTHER CASES
   1. Market integration: Swedish electricity interconnectors case
      a. The theory of harm
      b. The commitments
      c. Issues
   2. E.ON/GDF Case
      a. The theory of harm
      b. Fines
      c. Issues
I. MERGERS CASES
   1. Case COMP/M.5494 Enel/Endesa
   2. Case COMP/M.5224 EDF/British Energy
3. Case COMP/M.5496 Vattenfall/Nuon
4. Case COMP/M.5467 RWE/Essent
J. NATIONAL COMPETITION AUTHORITIES
K. TRINKO CASE
1. The theory of harm
2. Decision
3. Issues
   a. Essential Facilities Doctrine
   b. Sector Specific Regulation and Competition
L. EU: COMPETITION RULES AND SECTOR SPECIFIC REGULATION
M. CONCLUSIONS: COMPETITION AND SECTOR REGULATION ESPECIALLY
    UNDER THE NEW INTERNAL MARKET FRAMEWORK

ENERGY SECTOR INQUIRY

Commission concluded a Final Report on the Energy Sector Inquiry in 2007\(^1\) and found a number of
violations on behalf of member states regarding the application of 2003 Second Energy Package
and some other factors that delayed the progress towards a single European internal market. A
similar approach, by launching a sector inquiry, was followed in 1999 regarding
telecommunications sector\(^2\). The main obstacles towards the process towards Internal Market can
be comprised into the following:\(^3\)

One obstacle is the lack of transparency in gas and electricity markets, as the relevant TSOs do not
provide the necessary information, in order to permit access to the respective networks and trust to
the pricing mechanisms. Moreover, Commission observed that regulated prices still dominated the
relevant markets and along with the lack of liquidity were two obstacles that did not allow the
entrance of new competitors in the markets. Another obstacle that delays integration of energy
markets concerns the deficiencies of the regulatory framework concerning TSOs and national
regulators. A specific example is the lack of cross-border cooperation between TSOs and national
regulators and other authorities, in a way that does not allow the efficient allocation of network
capacity and the availability of capacity necessary, in order to optimise opportunities for cross-
border investments and competition in a European instead of a national level. Furthermore, there is
a lack of regulatory measures on behalf of the competent national authorities, which does not allow
them to enforce efficiently the European regulatory framework, while there are not either efficient
dispute settlement procedures at a national level between competitors and consumers\(^4\).

Commission highlighted that priority should be given to specific issues concerning regulation of
energy markets. These issues are the increase of transparency in the markets, the reduction of
barriers to entry in these markets, the bridging of the various regulatory gaps regarding the powers
and authorities of national regulators and the framework of cooperation and coordination between
them and between the TSOs at a regional and European level, the efficient confrontation of market
concentration and the enhancement of efficient unbundling of network and supply activities.
Besides, Commission noted that the simultaneous implementation of remedies of both competition
law and sectoral regulation may constitute an efficient solution for the confrontation of the existing
obstacles and the acceleration of the process towards the internal energy market.

Specifically, Commission underlines that a series of major problems and issues affecting the
operation of energy markets may be addressed by regulation, a strong application of competition

\(^2\) D. Geradin, G. Sidak, ‘European and American Approaches to Antitrust Remedies and the Institutional Design of
Regulation in Telecommunications’ in S. Majumdar, I. Vogelsang, M. Cave, (eds.), Handbook of Telecommunications
\(^3\) Commission (EC), ‘Communication from the Commission—Inquiry pursuant to Article 17 of Regulation (EC) No
\(^4\) C. Jones, The Internal Energy Market: The Third Liberalisation Package (Leuven: Claeys & Casteels, 2010), 4-7.; P.
Cameron, Competition in Energy Markets: Law and Regulation in the European Union, (New York: OUP, 2007), 297-
300.
law and the relevant structural remedies. As we will describe below, finally competition law became the means by which both regulation was widely implemented –although a new package was established- by quasi-regulatory remedies and structural remedies were also applied. First, market partitioning, due to technical (lack of infrastructure for cross-border energy connection) and structural (long-term transmission contracts) factors, encumbers the market integration and leads to collusion between incumbents. The implementation of EU antitrust law may lead to the lift of such barriers. Second, there is a high market concentration at the wholesale level, because of the existence of long-term contracts between energy firms and large industrial users and due to the structure and the portfolio of investments of energy groups of companies. Again, the application of EU competition law and its remedies are able to reduce the effects of this factor. Finally, the lack of effective unbundling and the existence of a strong vertical integration in energy sector create a benevolent environment for market abuse and a negative environment for new infrastructure investments and increased competition at the wholesale level. Competition law remedies and full ownership unbundling may constitute helpful steps, in order to address such problems. So, although the initial role of competition law in energy sector was to provide support to the establishment of a sector specific regime, which is assigned to primarily deal with the liberalisation of the market, Commission decided to follow a more interventionist and active approach towards internal market. The factors that led to that are the Second Package, the institutional tools provided by the Merger Regulation and a series of numerous complains about energy prices, along with a general observation –that was later affirmed in the Sector Inquiry that energy market is still far away from true opening to competition.

In conclusion, according to Commission a joint application of sectoral and competition law and the imposition –based on the joint application of the above regulatory framework- of structural remedies constitute the sufficient solution for the resolution of the remaining obstacles towards the single internal energy market. This conclusion underlines the value that Competition Law and especially the relation between competition law and structural remedies have for Commission, concerning this long-term process. The conclusions above preceded the Third Energy Package of 2009 and directed the content of this new regulatory framework, while they also widely influenced the subsequent Commission’s Decisions on several Cases of the energy market, concerning energy firms and member states and provided the conceptual basis for Commission’s approach towards relevant issues.

**THE THIRD INTERNAL ENERGY MARKET PACKAGE**

Based on this Sector Inquiry, in September 2007, Commission decided to set some specific objectives for a Third package of measures for energy liberalisation, as depicted in its Proposals. This legislative package, which was adopted by the European Parliament and the Council (in June 2009) and will be transposed by the Member States until the end of 2011 (although there are longer deadlines for several issues, such as unbundling, regarding which the relevant deadlines expire in 2012 and for some issues in 2013), includes two Directives on the internal market in electricity and

---

5 C. Jones, The Internal Energy Market, 7-8.; P. Cameron, 300-301.
6 P. Cameron, 300-301.
7 ibid., 564.
gas respectively, a Regulation establishing an Agency for the Cooperation of Energy Regulators (ACER) and two Regulations on conditions for access to the network for cross-border exchanges in electricity and to the natural gas transmission networks respectively. The main elements of this new package refer to ownership unbundling, concerning production, distribution and transmission of energy, the establishment of a European regulator for cross-border energy issues and the promotion of cross-border collaboration, strengthening of the range of powers of National Sectoral Regulators and facilitating cross-border energy transactions and the enhancement of transparency in energy networks.

Concerning unbundling, Commission suggested it as the most important remedy, in order to resolve problems in the energy sector, related to vertically integrated big firms. Commission proposed full ownership unbundling, meaning the complete separation of ownership if generation assets from ownership of transmission assets, as the best possible solution, which would also lead to the dissolution of big “national champions”. However, reactions especially from the energy sector and the Council—that also criticised the economic effectiveness of ownership unbundling—resulted to the introduction of two alternatives to ownership unbundling. The first one is the solution of the Independent System Operator (ISO). This solution provides that vertically-integrated firms can retain ownership of the network infrastructure; however the management of the network will be assigned to an independent third party, a separate legal entity, the ISO. Investments on the network will be accomplished by the owner’s funding but by the ISO’s management as well.

The second alternative is the Independent Transmission Operator (ITO) model, according to which a company may still own both supply and transmission systems, however the transmission system is operated by a legally separate but integrated second company. One condition that has to be fulfilled, in order to exclude any discriminations against competitors is the existence of a compliance officer, who is assigned to monitor a specific programme of relevant measures against market abuse. Investments are still generally managed by the owner, although there are certain provisions about a regulatory supervision. This third option is even less radical than ownership unbundling from ISO solution and generally resembles legal unbundling.

Furthermore, the final Package provided for a fourth choice for Member States apart from the three above. This option that may be referred as ITO+ or unbundling a la carte that Member States may keep their own system, provided that it already existed in 2009, it concerned a vertically integrated transmission system and it included provisions that ensure a higher independence status for the operation of the system than that of ITO.

Moreover, the package included the “Gazprom Clause”, according to which companies from non-member states have to apply relevant unbundling rules in their country, before taking over European undertakings; it also included a “level playing field clause” that allows countries that implement full unbundling to block acquisitions from highly vertically integrated energy firms.

---

17 Ibid, 118-120.
Concerning the European Regulator’s Issue, the Third Package replaces the European Regulators Group for Electricity and Gas (EREGG) by the European Agency for the Cooperation of Energy Regulators (ACER)\(^{19}\). Although the former was an advisory body for the Commission, the latter’s role is to support the National Regulators and to coordinate their operations, to decide on some technical issues and the regulatory regime, concerning the infrastructure, to develop, prepare and monitor the non-binding framework guidelines, which set the standards for the various network codes, to prepare the network codes and to develop the rules of procedure of ENTSOs (which we will present below)\(^{20}\). However, ACER will also have an advisory role, as on its own initiative or upon request it will give opinions and recommendations to EU institutions and will inform Commission and the European Parliament on all issues falling within its competence. The Package also establishes a new system of relations between ACER and National Regulatory Authorities, as the latter have to cooperate with the former, report and provide information to it and comply to its legally binding decisions, while the former – the Board of which consists of representatives of the latter - has to provide framework for cooperation for National Regulatory Authorities, assist them to share good practices, implement a peer review of their decisions and finally take the last decision, in case of disagreement between National Authorities.

Another issue that the Third Package addresses is this of the cooperation between national transmission system operators. European Networks of Transmission System Operators for Gas/Electricity (ENTSO-E and ENTSO-G) are a new form of cooperation of TSOs in electricity and gas sectors\(^{21}\). They are official bodies assigned to develop a ten year network development plan for EU, develop European network codes, based on the framework guidelines developed by ACER and generally organise and supervise network management, planning and access conditions across borders and cooperation between TSOs both on regional and European level\(^{22}\). Especially concerning the regional level, we have to note that regional cooperation is highly estimated within the Third Package as an integrated element of total European process towards the internal market goal and has taken a much more formal character, in comparison to past approaches. It is provided that there space must be left for regional initiatives and differences, regarding the speed of internal market implementation, while the character and limits of each region will be defined according to the degree of interconnection between the national markets. ENTSOs, regarding the implementation of the network codes and of the development plans will be monitored by ACER.

Moreover, the Third Package provides for a new system of powers and competencies regarding National Regulatory Authorities (NRAs). The independence of NRAs from politics and industry is underlined\(^{23}\) and now NRAs’ goal is to promote competition, environmental sustainability and security in internal energy market and to strengthen cooperation regarding cross-border issues, by implementing decisions of Commission and ACER. NRAs and not a centralised European Authority apply in principle sector regulation – contrary to competition law field, where the rules are applied by both national authorities, national courts and Commission as well- and this solution is assumed to be effective, considering telecommunications sector, which was previously liberalised\(^{24}\).

There are also many changes referring to the organisation and establishment of sectoral regulation. As we discussed above, non-binding Framework Guidelines and binding network codes will be adopted, in order to regulate a series of issues of the energy market, such as third party access, capacity allocation, congestion management, transparency, balancing, harmonisation of tariff


\(^{20}\) L. Hancher, A. De Hauteclocque, ‘Manufacturing the EU Energy Markets:The Current Dynamics of Regulatory Practice’ (2010), 4-6


\(^{23}\) L. Hancher, P. Larouche, ‘The Coming of Age of EU Regulation of Network Industries and Services of General Economic Interest’(2010), 17

structures, energy efficiency, network connection, interoperability, data exchange, energy trading, emergencies, network security and reliability\textsuperscript{25}. Both Framework guidelines and Network Codes are based on the annual priorities that Commission sets, however the first are non binding, while the latter may become binding via comitology. The latter have to follow the former, while the former set the general framework of principles, which the latter implement in detail. The main aims of framework guidelines is opening markets to effective competition and making them functional, while the main objectives of the codes are the promotion of cooperation between TSOs, effective cross-border access to networks and combination of national and regional specificities with general European goals\textsuperscript{26}.

Therefore, we can observe that the Third Package establishes a new system of allocation of powers and duties and of decision making, regarding sectoral regulation in energy markets. The roles of NRAs, TSOs, ENTSOs, ACER, Commission and Member States are interrelated and all together concern the formation of the relevant regulatory framework and the gradual regulatory convergence. Cooperation between all these different factors is a prerequisite for the success of this new system\textsuperscript{27}.

Regarding retail market the Third Package includes many provisions that focus mainly on consumers’ protection. There should be no charges for changing supplier within three weeks, while the consumer should have access to an extended set of information. Moreover, smart metering systems, which allow the active participation of the consumers in the market, should be introduced and finally should be widely applied till 2020. Additional rules for the protection of vulnerable customers are also included in the Package.

Finally, the Package includes several derogations, concerning isolated markets, small isolated systems, emergent markets, where gas has recently been introduced and take-or-pay contracts (regarding third party access).

**INFRINGEMENT PROCEEDINGS AGAINST MEMBER STATES**

While we are going to proceed to the presentation of the cases concerning firms below, we have to note that Commission followed a consistent with the Sectoral Inquiry’s findings, policy, also regarding member states, as in June 2009, Commission launched infringement proceedings against 25 member states, because of their inadequacy to strengthen competition in the energy sector and implement the Second Energy Package. The main issues of inadequacy refer to the lack of transparency concerning cross-border access, consumers’ rights and regulated prices; issues that refer to the Sectoral Inquiry as well. The same conclusions were also used for the Commission’s objectives for the Third Internal Energy Package, which we will briefly present below. It is remarkable that the infringement proceedings against Member States were decided the same day as the Third Package was adopted. This way, Commission underlined the value of the conclusions of the Sectoral Inquiry and its strong commitment for the establishment of a European Internal Energy Market and highlighted the fact that the implementation of the second package’s provisions was a prerequisite for the future implementation of the third package. Thus, Commission showed that the different energy packages were not some secluded and independent from each other approaches but interrelated successive steps towards the goal of a liberalised and functional internal market.

We should note that this was the second infringement procedure for non-compliance of EU energy regulation, as the first one took place in 2006 and that the Sector Inquiry, the infringement procedures and finally the Third Package were the results of a serious delay in the actual opening to competition of the European Energy Markets, of an unsatisfactory situation of competition in the markets and of strong reactions against the process of true liberalisation., as the European Energy Markets remains oligopolistic. However, we should also note that the final version of the

\textsuperscript{25} Electricity Directive 2009/72/EC art. 8; Gas Directive 2009/73/EC art. 8.


\textsuperscript{27} L. Hancher, A. De Hauteclocque, 3.
Third Package was a result of a serious compromise, especially regarding one of the most crucial issues of this legislative initiative, i.e. unbundling. The establishment of two alternatives to full ownership unbundling, which was proposed as a single option by Commission, was the outcome of serious reactions from Member States, in which big vertically-integrated firms exist. Although the Third Package constitutes an ambitious initiative that aims at fulfilling the goal of a functional and open to competition internal energy, only its actual implementation will show if it will be sufficient enough, in order to address the energy market’s issues, or if a fourth package will be required, not only for addressing other issues, such as security of supply but for implementing true competition in energy markets as well.

**KEY FEATURES OF RECENT CASES CONCERNING THE APPLICATION OF COMPETITION LAW IN ENERGY MARKETS**

Below, we examine a series of recent energy cases that were dealt by European Commission, under its authorities regarding the protection of free competition and especially enforcing rules on Competition and specifically Articles 101 and 102 TFEU (81 and 82 EC respectively). These cases generally coincided with the whole process towards the 3rd Energy Liberalisation Package, so it is apparent that they were related to it and affected by the overall process towards the establishment of an efficient internal energy market. All the cases -but one- follow the energy sector inquiry, while all the cases -but one- refer to violations of art. 102 TFEU, all the cases -but one- were resolved by the procedure of art. 9 Reg. 1/2003 (commitments). All the cases that were resolved by commitment included structural remedies (ranging from release of capacity to divestiture of assets – unbundling- and from prohibition of contracts of extended duration to division of national networks). The cases below deal with some types of market abuses that restrict competition in energy sector. Some refer to long-term contracts, some others to foreclosure of networks and refusal to give access to facilities, some to discrimination between national and cross-border energy transactions and market manipulation (one by withdrawal of generation) and one to market sharing. Generally speaking, types of abuse in recent energy cases can be distinguished to:

a) Exclusionary abuses (targeted at competitors)
   – Exclusive dealing
   – Refusals to deal
b) Exploitative abuses (targeted at competitors, customers or consumers)
   – Market manipulation
   – Discrimination
c) Market Partitioning

**ARTICLE 9 OF EU REGULATION 1/2003 AND ITS APPLICATION TO COMPETITION CASES**

Commission increasingly seeks to close cases under investigation by means of binding commitments, pursuant to Article 9 of EU Regulation 1/2003\(^\text{28}\). These commitments are offered by the investigated companies. According to this article, the company may offer commitments to remedy competition concerns identified by the Commission. In case that these commitments are accepted, the case can be closed without the adoption of an infringement decision and the imposition of fines. Commitments must be relevant to the competition concerns expressed in the Commission’s preliminary assessment. They may be behavioural and structural but they cannot involve payment of money or fines. If Commission intends to proceed to a fine, it cannot accept commitments as well. The Commission, if accepts the commitments, will not conclude whether there was an infringement, although national competition authorities and courts may still proceed to such a finding. Commitments are totally legally binding.

However, Commission has a clear idea about their commitments that could accept and actually this procedure is a method for closing cases at an early stage, without fines, formal finding of infringement—that may lead to further damage claims from third parties- and a quick end of the conflict with the Commission (for the benefit of the investigated); without needing to prove abuse and with low risk of appeal of decision and remedies (for the benefit of the Commission). Nevertheless, fines can still be imposed for violation of the commitments. Moreover, the flexibility of the solutions provided by this article, the fact that the competition issues are addressed for the future and the speed with which solutions and decisions can be adopted, made this method regularly used, concerning competition cases. There is, however the problem that frequently undertakings may offer disproportionate commitments, in order to avoid the excessive finds of the alternative procedure.

It is notable that most of the quasi-regulatory structural remedies imposed in the following cases – and actually regulating and restructuring the energy sector- were imposed, on the legal grounds of commitments procedure; thus by ex post interventions into individual cases. This fact, although it enables an easy application of far-reaching remedies, seems to reduce the legal certainty, which is crucial in a sector under liberalisation, such as energy.

**TWO CASES ABOUT LONG-TERM CONTRACTS**

**Distrigas Case**

**The Theory of Harm**

The several long-term contracts between Distripas and its large industrial customers were a relic of the gas wholesale monopoly in Belgium before liberalisation (Case 37.966). This situation made difficult for competitors to build up a serious customer base and take a market share from Distripas, therefore it delayed the development of competition and helped the practical extension of Distripas’ monopoly. This kind of problem existing in many national energy markets was also highlighted in Sector Inquiry.

**The Commitments**

Distripas would not conclude any new gas supply contracts with gas resellers for a duration of more than two years, while the maximum duration of the new contracts with other industrial consumers and electricity generators would not exceed five years. Moreover, Distripas had to guarantee that approximately 70% of the gas market, which would be subject to such long-term contracts with large industrial customers, would return to the market every year. These commitments will be in place until 31 December 2010. There is also an annuling clause referring to these commitments, i.e. if Distripas total market share falls below 40% or the respective share of a competitor reaches 20% of Distripas’ share, the above commitments will not apply. In another similar case about Coca-Cola, Commission followed a relevant approach about the applicability of the relevant commitments, accepting that the commitments apply only to the countries where Coca-Cola has a double market share than this of its largest local competitor and

---

31 L. Hanecher, A. De Hauteclouque, 12.
33 P. Cameron, 327.
its own market share is at least 40% of the total market. In this decision, the primary issue is the establishment of a model that enables the release to competition of a specific proportion of the market demand and not on the strict definition of a maximum duration for long-term contracts.$^{37}$

Issues

Distrigas Case established the so-called foreclosure model for long-term contracts. The commitments not only were binding for this company but also defined a measure to examine if long-term contracts constituted antitrust behaviour. In principle long-term contracts do not violate art. 102 TFEU (82 EC)$^{38}$, however especially in the energy sector$^{39}$, due to the recent liberalisation and the prior existence of monopolies, such contracts may constitute barriers against new competitors. So, the specific circumstances of each case show whether these contracts violate art. 102. In cases about long-term contracts and customer foreclosure, the investigation lies in the following main issues$^{40}$:

–Duration of the contract
–Market position of the company
–Exclusivity of the contractual relation or quantity forcing
–Market coverage by these long-term agreements
–Efficiencies

The above rationale and approach were replicated in Long-term contracts France Case (EDF). Besides, in this case Commission accepts a standard rule, according to which the duration of long-term contracts with large consumers should not surpass five years and long-term contracts should not occupy more than 70% of the total supply of the company; these standards were widely accepted in the EDF case as well. Finally, we note that this case’s investigation predated the energy sector inquiry.

EDF electricity case

The Theory of Harm

Long term exclusive contracts with industrial customers lead to foreclosure of the French market. Foreclosure and long-term contracts as a restrain to competition is an issue highlighted in Sector Inquiry. There are severe resale restrictions contributing to the lack of liquidity of the wholesale market. The illegal conduct includes actions to raise prices on the French wholesale electricity market. In response to the Commission’s concerns that EDF’s contracts with large electricity consumers may hinder the entry and expansion of EDF’s competitors on the French market, the European Commission has made legally binding commitments offered by the French electricity group (IP/09/1669), based on Article 9 of Regulation 1/2003 (Case 39.386)$^{41}$.

The Commitments$^{42}$


$^{40}$ Commission (EC), ‘Antitrust: Commission increases competition in the Belgian gas market – frequently asked questions’ MEMO/07/407

$^{41}$ Long-term electricity contracts in France (Case COMP/39.386).

65% of the volumes have to return to the market every year (IP/10/290). No new contract with large industrial users should surpass 5 years. EDF has to make dual offers to customers, one of which allows customers that wish to act as secondary suppliers to partly source electricity from another supplier (i.e. EDF has to allow these customers to choose freely between exclusive and non-exclusive contracts) and has to lift any resale restrictions to the industrial users. The commitments are applicable for 10 years (until 1/1/2020). As we observe, this case accepts approximately the same standards as Distrigas case, in order to prevent violation of art. 102 TFEU (82 EC). The 5 years standard maximum duration for long-term contracts applies in this case as well, while Commission accepts a bit smaller ratio of volumes that have to return to the market (65% instead of 70%).

Both the above cases highlight the maximum permissible foreclosure levels, concerning long-term contracts, which Commission is eager to accept. We should also note that similar investigations were also launched against Electrabel, concerning long-term downstream contracts on the Belgian market for industrial electricity customers. No decision has been published yet, however the similarities with the case above and Distrigas case, regarding their object, show that this decision will also be similar.

Issues

When is market access impeded?
There can be no absolute standards and tight market shares. 20%, 30%, 50% market coverage could respectively lead to a conclusion about the blockage of the market, given the overall structure of the market (many small competitors or 1/2 big competitors with relevant market coverage).

Are there different standards concerning the investigated company under Art. 101 and 102 TFEU?
Yes, there are. Article 102 asks for a strong position in the market. The reason is that the stronger is a company’s position, the easier is to abuse it. Dominance should assessed more strictly in highly concentrated markets under liberalisation.

Why contract duration is a problem?
Because long-term contracts bind large consumers and forbid them to change supplier for an extended period. Therefore, other competitors loose access to a significant part of the market for a period in a stable way (because of the long-term character of the contracts). Moreover, this practice constitutes a severe barrier for new entrants and a great danger for existing small competitors, which may not have the necessary power to bind their own clients in a similar way. So, these contracts indirectly but efficiently manage to impede market access to other competitors.

Why the dual supply commitment was imposed?
Because in this way, customers can also benefit from competing supplies during a life-time contract with EDF. This commitment does not mean that EDF has to offer two alternative offers, but has to offer to the customer access to a non-exclusive supply offer. So this provision combined with the limitation of the contracts’ duration lifts the barriers to competition and specifically to resale market.

Will the prohibition of resale restrictions prevent large industrial users and buying groups from obtaining attractive deals?

FOUR DIFFERENT CASES: RWE, ENI, GDF, E.ON

4 Cases, related to 102 TFEU that resulted to structural divestiture.

RWE and ENI cases

References:

43 Long-term electricity contracts in Belgium (Case COMP/39.387)
44 A. Hauteclocque, 102.
The Theory of Harm

RWE (Case 39.402) and ENI (Case 39.315), refer to vertically integrated incumbents. Both cases have to do with refusal to supply transportation capacity, leading to the foreclosure and harm for the competition and consumers. Refusal to give access to a facility may be abusive (refusal to deal and essential facility doctrine\(^{46}\)) when:
- Access to a facility is indispensable to operate on a neighbouring market
- The refusal excludes effective competition on that neighbouring market
- The refusal is not objectively justified and harms consumers\(^{47}\)

Access to network systems is indispensable in order to compete on supply markets. It is widely recognised that gas and electricity networks are natural monopolies. Networks constitute the gateway to the market. When the gatekeeper is a vertically integrated firm, it may have an incentive to use the network to distort competition in its favour on supply markets. Refusal to supply (network foreclosure) may take several forms such as:
- Margin squeeze (constructive refusal)
- Inadequate capacity management
- Capacity hoarding and degradation
- Long term capacity bookings by the incumbent shipper
- Strategic limitation of investments

Commission assumed that the gas transmission network of the companies can be considered as an essential facility, as the access to it is objectively necessary, in order to supply gas to customers within its own grid area.

RWE refusal to supply consists of\(^{48}\):
- Primary capacity hoarding
- Inadequate capacity management
- Margin squeeze

ENI refusal to supply consists of\(^{49}\):
- Primary capacity hoarding and degradation
- Strategic underinvestment\(^{50}\)

In ENI the Commission considered that a firm committed an abuse by failing to expand pipeline capacity to meet third party demand.

The Commitments\(^{51}\)

Divestiture of RWE gas transmission network, which was formally imposed in March 2009.
Divestiture of ENI’s share in the relevant international pipelines: TENP, TAG and Transitgas (not yet imposed, market test in March 2010)

Issues

Unbundling

These decisions belong to the group of a few cases in which a structural divestiture remedy has been imposed in an antitrust case under Article 9 of Regulation 1/2003. This divestiture will result


\(^{49}\) ENI foreclosure (Case COMP 39.315)

\(^{50}\) ENI foreclosure (Case COMP 39.315) (n 40)

to a structural change in the German gas sector, facilitating competition and enhancing the benefits of gas consumers.

The procedure coincided with the discussion on the 3rd Energy Package and applied a remedy related to unbundling, thus betokening the regulation of the coming directives. This fact may cause concerns that Commission actually implemented sectoral regulation in a strictly antitrust case, thus introducing energy regulation through the back door. However, the decision exclusively applied competition regulation and handled the individual competition issues of the case. Commission applied its powers deriving directly from the EC Treaty, in order just to restore competition.

On the other hand, we could argue that, given the fact that sectoral regulation provides for alternatives to ownership unbundling, it was not proportionate to impose unbundling in a competition case, by the use of the art. 9 of Reg. 1/2003. There may be a number of possible legal obstacles to such structural remedies – which actually constitute unbundling-, as the legal requirements of proportionality, the neutrality in relation to national property rights required by Article 295 EC Treaty, and the principle of subsidiarity and of the respect to the rules on protection of property of the European Convention on Human Rights. However, according to our opinion, the decision was acceptable, as the companies themselves offered the commitments, these commitments are the most effective means to restore competition –in comparison to behavioural solutions-, the commitments are appropriate, as after them it is very difficult for the companies to abuse their network and finally they are proportionate to the specific concerns, as there was a great potential harm for the customers, because they are obliged to use the single network. So all the conditions for the proportionality test are fulfilled; suitability, necessity –meaning that no less harmful alternative can provide the same result- and stricto sensu proportionality –meaning that the burden of the measure is excessive, compared to the objective-.

Furthermore, these cases show that ownership unbundling –although not the single solution according to the 3rd Energy Package- can be the single necessary and appropriate remedy in individual competition cases. This is affirmed by the fact that the individual case’s infringements and concerns –ex post- may need a much more individualised and strict solution in comparison to the general solutions of the sectoral regulation –ex ante-.

However, it should be noted that there are strong counter-arguments against the acceptability of ownership unbundling by EU legal order. One source of such counter-arguments concerns the compatibility of this remedy with Protocol 1 of the ECHR; another source has to do with freedom of establishment (art. 43 EC, art. 49 TFEU) and freedom of capital (art. 56 EC, art. 63 TFEU). It could be supported however that Treaties provide derogations from these principles for indistinctly applicable measures, on the grounds of public security and public policy or the public interest for an open market for the good of the consumers. However, the remedy has also to pass the proportionality test as described above, which is a prerequisite for derogation from basic EU principles for reasons of general interest. It is arguable if ownership unbundling is the only suitable measure for the goals of the internal market, if it is overall suitable and effective under economic terms and if finally it constitutes a proportionate measure in comparison to the objectives to be achieved. The latter has to be judged case to case and no abstract rule can apply to all cases of unbundling. As we observe, ownership unbundling has to face many legal difficulties. The fact that Commission has applied it as an antitrust remedy by the commitment procedure lead to the avoidance of any similar case resulting before European Courts; however it is not sure what the result will be when Courts are going to judge a similar case. This point is very important not only concerning unbundling as an antitrust remedy but as a remedy belonging in the overall spectrum of measures of the Internal Market regulation, either if it is applied by competition or sector specific rules.

Finally, it is notable that by this way Commission implements ownership unbundling before the new regulatory framework (Third Package) comes into force. Therefore, we observe that actually

53 M. Hunt, 87.
54 ibid, 73.
55 ibid 73-86.
56 ibid 86.
Commission introduces a second way other than this of specific sector regulation, in order to apply unbundling; this of using competition law rules and procedures.

**Essential Facilities Doctrine**

Regarding essential facilities doctrine, we have to note that it was created by lower US courts in order to oblige infrastructure owners to grant access to their inputs\(^{57}\). Some examples where this doctrine was accepted refer to telecommunications\(^{58}\), bridges\(^{59}\), energy generation infrastructure\(^{60}\) and generally utilities, while later the doctrine’s application expanded in intellectual property as well\(^{61}\). The doctrine applied according to the fulfilment of five conditions\(^{62}\):

- a) the firm controlling the facility must be a monopolist
- b) competitors must not be practically or reasonably able to duplicate the essential facility
- c) competitors must be denied the use of the facility
- d) provision of access to the facility must be feasible
- e) a “wilful” intent on behalf of the owner to eliminate competition.

As we will observe later, Trinko case restricted to a large extent the application of the doctrine in U.S.:

Regarding, EU, ECJ has ruled\(^{63}\) that the refusal to supply raw material to a competitor, if it led to the exclusion of the firm’s competitors from the market could constitute an abuse of a dominant position under Article 82 EC\(^{64}\). Later, the concept of “exceptional circumstances” was developed – the term "essential facilities” was not used-, according to which the owner of a non duplicable asset may be forced to grant access to it to competitors under Article 82 EC\(^{65}\). In later cases, ECJ developed a set of three conditions\(^{66}\) that should be met, in order that such a refusal to deal would be viewed as anticompetitive\(^{67}\):

- a) the refusal of access to a facility must be likely to prevent any competition at all on the applicant’s market
- b) the access must be indispensable or essential for carrying out the applicant’s business
- c) the access must be denied without any objective justification.

In Magill case\(^{68}\), ECJ accepted for the first time that a refusal to license (regarding intellectual property rights) may be abusive under the following conditions\(^{69}\):

- a) the prevention of the appearance of a new product which the IPR holder did not offer and for which there was a potential consumer demand
- b) the refusal is not justified and/or
- c) the IPR holder reserves to himself a secondary market by excluding all competition on that market

In a subsequent decision, it was ruled that the three conditions could also be defined as following\(^{70}\).

---

58 MCI Communications Corp. v. AT&T Co., 708 F.2d 1081, 1132 (7th Cir. 1983).
59 United States v. Terminal Railroad Ass’n, 224 US 383 (1912).
62 MCI Communications Corp. v. AT&T Co., 708 F.2d 1081, 1132 (7th Cir. 1983)
63 D. Geradin, ‘Limiting the Scope of Article 82 of the EC Treaty: What can the EU Learn from the US Supreme Court’s Judgment in Trinko in the wake of Microsoft, IMS, and Deutsche Telekom?’, 7.
66 D. Geradin, ‘Limiting the Scope of Article 82 of the EC Treaty: What can the EU Learn from the US Supreme Court’s Judgment in Trinko in the wake of Microsoft, IMS, and Deutsche Telekom?’, 7-8.
a) refusal is preventing the emergence of a new product for which there is a potential consumer demand
b) the refusal is unjustified
c) by this refusal, the firm intends to exclude any competition on a secondary market.

Another decision expands the scope of the above concept even more, as it does not refer to non duplicable assets. We should also add that this concept is related in practice to the duty for infrastructure holders not to discriminate between their competitors and their subsidiaries.

Generally, the above rationale was widely applied to network industries. However, we should note that the application of such a concept raises high concerns, as the wide use of such a rationale may lead to an actual reduction of investment incentives for firms. As they could easily gain access to the facilities of their competitors, they may find no reason to invest in similar or better facilities, while the owners of such facilities may feel discouraged to continue investing in their assets’ expansion and maintenance, as their competitors will also share the benefits without sharing costs and risks related to the investment. So, we observe that this concept may lead to an allocation of risk and benefits that is neither rational and fair nor effective. Moreover, this concept may also indirectly lead to collusion on downstream markets. As the risk and the cost of access to the networks and facilities will be low and standard, as there would be harmonised access conditions for operators on the downstream markets, price competition may be limited. Besides, the use of limited facilities will make the surveillance and the preservation of collusion practices easier, as any deviations from such agreements will be apparent to other market players, while the users of the facilities will gradually become widely dependent on the facilities’ owners and thus discouraged to end collusion practices. All the above lead to the argument that EU’s approach towards issues about essential facilities is mechanic and does not take into consideration the whole spectrum of issues, related to this concept.

**GDF and E.ON gas foreclosure cases**

**The Theory of Harm**

Refusal to supply by long-term bookings of almost all capacities on an essential facility, leading to the perpetuation of the dominance on the downstream markets.

**The Commitments**

The objective is to make downstream markets contestable and increase investment incentives.

There are two stages: Firstly the companies have to apply an immediate release of significant capacities at mix of entry points and second they have to implement a long term release of at least 50%. That means that at least 50% of long term capacity must be made available to third parties. These commitments were formally imposed on GDF in Dec. 2009 (Case 39.316) and on E.ON (Case 39.317) in May 2010.

In Gaz de France (gas market foreclosure) the Commission considered that it was abusive for a firm to reserve its own pipeline capacity for itself, even if the capacity was used (no capacity...
hoarding) and established the principle that it is abusive for the dominant shipper to reserve capacity in its pipelines for a long period; an approach that was replicated in E.ON. case.

Issues

*How can we determine whether a firm has engaged in “strategic underinvestment”? How does a firm ensure that it has invested sufficiently to avoid abuse?*

In GDF case, Commission based its accusations of market foreclosure on ‘strategic underinvestment’ as well. It is very hard to prove this accusation. A consistent behaviour towards this result or an underinvestment not justifiable by the company’s financial status can partially provide relevant evidence.

*Why is it an abuse for a firm to use its own capacity to serve its own needs?*

Because this leads to an actual refusal of access to third parties. Of course, it is not forbidden for a company to use its own network, however it is anti-competitive to intentionally create congestion in the network, in order to abuse the essential facility. So, the company can use it but to a reasonable and justifiable –by its own real needs- extent.

*Could the Commission have imposed the remedies that it accepted as commitments?*

In energy markets, time is crucial for various factors, especially when the networks are foreclosed. Not only the remedies must be efficient but their implementation has to be swift as well. A regular decision imposing remedies would consume much time. Divestiture requires that there is a substantial risk of a lasting or repeated infringement that derives from the very structure of the undertaking. Commission runs challenging cases, pushes the law into new areas and implements a far reaching policy, mainly fitting to the scope of ex-ante sectoral regulation, by using the procedure of art. 9 and commitments. However there may be some concerns as this new policy is developed by commitments and not by reasoned decisions and this reduces transparency and rigour, while these decisions are not tested before regular trial procedure.

**GERMAN ELECTRICITY CASES**

**German Electricity Balancing Market Case**

**The Theory of Harm**

There were inflating balancing costs in order to favour E.ON.’s own generation arm (Case 39.389). Moreover, imports of balancing power were prevented by refusing to pre-quality suppliers. All the above constituted a discrimination in favour of domestic balancing energy. E.ON. carried out a strategy as a TSO to favour its own supply affiliate, thereby raising costs for the final consumer.

**The Commitments**

Divestiture of E.ON’s German transmission network was formally imposed in Nov. 2008. This resulted to a Network sale to Tennet (NL) completed, cleared by DG COMP in Feb. 2010. The divestiture above is sufficient, in order to remove the incentives for E.ON’s TSO to favour its own arm, harming in this way other market operators, while is able to create a new level of

---

80 GDF foreclosure (Case COMP 39.316) (n 38).
competition in electricity transmission zone. It is one more case, where unbundling was applied by the application of competition rules.

**German Wholesale Electricity Market Case**

**The Theory of Harm**

E.ON. (Case 39.388)84 proceeded to a withdrawal of generation capacity that was profitable – though not profit maximising-. This lead to a significant increase in spot prices, an increase that had a serious impact on forward prices due to their indirect link with spot price. The loss of profit by this withdrawal was indirectly compensated by the increase in profits for the remaining generation plants, due to an increased price, because of the withdrawal. Moreover, E.ON. deterred investments in new generation plants by third parties, by offering long-term supply contracts or shares in E.ON. existing generation projects. Furthermore, given the relation of E.ON. to other companies in German market, Commission concluded that E.ON. was collectively dominant with RWE on the German wholesale electricity market.

This was a case of clear market manipulation. Limiting production generators can force recourse to more expensive plants in the merit order and thereby can lead to a manipulation of market outcomes to the prejudice of the consumers.

**The Commitments**

E.ON. has to apply a divestiture of 5,000 MW of generation capacity. This commitment was formally imposed in Nov. 2008 and sale of capacities were (or get) completed throughout 2009/2010, some of them as swaps.

The above structural divestiture constitutes the most significant in size structural remedy, imposed by Commission in a series of similar cases. Same alleged infringement is being investigated against EDF and ČEZ.

**Issues**85

Is market manipulation a new form of abuse?

It is difficult to understand that it is abusive not to produce as much as you can. However, as demand in this market is inelastic, the withdrawal of production leads to a rise of relevant price, if the operator already has a dominant position in the market and the size of the withdrawal is able to influence the market prices. The withdrawal of generation capacity on the electricity market by a dominant operator is considered an abuse of a dominant position and therefore contrary to Article 82 EC.

Is it a form of unfair pricing? If not, what is the benchmark?

ECJ stated about the meaning of unfair pricing, according to art. 102 TFEU (art. 82 EC) that ‘charging a price which is excessive because it has no reasonable relation to the economic value of the product supplied would be such an abuse’86 (par. 250). Moreover, ‘whether the difference between the costs actually incurred and the price actually charged is excessive, and, if the answer to this question is in the affirmative, whether a price has been imposed which is either unfair in itself or when compared to competing products’ (par. 252), while it also states that ‘other ways may be devised — and economic theorists have not failed to think up several — of selecting the rules for determining whether the price of a product is unfair’, thus applying benchmarking methodology for the investigation of unfair pricing, but also leaving an open character to the methodological tools that may be used for this investigation. Therefore, it is difficult to understand how E.ON.’s behaviour can be defined as unfair pricing, as the difference between costs and price

---

84 German electricity wholesale market (Case COMP 30.388)
85 Commission (EC), ‘Antitrust: Commission opens German electricity market to competition’ IP/08/1774 26 November 2008
for each generation plant are not excessive and the competing products cannot be compared as they function under a different cost. The way in which E.ON. manipulated the market was to raise costs by limiting production. The reason why this limitation affected prices lies in the very structure of the market. The equilibrium price when all plants in the market are operating at their full rating is equal to the marginal opportunity cost of consumption. As the demand is inelastic, the production is not abundant, each source offers a specific production under a specific price and other sources cannot reduce prices, in order to cover the blank, any reduction in any source will inevitably move the demand curve, thus raising the cost. As it is a firm with market power, E.ON can increase price by reducing output. If E.ON had no market power, it would take prices as a given and would produce up to the point where price equals marginal cost. So, E.ON had the advantage to act opposite to the market, i.e. by increasing price when the reduction was low till the price reaches a limit, when it could increase output again. E.ON. is a company that by the nature of its production assets is able to withdraw generation capacity –even profitable-, in order to raise prices.

Does the infringement derive from the very structure of the undertaking?
Yes, divestiture requires that there is a substantial risk of a lasting or repeated infringement that derives from the very structure of the undertaking. Only in this way the structural remedy will be reasonable, sufficient, effective and proportionate. The structure of the E.ON.’s position in the German market provides incentives to E.ON. to withdraw production, thus raising prices by market manipulation. After the divesture, the plants which would remain in E.ON.’s portfolio will be able to remove E.ON.’s incentives to undertake profitable capacity withdrawal. Moreover, because of the inclusion of types of plants in E.ON.’s portfolio, which competitors cannot easily access, the divestiture remedy also responds to the concerns about E.ON.’s effort to deter competitors from investing in new plants.

OTHER CASES

Market integration: Swedish electricity interconnectors case

Cheap hydro generation is located in the north, while nearly all consumption is located in the south. In order to keep Sweden as one price zone, the Swedish TSO SVK curtails on average 58% of available transmission capacity to neighbouring countries (Case 39.351).

The Theory of Harm

There was discrimination between transmission to consumers located inside and outside the network of Sweden without objective justification. This lead to a segmentation of the internal market and to a reduction of net consumer welfare, while it distorted generation and network investments signals. This behaviour may represent an abuse of the dominant position of the TSO on the Swedish electricity transmission market, by discriminating between domestic and export electricity transmission services.

The Commitments

---

89 Svenska Kraftnät (Case COMP 39.351)
SVK will subdivide the Swedish network into two or more bidding zones and will cease curtailing trading capacity Reinforce West-Coast-Corridor network by 30 November 2011, while in the interim period it will apply counter trade to reduce curtailing. These commitments were formally imposed in April 2010. The same congestion management mechanism would be deployed both within Sweden and cross-border, in order that the concerns about discrimination would be reduced.\(^9^2\)

**Issues**

This case marks the entry of competition policy on topics traditionally falling in the spectrum of energy policy and sector regulators. In this case, the need for a unified approach to national and cross-border congestion management constitutes a major point and the discrimination between national and cross-border transactions are dealt as opposing the establishment of a consolidated European Transmission Network. It also underlines the need for coordination among the different European policy levels, relevant to the establishment of a single internal market. The case—as the previous—results to quasi-regulatory structural remedies—ownership unbundling—by the use of competition law.

In this case, Commission uses Art. 102 TFEU about the abuse of dominant monopolistic position and manages to assess this role and position of the TSO, without referring to the sectoral regulatory framework, while it leaves out any efficiency issues—issues if high concern in sectoral regulation—\(^9^3\), in order to identify discrimination against cross-border transactions. In this way, Commission interferes in the role of the sectoral regulator and EC Competition Law functions independently and as a substitute of Sectoral Regulation. In this way, we can observe that the complex structure of various institutions that are responsible for the energy sector—a structure that is not less complex after the 3rd Energy Package and involves national and European sectoral regulators and agencies, states, commission and competition authorities—may lead to serious tensions, contradictory initiatives and solutions and disagreements that may put the effort for a single internal market in danger.

**E.ON/GDF Case**

This is a case (Case 39.401)\(^9^4\) of a 50/50 Joint Venture between the two companies, based on two side letters signed in 1975 (between GDF and Ruhrgas AG now part of E.ON group), concerning the MEGAL gas pipeline, which the joint venture owned and transports gas across Southern Germany between the German-Czech and German-Austrian borders on the one side and the French-German border on the other.

**The Theory of Harm**

According to the agreement between the two companies, GDF would not sell gas from MEGAL in Germany and E.ON would not sell gas from MEGAL in France. Discussions took place between parties in 2000 after the expiration transposition date for Directive 98/30/EC, about the terms of expediency, in order to terminate agreement. However, the parties decided to maintain this market-sharing agreement, which limited sales into each other’s territories till 2005, when their new agreements of 2004 and 2005 expressly ended the above agreement.

---


\(^1^0^2\) Temple Lang, (n 99), 319; Wils ‘Settlements of EU Antitrust Investigations: Commitment Decisions under Art. 9 of Regulation No 1/2003’ [2006] 29 World Competition 345, 355.

\(^1^0^4\) Art. 48 Dir. 2009/73/EC (n 7).
According to the Commission, all the above constituted a single continuous infringement and a restriction of competition by object; therefore they violate Art. 101 TFEU (art. 81 EC) by entering into an agreement and concerted practice, while there was no need to prove a specific harm on the market. The above market-sharing agreement helped the two companies to keep a strong position on their countries’ national gas markets, even after their liberalisation. In this way, they did not practically allow price competition and free choice of supplier in their markets, thus actually harming consumers. Commission also assumed that particularly the post-2000 discussions’ objective was to restrict competition. The above case is the only of all the cases analysed in this paper, in which Commission identified a violation of art. 101 and not of art. 102 and the only in which the case did not close by the method of commitments, but a heavy fine (2 x 553 million euros) was imposed on both the companies.

Fines

Commission calculated the fine\textsuperscript{95}, taking into consideration that competition was possible in France after 2000 (when GDF legally lost its prior monopoly on gas, as the deadline for implementation of the First Gas Directive expired) and in Germany after new Electricity and Gas Act in 1998. So, although Commission identified a long-term infringement that lasted for 30 years it calculated the fines, based on much shorter periods. This is rational, firstly as it would not be acceptable to impose the fine, based on behaviours going back to the era, when gas monopolies were totally legitimate and second as, if Commission did so, it would harm both companies severely. The relevant turnover, which was used for the calculation of the fine, was only that concerning gas shipped via MEGAL pipeline. Nevertheless, the fine was considered as being very heavy. They are the second largest fines imposed by the European Commission and the first on the energy sector. Both companies appealed against the Commission’s decision before the General Court (former CFI).

Issues

This case is about a classical cartel or a joint venture?

According to Article 101(1) TFEU, any agreements between undertakings, which may affect trade between Member States and which restrict competition within the common market are prohibited. According to (c) of the same paragraph, market sharing is one case of hardcore cartel. Cases of hardcore cartel constitute restrictions of competition by object and according to par. 2 of Article 101 are always prohibited without any need to show actual anti-competitive effects as they are presumed to produce such effects. There is no chance of successful defence in such cases and they frequently lead to severe penalties and fines. So, this is not a typical case of joint venture. Article 101 is not applied to full function joint venture, i.e. entities that perform on a lasting basis all the functions of an autonomous economic entity. Such joint ventures are subject to the merger regulation. However, in this case Commission did not actually examine the joint venture between E.ON and GDF but their market sharing agreement that followed their joint venture. We should admit that non-competition agreements naturally follow joint ventures in all aspects of economic life. However, in this case the non-competition agreement had a particularly serious aspect, as both companies are the largest players in their home markets and hold this position since the pre-liberalisation era. Moreover, the effects of this agreement were clearly disproportionate to achieve claimed objective, which was the preservation of the joint venture relation. The agreement clearly influenced both German and French market and prohibited competition. So, Commission followed an approach, according to which the joint venture was the pretext, under which the two companies shared these two large markets for several decades, even after liberalisation. Therefore, we have a clear cartel case.

Were the fines proportionate in view of the nature of the infringement?

\textsuperscript{95} 2006 Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, OJ C 210, 1.9.2006., 2-5.
The fines were extremely heavy, however they can be assumed as proportionate for the following reasons. The companies were aware that their practice constituted a severe infringement of competition law, as the gas industry was undergoing a process of liberalisation for several years. Moreover, both companies had earned big profits from their practices that lasted for 30 years, some of which after the liberalisation of the market, while on the other hand the consumers of both countries were respectively deprived of the several benefits of liberalisation of gas market.

Besides, the fines followed the general relevant guidelines. However, there was one more reason why Commission chose to impose such a heavy fine. This decision followed the inquiry into the energy sector, which concluded in 2006 and showed a severe delay in the practical application of liberalisation in the energy markets. Arrangements like GDF/E.ON case may harm the consumer; however they also harm the policy for the establishment of a single internal market. This market sharing managed to actually delay the opening of gas markets to competition and expressively opposed the general intent of Community Legislator and the effort –of high priority- for the liberalisation of European energy markets. The fact that this arrangement concerned two of the biggest energy markets of Europe highlighted the significance and the general danger –for the whole liberalisation process- of this infringement. Given the overall nature and importance –financial and political as well- of this case, we support the opinion that the fines were proportionate.

**MERGERS CASES**

1. **Case COMP/M.5494 Enel/Endesa**

Enel acquired control of Spanish electricity provider, Endesa. Previously, Spanish government pushed Endesa to merge with Gas Natural, in order to create a sole national corporation for gas and electricity. Enel and its Spanish partner Acciona concluded a joint public bid for Endesa, while later Enel bought out the Acciona’s share. Finally, Enel totally took over Endesa and Commission did not oppose to this concentration, as it assumed that this takeover “will not significantly impede competition in the European Union or in any substantial part of it since ENEL already has joint control over Endesa and the overlaps between ENEL’s and Endesa’s activities are extremely limited”. Moreover, we have to note that Commission brought Spain’s behaviour before ECJ, as Spain imposed a series of restrictions on a takeover attempt for Endesa by E.ON. and ECJ (C-196/07) ruled that Spain failed to fulfil obligations deriving from European law, by not withdrawing certain conditions that were imposed on the bid by E.ON for Endesa, referring to two Commission decisions finding Spain to be in breach of Article 21 of the EC Merger Regulation.

2. **Case COMP/M.5224 EDF/British Energy**

EDF acquired control of British Energy but Commission required far-reaching commitments, in order not to oppose; commitments that followed the Commission’s recommendations in the Final Report on the Energy Sector Inquiry of 2007. This is significant given the fact that the group was not going to have high market shares in the relevant markets. The commitments included the EDF’s obligation to end one connection agreement to the electricity grid, to sell minimum volumes of electricity in the UK wholesale market, to sell one generating plant and a coal plant and divest a site potentially suitable for a new nuclear power station in UK.

3. **Case COMP/M.5496 Vattenfall/Nuon**

---

96 Commission (EC), Non-opposition to a notified concentration , (Case COMP/M.5494 — ENEL/Endesa), 24 April 2009
97 Commission (EC), Non-opposition to a notified concentration , (Case COMP/M.5224 — EDF/British Energy), 17 February 2009
98 Commission (EC), Non-opposition to a notified concentration (Case COMP/M.5496 — Vattenfall/Nuon Energy), 5 September 2009
Vattenfall is the largest utility in the Nordic region, with significant presence in Germany, France and Poland as well and controlled by the Swedish state. It took over a Dutch energy corporation, Nuon Energy, in order to acquire a strong foothold in electricity and gas of Netherlands and Belgium. Commission accepted the takeover, but requested that Nuon’s retail activities in Germany would be sold.

4. Case COMP/M.5467 RWE/Essent

RWE bought the Dutch corporation Essent and Commission accepted the takeover, under some limited divestments. It is important, however, that although both the takeovers above were accepted, a proposal for a merge between these two Dutch corporations, were not accepted by the Dutch Competition Authority –Nma-, in 2007, as the latter assumed that this merge would limit competition between the Dutch market, no matter if this competition includes foreign controlled firms.

NATIONAL COMPETITION AUTHORITIES

Except Commission, National Competition Authorities and sectoral Regulators are also active, concerning mergers, antitrust and market abuse cases in energy sector during last years, especially after the Commission’s Sector Inquiry and during the process of the establishment of the Third Energy Package.

In Spain, in 2009, the Comision Nacional de la Competencia imposed fines to major Spanish companies as they concealed information that could lead customers to change suppliers. Later, the same year, the same authority launched an investigation against Iberdrola, Endesa, Union Fenosa, Hidrocontrabrico and E.ON for the same reason and for general anti-competitive behaviour and imposed interim measures. Furthermore, the Authority approved the merger of Gas Natural and Union Fenosa -which will create a big integrated gas and electricity company in Spain after the takeover of Endesa by Enel (look above)-, although this merger will strengthen the dominant position of Gas Natural in Spanish natural gas market, after some commitments offered by Gas Natural.

In Italy, Autorita Garante della Concorrenza e del Mercato Authority and the Italian Electricity and Gas Authority suggested that ENI should sell part of its natural gas storage capacities, in order to allow more effective competition for other market participants. Moreover, Competition Authority launched investigations into the Italian gas and electricity retail markets, as the situation

---

99 Commission (EC), Non-opposition to a notified concentration (Case COMP/M.5467 — RWE/Essent), 15 September 2009
was similar to Spain, including market foreclosure by big firms, which put obstacles to retail customers willing to change supplier. In Germany, also in 2009, Bundeskartellamt launched sector inquiries into the gas and electricity markets. The goal of the inquiry regarding electricity market was to examine artificially high prices on the wholesale level, as a result of collusion between major market players. The goal of the inquiry regarding gas market was to examine the foreclosure effects of capacity-booking and long-term transportation agreements in German market.

In Netherlands, Nederlandse Mededingingsautoriteit published a research on national electricity and gas market, the Monitor on the Dutch Electricity and Natural Gas Markets for small-scale Users, according to which the market is still dominated by three companies, although there seems to be active and effective competition. In Portugal, Autoridade da Concorrência published a report on wholesale electricity prices in Portugal, according to which prices were relevantly high, because of high generation costs and poor interconnector capacity. The report recommended both deregulation of retail prices and further investments on generation and interconnection.

In Belgium, Direction Générale de la Concurrence conducted surprise investigations in wholesale electricity market, as there were fears about price formation, capacity withdrawal and other forms of market abuse. In France, Autorité de la Concurrence issued a minor—but yet severe considering the size of the local market—fine on a joint venture between EDF and Gaz de France-Suez (Gaz and Electricité de Grenoble) for abuse of dominant position, as the incumbent gas and electricity supplier had issued defamatory press releases, in order to weaken competition. In UK, in 2008, Ofgem published a report on investigation of the energy supply markets, according to which there is a low level of liquidity on wholesale electricity markets, which could act as a disadvantage to suppliers of small size and as a barrier to new entrants into supply markets. This market is still dominated by six large companies (EDF Energy, Scottish Power, E.ON UK, Centrica, RWE, Scottish and Southern Energy). In 2009, Ofgem opened a consultation on the issue of market power in electricity wholesale sector and published three alternative proposals. The

---


---
first concerns the establishment of mechanisms such as ex ante price control or market power licence condition; the second refers to amendments of the price setting method on the balancing market and alignments on the incentives for transmission systems’ owners and operators to limit transmission constraints; the third refers to unbundling of transmission networks, divestments on generation plants in highly concentrated sub-markets, new investments on transmission and generally to changes to the structure of assets’ ownership.

Moreover, in 2009, Ofgem closed its investigation against Scottish Power and Southern Energy, which was launched on the grounds that these operators abused their dominant position in the electricity generation market, by constraining capacity on the network, as they were deliberately shutting down their plants when supplies were tight, in order to receive higher payments, in order to start up again, thus increasing the total balancing costs and the consumers’ expenses. The investigation was suspended, as Ofgem assumed that it would be more effective to deal with the wider problem, also concerning National Grid. Ofgem also imposed a heavy fine – the heaviest ever imposed for abuse of dominant position in UK, although it was limited by Competition Appeal Tribunal on National Grid for abuse of dominant position on the metering market, as the latter limited competition by concluding binding long-term contracts with energy suppliers, which provided for heavy penalties, in case of using competitors for replacement of meters.

As we observe, national authorities follow the Commission’s example and proceed to sector inquiries and antitrust proceedings, recommending steps to be taken – including structural remedies, in order to make the market more functional, thus completing the framework of initiatives towards the establishment of the internal energy market.

TRINKO CASE

The theory of harm

AT&T was using for a fee lines owned by Verizon, under anti-monopoly 1996 Telecommunications Act. Trinko was an AT&T customer, who received poor service on lines owned by Verizon and claimed that Verizon discriminated against AT&T customers, as it provided them worse services than those provided to its own customers, claiming a violation of both Section 2 of Sherman Anti-Trust Act of 1890 and 1996 Telecommunications Act. The key point of the case was that effective access to Verizon’s systems was necessary for competitive local exchange carriers to provide services to their own customers. The case resulted before the Supreme Court, which tried to answer the question whether a company that does not fulfil its duty to share its network with competitors under the Telecommunications Act, i.e. sectoral regulation, can be sued under the Sherman Act, i.e. general competition law.

Decision

The Supreme Court judged that the answer to the previous question should be negative as, the Court underlined that the 1996 Telecommunications Act did not alter or add new claims to previously existing antitrust law and that Verizon did not violate this previous antitrust regulation.

117 Verizon Communications, Inc. v. Law Offices of Curtis Trinko LLP, 13 January 2004, 540 U.S.
So, the rule that business do not have to aid competitors was affirmed and no exception was accepted.
We should note that Trinko case followed a very different path, in comparison to the previous similar U.S. v. AT&T case\textsuperscript{119}, about competitors needing services from regulated monopolies. In this case, it was judged that equal access should be given to competitors and a divesture of local subsidiaries was imposed on AT&T, based on competition rules. This decision was based on the assumption that competition law and regulation are not substitutes, but complements as the latter is the prerequisite for the latter to apply. Specifically, regulation eliminates the incentives for firms to act in anticompetitive way\textsuperscript{120}.

**Issues**

**Essential Facilities Doctrine**

We previously briefly described (RWE and ENI cases) the key points of essential facilities doctrine.

This doctrine was developed by lower courts and provides an exemption to the general rule that firms do not have to aid their competitors. Supreme Court in Aspen Skiing\textsuperscript{121} judged that, in spite of this freedom not to deal with competitors, when a firm intentionally refuses to deal with a competitor, in order to achieve monopolisation of the market, this freedom may be limited, as the firm may be obliged to grant access to its inputs, according to antitrust law.

In Trinko case this doctrine was rejected, according to the following rationale\textsuperscript{122}. First, the Supreme Court had never recognised such a doctrine in past cases. Second, the doctrine cannot apply, in case that a state –or federal- agency or authority has powers to regulate the use of these facilities. Third, in order that this doctrine should be applied, the access to the relevant facility has to be totally unavailable and not just provided for a high price. Fourth, there is no need to apply such a doctrine, when relevant arguments can directly arise from Section 2 of Sherman Act. Five, apart from the above, the refusal to deal with a competitor has to be motivated by an intention to limit competition\textsuperscript{123}. In sectors where regulation about the sharing and use of such facilities exist, such as in telecommunications –and energy in EU as well-, access to these facilities is guaranteed, so there is no more space, in order to apply the essential facilities doctrine. Moreover, the Supreme Court accepts that the wide use of an essential facilities doctrine may reduce incentives for investments in assets, thus harming the general objectives of antitrust law\textsuperscript{124}.

Referring to the issue of essential facilities, we should also note that an approach towards mere facilities’ sharing may not lead to effective results, but can only work if combined with sectoral regulation sets upper limits to the prices for the use of the facilities. So, in order that a concept like this can function, the access price should also be set or limited by sectoral regulation. Whoever applies such a doctrine should set prices and act as “a central planner”, a role for which competition authorities are generally inadequate\textsuperscript{125}.

**Sector Specific Regulation and Competition**

In Trinko case, the Supreme Court was called to answer if competition rules could be enforced, in cases where sectoral rules are also applied. The Court ruled that antitrust rules have a very limited scope of application, if there is sector specific regulation\textsuperscript{126}. The reason has to do with a

\textsuperscript{119} United States v. AT&T, 552 F. Supp. 131 (D.D.C. 1982)
\textsuperscript{120} T. Brennan, K. Palmer, S. Martinez, Alternating Currents: Energy Markets And Public Policy, 71.
\textsuperscript{123} D. Geradin, ‘Limiting the Scope of Article 82 of the EC Treaty: What can the EU Learn from the US Supreme Court's Judgment in Trinko in the wake of Microsoft, IMS, and Deutsche Telekom?’, 5.
\textsuperscript{124} Verizon Comm. Inc. v. Trinko, 8.
\textsuperscript{125} D. Geradin, ‘Limiting the Scope of Article 82 of the EC Treaty: What can the EU Learn from the US Supreme Court's Judgment in Trinko in the wake of Microsoft, IMS, and Deutsche Telekom?’, 7.
\textsuperscript{126} ibid, 5-6.
cost/benefit analysis about the additional benefits of the enforcement of competition rules, when sector specific regulation already treats issues of anticompetitive behaviour in the sector. The specific conditions that the regulatory environment provides to the case lead to the minimisation of the benefits above. Sector specific regulation in U.S. Telecommunications Sector is very detailed and provides a strict framework of supervision, remedies and strong powers given to the competent sectoral authority. On the other hand, competition rules are very general compared to the specific and detailed character of sector specific rules, while the competition enforcing authorities are not technically adequate, in order to handle such specific issues. Therefore, competition rules do not provide a functional, complete, exact and adequate framework that can be applied to the sector, while their application may also lead to simplistic and finally harmful results, as they ignore the specific parameters and factors of the sector. So, US Supreme Court expressed an “exhaustion” rule, according to which the scope of application of competition rules is exhausted in fields, where sector specific regulation exists and that the role of competition rules in such fields has to be subsidiary and these rules should be used, only where no sector specific remedies are available. In this way, sector rules, as more specific, displace general competition rules. The assumption underlying Trinko decision is that competition and regulation are substitutes and that’s why the Court conducted the cost/benefit analysis. This assumption allows the sectoral regulator to both control prices and enforce competition. The rationale behind Trinko case and the overall approach towards the issue of the relation between competition and sector specific rules was also expressed in the Credit Suisse v. Billing case, in which Supreme Court judged that regulated securities industry is exempted from general antitrust rules and it is solely regulated by the sector specific rules of SEC. Moreover, Trinko case’s approach is assumed as applicable in other network industries, except telecommunications.

128 ibid, 14.
European Law seems to follow an opposite approach than this followed in U.S. during last years, regarding the issue of the application of competition rules in sectors specifically regulated. The issue is very important, considering network industries and especially energy sector. Above, we presented a series of cases, where Commission not only applied competition rules in energy market—a regulated market-, but also used antitrust framework, in order to promote liberalisation of energy sector and justify its interventions into the sector, by far-reaching remedies, frequently structural that actually implement rules and objectives of new sector-specific regulation. We should highlight that some remedies—based on competition law—imposed by Commission in recent cases lead to full ownership unbundling, although such an option is not available in existing sectoral legislation (Second Package), but are included as just an option—and not an obligatory measure—in the Third Package, which is not yet applied and is going to be applied in a few years. In other words, in the above cases Commission actually implemented sector specific rules—or better we should say remedies that fit in sector specific regulation—by competition law means and under competition law cover. So, we can observe that a peculiarity of EU Law, considering energy sector, is that competition law is used, in order to ensure the promotion of the objective of the Internal Market, while there is a simultaneous effort for a completed sector specific framework that will also deal with this issue.

Besides, the issue of the relation between sector specific and competition rules is important in EU as much as in U.S., as even the first generation sector specific directives, which started the liberalisation in energy and other network industries, pointed out that they are not going to substitute competition rules, however they did not define the extent to which the latter would be applied. This led to a situation, in which, although a sector was regulated, it was also open to the enforcement of competition rules. In Deutsche Telekom case, although the NRA had approved the firm’s tariffs, Commission applied art. 82, ruling that the competition rules may apply in any case where the sector specific rules do not preclude the undertakings from engaging in autonomous anticompetitive conduct and thus establishing a truly parallel system of dealing with such cases—even in the opposite way from this applied by the NRA.

We observed that in U.S. finally sector rules gained a priority against competition rules. However, the case in EU is the opposite, as we will explain below. We should also note that it would be very difficult for sector rules to gain priority against competition rules in the same way as in Trinko, for one additional reason; although in U.S. sector specific and competition rules are legally equal, under EU law, sector regulation is included in secondary legal sources, i.e. directives and regulations, while competition law is part of the Treaties. It is, therefore, possible for the Commission to practically abstain from implementing competition rules, when sector specific regulation exists; it would be however impossible to accept that competition rules are not applicable in such cases.

We could also observe that except from parallel, competition procedure seems to appear as a system that may actually cancel the approach of sector specific regulation; thus we may imagine

---


133 Ibid, para 54.

134 D. Geradin, ‘Limiting the Scope of Article 82 of the EC Treaty: What can the EU Learn from the US Supreme Court’s Judgment in Trinko in the wake of Microsoft, IMS, and Deutsche Telekom?’, 26-27.
that in EU we may result to a case of “reverse Trinko”, meaning that antitrust rules will displace and substitute sector specific rules, which will turn to an auxiliary and programmatic role. This scenario becomes more probable, after taking into consideration the recent cases we examined above and the way in which Commission used competition law and commitments procedure, in order to achieve results more far-reaching and radical than these that could be achieved by sector regulation. In some other cases –older indeed- Commission seemed to accept the priority of sector regulation\textsuperscript{135}. However, competition rules remain a valuable reserve for Commission, in case that sector regulation does not achieve results in specific situations. This may be attributed to the fact that Commission itself can launch antitrust procedures, thus is able to directly deal with problems. On the other hand, the use of competition rules in this way may also be justified, on the grounds that in many cases sector regulation is not applied in an effective enough way or is not mature enough, in order to secure a functional market. In these cases, competition rules may be effective, in order to complement the inadequacies of sector regulation or prepare the market to accept a new sector regulation under process –like the current situation in energy market-. Besides, generally, sector regulations are applied by NRAs and sometimes NRAs tend to be slow and unable to enforce these rules for many reasons. A launch of proceedings under competition law would be helpful, in case of an inert NRA, so as to activate it and then transfer the proceedings to it, in order to continue them under sector specific rules\textsuperscript{136}. Furthermore, even in Trinko case, a major argument of Supreme Court was that the framework of sector specific regulation was detailed, complete and strict enough to make the competition rules’ application meaningless. It is difficult to claim the same regarding European energy sector\textsuperscript{137}. It is remarkable that EU seems to replicate the model applied to the telecommunications sector, which was previously liberalised. While in U.S. after the Telecommunications Act 1996 antitrust proceedings were put aside, in EU after the liberalisation competition law gained priority in the sector\textsuperscript{138}. The difference however is that in energy sector, liberalisation has not been concluded and it is doubtful when it will be completed. Moreover, in telecommunications and electronic communications competition enforcers take seriously under consideration sector policies, guidelines and objectives\textsuperscript{140}, while in energy Commission actually applies a sector plan by competition means.

For these reasons, competition rules remain strong in energy cases. We can suppose that Commission uses them, in order to accelerate the transformation of energy market and prepare it for the Third Package. Competition rules are not limited to their traditional ex post corrective role but result to an on-going process of ‘trial-and-error’, which reaches the limits of an ex ante quasi-regulatory role, in order to supplement the inadequacies of sector regulation\textsuperscript{141}. However, this practice is criticised from an economic point of view, as obliges Commission to focus on market structure and not on market design\textsuperscript{142}. Competition rules may continue being in use after this Package, in cases where corrective measures should be taken or the application of the Package will not prove effective. It is argued that in long-term sector specific rules not only will not substitute competition rules but actually the former are designed to transform the market, in order to liberalise it entirely and make it open to

\textsuperscript{138} D. Geradin, ‘Limiting the Scope of Article 82 of the EC Treaty: What can the EU Learn from the US Supreme Court’s Judgment in Trinko in the wake of Microsoft, IMS, and Deutsche Telekom?’, 26.
\textsuperscript{140} ibid, 542.
\textsuperscript{141} L. Hancher, A. De Hauteclocque, 13.
\textsuperscript{142} ibid, 10-13.
competition and then economy-wide rules will be sufficient to regulate market power. After the sector rules fulfil their objectives and the markets become competitive, these rules will become meaningless and only general competition rules will apply. On the other hand, there are doubts about whether sector regulation can become meaningless and unnecessary in a market, with such strong monopolistic and oligopolistic features, as energy.

In medium-term however, competition and sector specific rules seem not to be substitutes—as Trinko case assumed-but complementary to each other. Concerning technical issues and issues of remedies— including unbundling—sector regulation seems to be more effective, while competition rules seem suitable, in order to fill gaps and deal with issues not covered by the technical approach of sector regulation, such as collusion.

Other authors argue that Commission should learn from Trinko case and abstain from competition rules’ application, when there are effective sector specific rules; thus competition rules’ role should become auxiliary and limited to cases, in which NRAs are not able or willing to launch the suitable proceedings.

CONCLUSIONS: COMPETITION AND SECTOR REGULATION ESPECIALLY UNDER THE NEW INTERNAL MARKET FRAMEWORK

We should firstly clear that, regarding energy sector under the new sectoral regulatory framework, Commission is going to intervene exceptionally, while NRAs will primarily deal with the relevant issues of application of the sectoral rules. However, considering competition, Commission has much broader and direct powers and can intervene very easily. So, we stand before a dualistic model that involves two different frameworks with two different sets of procedures, powers and competent authorities that are going to deal with the issue of the Internal Market. Of course, sector specific rules apply ex ante, while competition rules are theoretically designed, in order to apply ex post to a generally functional market and resolve dysfunctions, while as we observed in AT&T case, regulation provides the prerequisites, in order that competition law can effectively work. Nevertheless, the practice of the Commission in the cases above was much more active than what we could expect, basically influenced by the findings of Sector Inquiry and generally applying the remedies proposed in this Inquiry and later before the proceedings for the Third Package. As explained, several points of the new framework, were a result of compromise between states, Commission, Council and Parliament and for this reason many points included in the initial Commission’s proposals and the findings of the Inquiry were gradually softened—as for example concerning unbundling and the final several alternative options that may lead to a situation where most states will implement one of the alternatives and not full ownership unbundling, although the latter was the basis of Commission’s approach-. On the other hand, Commission seems to abide by its initial approach and distance from the final compromises of the Third Package. Moreover, National Competition Authorities follow the Commission’s dedication to Sector Inquiry and result to similar solutions and remedies. Therefore, this situation may eventually lead—especially when the Third Package comes into force—to two parallel systems, approaches, frameworks, procedures and sets of rules towards Internal Market.

As we observed, in U.S. the Regulator may enforce both sector specific and competition rules. In EU we could result to the same result, however duplicated and on a member-states level as well. NRAs will have wide powers and will be able to enforce sector specific and to a specific extent competition rules—or better, approaches-, while National Competition Authorities will also be able to enforce competition rules.

---


145 And telecommunications as well. Look ibid 18-19.


147 D. Geradin, Limiting the Scope of Article 82 of the EC Treaty: What can the EU Learn from the US Supreme Court’s Judgment in Trinko in the wake of Microsoft, IMS, and Deutsche Telekom?, 30.
to apply sectoral legislation by the cover of competition rules. The same duplication will continue on European level. Of course, in some countries like U.K. the problem is generally solved, as there is one Authority for the sector, i.e. Ofgem, which applies both sets of rules, sector specific and competition. However, the problem will mostly exist in countries, where there are or will be two independent authorities, one as a sector regulator and the other as competition authority (like Greece). The allocation of duties and powers and the designation of the suitable procedures will be a serious problem, especially as there is no cooperation platform between competition and sector authorities on a European and regional level. The fact that both authorities will be able to enforce both rules will make the problem more serious and overlaps may occur.

The above will result to jurisdictional and substantive conflicts\(^{148}\). The duplication above will create alternative remedial routes, as a specific case or a set of related cases may be brought before competition enforcers and NRAs as well, without one procedure exclude the other, while similar cases may be brought before different bodies and judged under different procedures. Moreover, this duplication may lead to opposite decisions regarding the same or similar cases, while it will lead to legal uncertainty, high transaction costs and legal risk and regulatory inconsistencies\(^{149}\). Furthermore, the different approaches, priorities, principles, objectives and philosophies of the two systems, i.e. competition and sectoral, will worsen the situation\(^{150}\). Regulation tends to assume returns on investment and the long-term preservation of the competition –by investments and innovation- as key issues, while competition law tends to assume that the key issue is the lift of restrictions and the preservation of medium-term competition, thus it is more generous regarding access rights and much stricter regarding refuse of supply; this last approach is very problematic, concerning newly liberalised markets, where new investments are crucial. Competition law is designed, in order to protect the competitive character of a market structure, while regulation is designed, in order to make the market more functional, even by imposing new duties\(^{151}\).

A market under liberalisation, in which competition authorities will try regulate by competition means and regulatory authorities will apply competition law, along with sector rules, concurrently, will probably face problems. The wide use of competition rules –as the seeming easy solution- for objectives different from those, for which it was designed, will multiply the problems\(^{152}\).

Therefore, in order that the new system of powers, which Third Package introduces –and already involves numerous different bodies and agencies in decisive, advisory and supervisory tasks-, works, it is necessary that there will be a clear line that will define in which cases competition rules should be enforced and in which cases sector specific regulation should have priority. Moreover, a functional system of cooperation between competition enforcing and regulatory authorities should be established or the competition authorities should be integrated in the platform of cooperation between the various agencies competent for the implementation of Internal Market.

Finally, serious thought should be given when dealing with strictly sector specific issues by competition law means and approaches, especially in cases that far-reaching structural remedies are imposed and especially when they are imposed by commitments procedure. First, their legitimacy may be under question and this may problem may arise when they will be brought before European Courts. Second, competition law as a means to apply sector regulation may turn ineffective and inadequate and fail to succeed the long-term design of a functional market. Any failure concerning the methodology of the efforts towards the establishment of an open to competition energy internal market may lead to serious delays and medium-term failure of the overall effort.


\(^{149}\) D. Geradin, ‘Limiting the Scope of Article 82 of the EC Treaty: What can the EU Learn from the US Supreme Court’s Judgment in Trinko in the wake of Microsoft, IMS, and Deutsche Telekom?’, 27.


\(^{151}\) ibid, 63-64.

\(^{152}\) ibid, 65.