

IBC Conference – Competition Law in the Energy Sector

Radisson SAS Royal Hotel

Brussels, 26 November 2009

Making Energy Markets in Europe work better

Philip Lowe

Director General

DG Competition

It is a pleasure to be here today. Let me start by saying that the EU is committed to open and competitive energy markets. They are of fundamental importance to the overall competitiveness of the European economy – particularly in times of crisis.

In recent years, the Commission has probably brought more competition cases in energy markets than in any other sector. The Commission is using all the tools it has to achieve the liberalisation objectives set for European energy markets.

A decade of liberalisation of the energy sector– the Commission's role

The energy sector has been one of the Commission's key priorities since the late 1990s. In spite of two waves of liberalisation Directives that aimed to tackle inefficient and monopolised national energy markets, competition on European energy markets was still limited.

Between 2005 and 2007, the Commission carried out a Sector Inquiry into competition in the energy sector. Our conclusion was that there were (and continue to be) barriers to competition on the market.

Following the Sector Inquiry, the Commission pursued a dual strategy:

- first, proposing a package of legislative measures to improve the regulatory framework (the Third Energy Package);
- second, using the full range of competition tools at our disposal to pursue cases that can significantly improve competition in the market and set important precedents for companies in the sector.

Regulatory framework: The 3rd liberalisation package

The Third Energy liberalisation package was approved by the European Parliament last April and adopted by the Council in July 2009 – it will come into force in March 2011. It consists of three regulations establishing an Agency for the Cooperation of Energy Regulators, on conditions for access to power network, and on conditions for access to gas network and two Directives on common rules in the internal power market and common rules in the internal gas market. I would like to mention three key aspects of the new legislation:

(1) Effective unbundling

Our biggest concern with current legislation is that it does not effectively address access issues that may arise as a result of vertical integration in networks and supply. The Commission's legislative proposals, therefore, focused on effectively separating network activities from commercial activities elsewhere in the energy value chain.

However, I think we need to recognise that while effective unbundling is important, it is not a 'miracle solution'. In other words, effective unbundling is a necessary but not a sufficient condition for creating competitive energy markets.

(2) Cross border integration

Another aspect of the third legislative package is measures to promote cross-border integration of networks, which provide for mechanisms for coordination between Transmission System Operators (TSOs). Harmonising the different rules and

administrative conditions is essential and TSOs should agree on a common framework.

(3) Need for adequate regulatory oversight

Furthermore, we need strong and consistent regulation to ensure that effectively unbundled TSOs become more efficient. The package provides for the creation of an Agency for the Coordination of Energy Regulators (ACER) with a cross-border focus – we believe this is crucial to achieving market integration in Europe, since in the event of a dispute on cross border issues, we need a supranational body that can resolve conflicts within a reasonable time frame.

Role of competition in European energy markets

Let me begin by asking a provocative question: why do we bother with competition in the energy sector? What is wrong with letting incumbents provide steady supplies of energy to Europe? Doesn't customer switching create confusion? Why disrupt the status quo?

Of course, you would expect me to defend the need for competition in this sector, and you would be absolutely right. In my view there are a multitude of benefits to bringing competition to the European energy markets:

- Freedom of choice: Europe's citizens have very different expectations on the energy market. Some focus solely on prices. Others want to choose green electricity. Some may even wish to generate their own power and feed it to the grid. Whatever the expectations, consumers should have a choice.
- Energy prices: Competitive markets play an important role in curbing energy price increases and protecting consumers against unjustified price increases. However, the Commission cannot guarantee that, with liberalisation, energy prices will drastically go down. The liberalised energy market cannot of course influence overall world energy prices.
- Increased investments in infrastructure: a competitive market with correct price signals increases investments in new infrastructures, as we have witnessed in some Member States following liberalisation of their gas markets.

I believe that effective competition in the energy markets is essential in order to ensure that, going forward, European citizens and businesses enjoy sustainable, secure and fairly priced energy.

Our aim has been to implement a comprehensive enforcement strategy to dissuade companies from engaging in anti-competitive behaviour. With this in mind, we have brought cases that address competition problems along the whole of the gas and electricity supply chains, and that make use of the full range of our powers in antitrust, merger control and State aid.

Enforcing the antitrust rules

Our investigations of energy companies under the antitrust rules – Articles 81 and 82 EC – can be divided into different categories, such as:

- (i) exclusionary conduct engaged in by dominant incumbents;
- (ii) exploitative abuses by dominant incumbents; and
- (iii) collusion between incumbents.

Exclusionary conduct

The first category covers practices by vertically integrated incumbents relating to their networks.

More specifically, we have investigated whether incumbents engaged in capacity hoarding, i.e. failure to release unused capacity; failure to increase capacity in major import pipelines to protect their dominant position on supply markets; blocking of access to the dominated markets by a combination of long-term upstream supply contracts and matching long-term capacity reservations.

This category of exclusionary conduct cases also includes two cases not related to networks, but which concern suspected foreclosure caused by downstream exclusive long-term contracts between the dominant incumbent and its customers.

In the French long-term power contracts case, we are currently market testing commitments proposed by the company to resolve the issues we have identified. The proposed commitments include guaranteeing that sufficient electricity comes back to the market on a yearly basis, removing resale restrictions from downstream sales contracts and limiting their length to a maximum of 5 years.

In the gas sector, following our investigation into whether RWE had abused its dominant position on its gas transmission network to restrict competitors' access to the network, the Commission adopted a commitment decision in March of this year, under which RWE agreed to sell its entire high-pressure gas pipeline network in Germany.

Exploitative conduct

The second category includes conduct by incumbents (such as withdrawal of available generation capacity) to reduce production to the detriment of consumers.

In November 2008, in the electricity sector, the Commission accepted a substantial commitment by E.ON [to divest 5000 MW of generation plants] that structurally changed the German electricity market to the benefit of consumers. In a parallel case the Commission investigated whether E.ON had abusively raised network costs to the benefit of its generation affiliates. To resolve these concerns E.ON agreed to sell its ultra-high voltage network.

Collusion

The third category covers alleged collusion between incumbents to share markets [E.ON/GDF]. In July 2009, the Commission issued a Decision fining both E.ON and GDF Suez €553 million for having colluded to share the German and French gas markets.

In 2009 we maintained our strong enforcement record. For example:

- in March, we addressed a Statement of Objections to ENI concerning capacity hoarding and strategic underinvestment;
- in August, the Commission adopted a commitment decision concerning preferential access by Public Power Corporation (PPC), the Greek electricity incumbent, to the cheapest fuel available in Greece (lignite);
- we are looking into alleged foreclosure of the French gas market by GDF; the company has proposed commitments that would lead it to release significant amounts [around 7 bcm] of entry capacity to the French gas network immediately and to reserve a maximum of 50% of the long-term entry capacity to the French gas network;
- this month we concluded the market test of the commitments offered by Svenska Kraftnät (SvK) to solve our concerns that it could be artificially be limiting electricity exports from Sweden to neighbouring States, thus infringing Article 82 of EC Treaty. The company is proposing to sub-divide Sweden into several price zones, thus removing the anticompetitive export curtailment system which is currently in place.

The sheer number of decisions adopted and cases still on the table demonstrates the Commission's commitment to use competition rules to open the energy markets and make them work better for the benefit of consumers – and gives you a taste of what has been achieved so far.

Merger control in the energy sector

Our focus in merger cases is always on identifying any anti-competitive effects that may result from a transaction, and seeking to ensure that competitive market structures are maintained.

The **GDF/Suez** merger, finalised in July 2008, would have, as originally planned, weakened competition on the gas and electricity wholesale and retail markets in Belgium and on the gas markets in France owing to the disappearance of competition between GDF and Suez in markets with high barriers to entry. The remedies offered ensure that there is no reduction in competition in the Belgian and French markets.

Another recent example is the takeover of **British Energy by EDF**. At the end of 2008 the Commission approved the acquisition of British Energy by EDF, subject to conditions. Although the new entity would not have very high market shares and faces quite a number of competitors, there were many complaints and our investigation identified some real concerns. The package of remedies we obtained from the parties wholly addresses these concerns.

First, by divesting two flexible power plants the merged entity has little ability left (if any) to carry out potential withdrawals of capacity. Second, the commitment to sell certain minimum volumes of electricity into the wholesale market solves the issue of the merger leading to reduced liquidity in the UK power markets. Third, in addition to the agreements made with the UK government for the disposal of suitable sites for new nuclear plants to allow a second nuclear operator to emerge, EDF will divest a

further one. This deals with concerns over the certainty and timing of the release of sites for new nuclear build.

Three other merger cases in the energy sector which I'd like to mention are:

- the **RWE/Essent** case;.
- the **Vattenfall/Nuon** case;
- the **EDF/SPE** case, approved only two weeks ago: to remedy competition concerns relating to EDF's reduced incentives to continue its plans to build additional electricity generation capacity in Belgium, EDF has committed to divestments - to immediately divest the assets of one of its companies in charge of the development of one of EDF's planned power station projects and, should EDF decide not to invest in a second planned power station by June 2012, or no decision to invest has been taken by then, EDF has committed to divest the assets of the company in charge of the development of that project at that time. This remedy will ensure that the incentives to build the 10 percent of additional capacity which was planned before the merger will be maintained post merger. As a result of this merger and of these remedies, Electrabel should face increased competition to the benefit of consumers from a stronger SPE (with EDF) but also from other operators which have acquired or will develop additional generation capacity (as for instance EON).

State aid in the energy sector

The Commission has also keen to ensure competition in the energy sector is not distorted by illegal state aid.

In 2007, we opened an in-depth State aid investigation concerning regulated electricity tariffs for large industrial electricity users in France. Such companies seem to be paying substantially less than the market price for their electricity, and that anomaly may both give them an unfair advantage over their competitors and block new entrants from the electricity supply market.

This state aid procedure against regulated electricity tariffs could potentially be solved by the implementation of French government proposals to reform the electricity market. Both Commissioners Kroes and Piebalgs consider the proposed reform announced in September 2009 to be a positive step towards the opening of the French power market. The proposed reform would, in particular, allow producers other than EDF to access nuclear energy in the French power market and put an end to the regulated tariffs at the end of a phasing out period (2015 for the last category of tariffs).

The Commission is pursuing a holistic approach to competition to the French power market. The state aid case runs in parallel to the EDF long-term contracts case: the French government proposal for the power market seeks to give producers other than EDF access to nuclear power, whilst the EDF long-term contracts case seeks to allow EDF's competitors to acquire industrial customers.

Conclusion

I believe that, through a robust use of the competition tools at our disposal, the Commission has already achieved significant results in terms of strengthening competition in the European energy markets.

The EU has progressively improved the rules of the EU energy market to ensure that consumers get the best deal possible and that the most efficient and competitive energy providers can prosper. The third liberalisation package promises a new, more coordinated approach to regulation of energy markets.

The liberalisation of the EU energy markets – through legislation and competition enforcement action - is an ongoing process. But one that is helping us move towards a common objective of sustainable, secure and fairly priced energy.