



**UNIVERSITY  
OF OSLO**

# **Article 82 in the Energy Sector: the Most Effective Tool to Maintain and Enhance Competition?**

Professor Nils-Henrik M von der Fehr,  
Department of Economics, University of Oslo

**CRA International Competition Workshop  
“Competition Policy in the European Energy Sector”  
Thursday, 12 February 2009, Conrad Hotel Brussels**



## Dominance - Critical Factors (cf. Guidance)

- Market concentration
  - number of players
  - symmetry in market positions
- Barriers to expansion and entry
  - legal/regulatory
  - economies of scale and scope, sunk costs
  - privileged access to essential inputs, contractual arrangements
- Countervailing power
  - concentration on other side of the market
  - bargaining strength
- Transparency
  - prices and other contractual elements
  - costs, availability, capacities



## Energy Market Characteristics (cf. Sector Inq.)

- Market segmentation
  - physical (transmission constraints)
  - institutional (market places, system operations, tariffs)
- Natural monopolies
  - infrastructure (transmission, distribution, storage)
  - essential facilities
- Barriers to expansion and entry
  - government regulations
  - time to plan and construct
  - access to infrastructure
  - limited innovation (and, in some regions, modest growth)
- Vertical integration
  - monopoly activities
  - (potentially) competitive activities
- Highly politicised
  - energy security, consumer protection, environmental protection
  - measures often in conflict with competition policy concerns



## Article 82 Cases – Some Recent Examples

- Exclusive dealing
- Tying and bundling
- Predation (foreclosure)
  - DISTRIGAS: long-term gas supply contracts
  - EDF: long-term electricity contracts
  - ELECTRABEL: long-term electricity contracts
  - ENDESA-GAS NATURAL: long-term gas contract
  - ENI: transport capacity hoarding and underinvestment
  - E.ON: withdrawal of capacity and entry deterrence
  - E.ON: access to electricity balancing market
  - GdF: gas transport capacity and import agreements
- Refusal to supply and margin squeeze
  - RWE: access to and tariffs for gas transport



# Antitrust Remedies

- Remedies aimed at conduct
  - ban business practices (exclusive dealing, tying/bundling)
  - require business practices (supply obligations, price setting)
  - increase transparency
- Remedies aimed at structure
  - vertical separation
  - (horizontal) divestiture
  - infrastructure investment
  - removal of institutional/regulatory barriers
- If structure is flawed, conduct will tend to be so also!
- Antitrust versus direct regulation
  - *ex post* versus *ex ante*
  - remedying versus bettering competitive conditions



## Conclusion

- Antitrust enforcement maintains, but cannot generally enhance (or create) competitive market conditions
  - re-establish pre-abuse market conditions
  - exposure of underlying structural flaws
- There is no inherent conflict between competition and other policy objectives
  - efficient use of resources
  - apparent conflict due to inefficient implementation
- Competition policy in general, and antitrust enforcement in particular, is important not only because of the direct, but also indirect, effects
  - expose need for structural reform
  - challenge implementation of other policy objectives