



Article 82 in the energy sector: the most effective tool to maintain and enhance competition?

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**All the views expressed are personal and do not commit the European Commission*

Energy Sector Inquiry – the findings

1 Market concentration/market power

2 Vertical foreclosure: inadequate unbundling of supply and network

3 Lack of market integration

4 Lack of transparency

5 Distrust in price formation

6 Little competition on downstream markets

EU energy markets – Objectives

- An integrated market
- Networks developed and operated to serve the interests of European consumers
- Strong and efficient European energy companies
- Achieving simultaneously:
 - Competition
 - Security of supply
 - Sustainability

Instruments to foster competition

Ex-ante: design of the market



**Competitive
energy
markets**



Ex-post: competition law

Article 82 - Dominance

- Most markets remain national
 - Incumbents control:
 - Generation capacity
 - Gas
 - Infrastructure
 - Very high barriers to entry
- ⇒ Single / collective dominant position(s) on most markets

Designing enforcement of Article 82

- Designing cases to tackle problems at all levels of the supply chain
- Exclusionary conduct
 - Network related foreclosure
 - Customer foreclosure
- Exploitative conduct
 - Withholding of generation capacity
 - Discrimination

Network related foreclosure

- Networks: gateway to the market
- Incentive of vertically integrated companies to leverage the control of the network to protect their downstream position
- One of the main issues identified in the sector enquiry

Network related foreclosure - Examples

- Capacity Hoarding and degradation
 - ENI
 - RWE
- Strategic underinvestment
 - ENI
 - GDF
- Margin squeeze
 - RWE
- Long term bookings / long term upstream contracts
 - GDF

Network related foreclosure - Remedies

- Abuses derive from the very structure of the undertakings
 - ⇒ risk of lasting or repeated infringement
- No equally efficient behavioural remedy
- Structural remedies: divestiture of the network to an independent buyer
raison no prima facie competition concerns
- Example: RWE

Customer foreclosure

- Historic situation: customers linked to incumbents
- Slowly growing demand
- Long term contracts tying significant part of existing customers to the incumbent
- Examples
 - Distrigaz, decision 2007
 - EDF, SO 2008
 - Suez, Opening of proceedings 2007

Customer foreclosure - Remedies

- Ensure that a large share of customers return to the market every year
- Limit the maximum duration of contracts



Exploitative abuses

- Limits of regulation
 - Withholding of capacity
 - Discrimination
- ⇒ Leading to higher prices for consumers

Withholding of capacity

- Article 82 EC expressly prohibits practices that limit production to the prejudice of consumers
- By limiting production generators can force recourse to more expensive plants on the merit curve and thereby manipulate market outcomes to the prejudice of consumers
- Remedies: divestiture of generation capacity
- Example: E.ON case

Overview of energy antitrust cases

Case	State of play
Exclusionary abuses (network foreclosure)	
– ENI	– Opening of proceedings (2006)
– RWE	– Market test (2008)
– GDF	– Opening of proceedings (2008)
Exclusionary abuses (customer foreclosure)	
– Distrigaz	– Commitment decision (2007)
– EDF	– Statement of Objections (2008)
– Suez/Electrabel	– Opening of proceedings (2007)
Exploitative abuses	
– EON	– Commitment decision (2008)

Conclusion

- Article 82 is an effective answer
- It is independent from the legislative process
- Not the only competition law enforcement answer
 - Sanction collusion (Article 81)
 - Scrutinise mergers
 - Address State aid