

A note on recent developments on scopes of intervention for competition authorities and energy regulators¹

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Resumen

En los últimos años ha surgido una dualidad entre las autoridades de competencia y los reguladores de energía en el marco de reestructuración de los mercados de electricidad y gas. Este trabajo intentará explicar cuáles deben ser los nuevos ámbitos de intervención tanto de las autoridades de competencia como de los reguladores energéticos, y pondrá de relieve que la cooperación entre ambas instituciones será clave en ese proceso de reforma de los mercados energéticos.

Palabras Clave: mercados de electricidad, mercados de gas, regulación, competencia.

Clasificación JEL: L43, L94, L95.

Abstract

Over the last years, a duality has emerged between competition authorities and energy regulators, as far as the (re)designing of European electricity and gas markets is concerned. The article will try to tackle the new scopes of intervention of both competition authorities and energy regulators and will highlight that cooperation becomes key to reshape energy markets.

Keywords: electricity markets, gas market, regulation, competition.

JEL Classification: : L43, L94, L95.

In most network industries that have recently been opened to competition (telecom, electricity, gas), a sharing of the tasks can be observed between national sector-specific regulators on the one hand, and national/European competition authorities on the other hand. If these tasks seem distinct from each other at first sight, it has to be pointed out that they can sometimes lead to overlaps. Collaboration between competition authorities and national regulators is emerging and becomes key to reshape European energy landscapes.

1. Theoretical distinctions between competition authorities and energy regulators

On the one hand, competition authorities generally aim at making sure that the rule of competition is respected by the market players on one given market. On the

¹ The opinions expressed are not necessarily those of the European Commission.

other hand, energy regulators aim at (re)designing these structures so that the entry of competitors be made easier and organise the transition from a market dominated by a monopoly/oligopoly to a market with much more players. Energy regulators are for instance entitled to make sure that access to gas and electricity transmission networks are non-discriminatory via the introduction of regulated tariffs for example. It has also to be underlined that only energy regulators are in charge of the organisation of the universal service via for instance the introduction of specific tariffs for deprived customers.

Secondly, competition authorities and energy regulators do not have the same tools. Competition authorities generally resort to the following tools: fines, injunctions to cease and desist and commitments. Energy regulators are given a wider range of tools to deal with the companies they have to monitor: they set transmission and distribution tariffs for access to electricity and gas networks; they have the ability to screen the participants and give licences to market participants.

Thirdly, the time horizons differ between competition authorities and energy regulators. As far as the enforcement of the anti-trust rules is concerned, the former tend to intervene “ex-post” in order to redress a distortion of the competition structures qualified as either concerted practices or as abuses of dominant positions, while energy regulators tend to intervene “ex-ante” in order to design the structures of the market.

2. Traditional distinctions between scopes of intervention of competition authorities and energy regulators are increasingly blurred

Competition authorities are more and more inclined to have a say in the structure of energy markets. Indeed, the fact that competition authorities open cases in relation to margin squeezes or refusals to supply in sectors such as network industries shows that they are willing to have an active role in the structure of these markets. In 2008, this role was strengthened by the ruling of the Court of First Instance “*Deutsche Telekom AG / European Commission*” where the Court observed that the decisions of national authorities in respect of Community telecommunications law do not in any way affect the Commission’s power to find infringements of competition law and that the Commission cannot therefore be accused of introducing double regulation in order to end the margin squeeze². In addition, as far as the gas sector is concerned, the European Commission expressed concerns that RWE may have abused its dominant position, notably by way of a refusal to supply gas transmission services to third parties and by way of lowering the margins of RWE’s downstream competitors in gas supply (“margin squeeze”). Following detailed discussions, RWE

² See the following link for more information on that case:

<http://europa.eu/rapid/pressReleasesAction.do?reference=CJE/08/26&format=HTML&aged=1&language=EN&guiLanguage=fr>

proposed commitments to address the Commission's concerns. RWE committed to divest its German high-pressure gas transmission network, with a total length of approximately 4.000 km, including assets, personnel and ancillary services necessary for a viable gas transport business. RWE committed to sell this network to a purchaser who was independent from RWE and who did not give rise to *prima facie* competition concerns³. Via the RWE case, the European Commission achieved the separation between gas transmission assets from the rest of the RWE company, which had the impact of introducing more competition for the supply of gas in Germany.

Besides, the respect of the non-discrimination rule for the access to electricity and gas infrastructure is not any longer the only prerogative of the energy regulator. Indeed, in the Svenska Kraftnät case⁴ for instance, the Commission had reason to believe that Svenska Kraftnät (SvK) limited the amount of export transmission capacity available on electricity interconnectors situated along the Sweden's borders, with the objective of relieving internal congestion on its network. This appeared to favour consumers in Sweden over consumers in neighbouring EU and EEA Member States by reserving domestically produced electricity for domestic consumption. Via this EC competition case, the Commission is willing to ensure that the access to the electricity transmission network operated by Svenska Kraftnät be non-discriminatory.

Furthermore, it has to be added that energy regulators themselves tend also more and more to intervene "ex post", like competition authorities. For instance, an increasing number of energy regulators are given powers in order to monitor retail and/or wholesale energy markets. They regularly publish annual statistics on the evolution of the opening of the gas and electricity markets and ad hoc reports on specific events such as price spikes on electricity wholesale markets (e.g., report on price spikes in November 2007⁵ by CRE – French energy regulator-). However, it has to be pointed out that most energy regulators in European countries have no specific power to remedy the misconducts of energy firms that are potentially unveiled. For instance, in France, the CRE is only entitled to bring a case in front of the French national competition authority.

This leads us to our third point: collaboration between competition authorities and energy regulators.

³ See the following link for more information on that case:

<http://europa.eu/rapid/pressReleasesAction.do?reference=IP/09/410&format=HTML&aged=0&language=EN&guiLanguage=en>

⁴ See the following link for more information:

<http://europa.eu/rapid/pressReleasesAction.do?reference=IP/09/1425&format=HTML&aged=0&language=EN&guiLanguage=en>

⁵ See the following link for more information:

http://www.cre.fr/en/marches/surveillance_des_marches_de_gros/deliberations_et_rapports

3. Towards closer collaboration between energy regulators and competition authorities

On several recent cases, the European Commission had the possibility to resort to the sector expertise of energy regulators. Indeed, for instance, in the recent GDF Suez foreclosure case⁶, the Commission was concerned in particular that GDF Suez might be closing off competitors from access to gas import capacity into France. GDF Suez proposed to address the Commission's concerns through a major structural reduction in its long-term reservations of gas import capacity into France. In that case, the Commission had the opportunity to assess the relevance of the commitments brought by GDF Suez with the help of the French energy regulator (CRE), especially as regards the most relevant gas entry points to tackle in order to boost competition in France.

In addition, it has to be mentioned that energy regulators played an active part in the energy sector inquiry that was published in 2007 by the Commission⁷. The in-depth knowledge of the different markets was an inestimable asset for the review of the malfunctioning of the markets identified by the Commission in its report.

This cooperation also works the other way around. As regulators set up units in charge of the monitoring of wholesale and retail energy markets on a permanent basis, they are usually well-placed to detect potential misconducts of market players. National laws in several Member States (Italy, France, the UK, Germany...) empower energy regulators to bring before the corresponding national competition authorities their potential findings in relation to misconducts of market players. In Italy for instance, many electricity cases initiated by the national competition authority originated from the findings of the national energy regulator.

In conclusion, collaboration between energy regulators becomes key to push for more transparent and competitive energy markets. In order to reach this objective, it has to be underlined that the "Third energy package"⁸ (adopted by the European Parliament and the Council in July 2009) significantly strengthens the powers of energy regulators in granting them the power *"to decide, irrespective of the application of competition rules, on appropriate measures ensuring customer benefits through the promotion of effective competition necessary for the proper functioning of the internal market in electricity and gas"*. According to these new electricity and gas directives, these measures could take the form of gas and electricity releases and the granting of access to parts of the capacities to interested suppliers for a certain period of time. These new measures are welcomed and will ensure that energy customers benefit from more competitive markets.

⁶ See the following link for more information:
<http://europa.eu/rapid/pressReleasesAction.do?reference=IP/09/1097&format=HTML&aged=0&language=EN&guiLanguage=en>

⁷ See the following link for more information:
<http://ec.europa.eu/competition/sectors/energy/inquiry/index.html>

⁸ See the following link for more information:
http://ec.europa.eu/energy/gas_electricity/third_legislative_package_en.htm