Abuse Regulation in the EU energy sector: mapping substantive and procedural enforcement

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Abstract

EU competition law has played an important role in shaping EU energy markets. The application of Article 102 TFEU in the energy sector after the completion of the Energy Sector Inquiry supports this contention. This paper explores the application and the limits of Article 102 TFEU in furthering a competitive energy market. The Commission decisional practice to date has endorsed a more flexible application of Article 102 TFEU via commitment decisions. While such practice may blur the line between permissible competition law enforcement and the furtherance of disguised regulatory aims, it has nonetheless accounted for an enhanced degree of competition in the energy sector. The flexible use of Article 102 TFEU may occasionally entail shortcomings from the perspective of legal certainty and result in a more ambiguous abuse regulation, however it also entails benefits for the implicated actors and the completion of a single EU energy market. Given that such flexible application has been endorsed by the Commission, the implicated actors and the European Court of Justice, it is time to acknowledge that the application of EU competition law in the energy sector will unavoidably assume a regulatory tone. This realization will aid the improvement of current mechanisms by infusing more transparency in the process and designing remedies that account for concrete benefits for affected actors.

I. Introduction

European energy policy focuses on three interrelated objectives; the promotion of competition, achieving security of supply and environmental sustainability.[1] Its remit, objectives and aspirations are wide. EU competition law comprises one of the tools to achieve certain objectives of the EU energy policy and its effective enforcement together with existing energy legislation has been identified by the Commission as one of the main action points for the following years in its Energy Union Strategy.[2]

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[1] Commission, 'Inquiry pursuant to Article 17 of Regulation (EC) No 1/2003 into the European Gas and Electricity Sectors' (Communication) COM(2006) 851 final (Brussels, 10.1.2007) ('Sector Inquiry Communication') paras 6 and 9. See also Commission (EC), 'A European Strategy for Sustainable, Competitive and Secure Energy' (Green Paper) (2006) COM(2006) 205 final; 'An Energy Policy for Europe' COM(2007) 1 final.

[2] Commission (EU), 'A Framework Strategy for a Resilient Energy Union with a Forward-Looking Climate Change Policy' COM(2015) 80 final, 19.

Whereas there exists an incremental amount of secondary energy legislation, competition law enforcement has overtime assumed a central role in promoting a single competitive EU energy market as a supplement to existing positive rules. This article discusses the application of Article 102 TFEU in gas and electricity cases in a bid to ascertain its contribution. *Section II* gives a general overview of EU energy regulation and the relevance of competition law provisions for building a competitive EU energy market before turning in section IIII to discuss the application of EU abuse regulation (102 TFEU) post the Energy Sector Inquiry. *Section III* discusses the Commission decisions in the gas and electricity sectors and attempts a classification of these decisions based on the potential abusive practice (type of abuse) and the ensuing remedies (behavioural or structural). *Section IV*, then, assesses the role and limits of article 102 TFEU as a regulatory tool in order to promote a single energy market. Given that the vast majority of the respective decisions were adopted through the commitment proceedings, it critically reflects upon the use of more flexible mechanisms in combating possible anticompetitive practices in EU energy markets. While accounting for the shortcomings of this approach, it acknowledges the potential legitimizing function of the application of Article 102 TFEU through commitment proceedings, especially in the light of the ensuing benefits in the form of tailored compensatory remedies.

II. EU Energy Regulation and the Role of Competition Law

1. Introduction

Energy policy in the EU has been pursued both by 'positive actions', i.e. the adoption of harmonized legislative measures as well as 'infringement actions'. 'Infringement actions' comprise Commission actions against Member States for failing to timely implement the secondary energy legislation[3] and actions against incumbent operators for an alleged violation of the competition law provisions.[4] The focus here is on the latter. A detailed discussion of the development of EU energy law is beyond the ambit of this paper that focuses on a more specific issue; namely the contribution of Article 102 TFEU in promoting competitive energy markets in Europe.[5] With that in mind, a brief exposition of positive legislative developments aimed at combating national monopolies and opening up national markets to competition is warranted, in order to understand the supporting – but yet important - role of Article 102 TFEU in EU energy policy .

2. First and second energy packages and early application of competition provisions

The adoption of legislation has been incremental and faced three main stages. Following long and arduous policy discussions,[6] the first 'en masse' legislation on energy was adopted in 1996 (First Energy Package) and comprised two Directives on the internal electricity and gas market,[7] in order to allow large energy consumers to choose their suppliers.

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[3] See Commission (EU), 'Making the internal energy market work' (Communication) COM(2012) 663 final, 8. Commission (EU), 'Enforcement of the Third Internal Energy Market Package' (2014) http://ec.europa.eu/energy/sites/ener/files/documents/2014_iem_communication_annex6.pdf. See also < http://ec.europa.eu/energy/en/topics/enforcement-laws >.

[4] Here, actions for the violation of EU state aid rules and free movement provisions can also be enlisted. A third route through which national courts can be enlisted as actors promoting EU energy policy is the Article 267 TFEU preliminary rulings procedure. These actions remain outwith the ambit of this paper.

[5] There is abundant literature on the interaction between competition and regulation. See P Larouche, *Competition Law and Regulation in European Telecommunications* (Hart 2000); P Ibanez Colomo, 'On the Application of Competition Law as Regulation: Elements for A Theory' (2010) 29 Yearbook of European Law 261; M Cave and P Crowther, 'Pre-emptive competition policy meets regulatory anti-trust' (2005) ECLR 481; J Tapia and D Mantzari, 'The Regulation/ Competition Interaction' in D Geradin & I Lianos (eds.), Research Handbook on European Competition Law (Edward-Elgar 2012), Ch. 15; […] ;

[6] For a discussion on the development of EU's energy legislation see A Johnston and G Block, *EU Energy Law* (OUP 2012); K Talus, *EU Energy Law and Policy: a Critical Account* (OUP 2013); C Jones and W Christopher, EU Energy Law (Claeys & Casteels 2005); Albers, Michael M. Kanellakis, G.Martinopoulos and T.Zachariadis, 'European Energy Policy—A Review' (2013) 62 Energy Policy 1020. See also Commission (EC), 'The Internal Energy Market' (Commission Working Document) on an Internal Energy Market (1988) COM(88) 238 final.

[7] Directive 96/92EC of the European Parliament and of the Council of 19 December 1996 concerning Common Rules for the Internal Market in Electricity [1997] OJ L27/20; Directive 98/30/EC of the European Parliament and of the Council of 22 June 1998 concerning Common Rules for the Internal Market in Natural Gas [1998] OJ L204/1. The First Energy Package also contained Council Directive 98/93/EC of 14 December 1998 amending Directive 68/414/EEC Imposing an Obligation on Member

These Directives were adopted in a bid to reverse legal monopolies and contained provisions, amongst others, on third party access (TPA),[8] minimum unbundling of vertically integrated energy incumbents[9] and the appointment of independent Transmission System Operators (TSO) and Distribution System Operator (DSO).[10] The First Energy Package (then complemented by harmonized legislation on renewable electricity)[11] did not bring about the desired degree of liberalization.

The second milestone in EU energy markets liberalization came with the Second Energy Package repealing the first two Directives on electricity and gas[12] and containing specific harmonized legislation improving cross border electricity exchanges,[13] establishing an EU emissions trading scheme[14] and providing for guidelines on an EU wide Energy Network.[15] The second energy package focused on improving market opening, unbundling and achieving TPA.[16] It also provided for the establishment of independent regulatory authorities.[17] During this period, the Commission applied competition law provisions against gas and electricity companies. Cases concerning mainly the application of 101 TFEU (territorial sales restrictions) were closed informally.[18] Prior to the sector inquiry, competition law enforcement in the energy field was scarcer.[19]

States of the EEC to Maintain Minimum Stocks of Crude Oil and/or Petroleum Products [1998] OJ L358/100.

[8] Art 17-18 Directive 96/92; Art 15-16 Directive 98/30/EC.

[9] Art 13-15 Directive 96/92; Art 12-13 Directive 98/30/EC.

[10] Art 7 and 10 Directive 96/92.

[11] Directive 2001/77/EC of the European Parliament and of the Council of 27 September 2001 on the Promotion of Electricity Produced from Renewable Energy Sources in the Internal Electricity Market [2001] OJ L283/33.

[12] Directive 2003/54/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity and repealing Directive 96/92/EC [2003] OJ L176/37. Directive 2003/55/EC of the European Parliament and of the Council of 26 June 2003 Concerning Common Rules for the Internal Market in Natural Gas and Repealing Directive 98/30/EC [2003] L 176/57.

[13] Regulation 1228/2003/EC of the European Parliament and of the Council of 26 June 2003 on Conditions for Access to the Network for Cross-border Exchanges in Electricity [2003] OJ L 176/1.

[14] Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 Establishing a Scheme for Greenhouse Gas Emission Allowance Trading within the Community and Amending Council Directive 96/61/EC [2003] OJ L275/32.

[15] Decision 1229/2003/EC of the European Parliament and of the Council of 26 June 2003 laying down a series of guidelines for trans-European energy networks and repealing Decision No 1254/96/EC

[16] Art 10, 15, 20, 21 Directive 2003/54/EC; Art 9, 13, 18 Directive 2003/55/EC.

[17] Art 23 Directive 2003/54/EC; Article 25 Directive 2003/55/EC.

[18] See text to n—IV 1 below.

[19] L Hancher and A de Hauteclocque, 'Manufacturing the EU Energy Markets: the Current Dynamics of Regulatory Practice' (January 2010) (TILEC Discussion Paper DP 2010-003) 11.

3. Sector inquiry and beyond: Third Energy Package and competition law

Despite the two liberalization packages and the occasional application of the competition rules against gas and electricity operators, the Commission observed an increase in gas and electricity prices. This fact coupled with a persisting market concentration, lack of entry and cross border trade, as well as complaints from large industrial users that they are unable to receive competitive offers from alternative suppliers and have limited leeway to negotiate non price contractual terms prompted the Commission to launch the Energy Sector Inquiry.[20]

Comments on the Preliminary Report to the Energy Sector Inquiry were rather contradictory, with vertically integrated operators opposing structural unbundling, while consumers, traders and new entrants largely endorsed such (and even more radical) remedies.[21] In the end, the Energy Sector Inquiry report identified eight main problems in the EU energy markets. First, wholesale gas and electricity markets largely remained national in scope and depicted high levels of *market concentration* with the concomitant result that incumbent producers were able to manipulate supply and raise prices. Concentration levels have been often re-enforced through long term supply contracts, whereas the existing interconnection capacity fell short of tackling concentration.[22] Second, *vertical foreclosure* persisted and the level of unbundling fell short of encouraging new entry.[23] Third, energy markets remained largely national in scope as the levels of cross border sales remained very low, thereby jeopardizing *market integration* with incumbents lacking the incentives to invest in additional capacity.[24] Fourth, network users identified an information asymmetry between vertically integrated incumbents and their competitors and called for increased *transparency* in relation to network availability, in particular for electricity interconnections and gas transit pipelines and in relation to generation capacity and gas storage.[25] Fifth, issues in relation to gas and electricity *price formation* were identified.[26] In addition, problems were identified in the competition levels at the *downstream markets*. Here, long-term contracts acted as a barrier for new suppliers.[27] Further effective unbundling was discussed as a remedy for reducing

[20] See Joint Communication by Ms. Neelie Kroes and Mr Piebalgs ('Sector inquiry pursuant to Article 17 of Regulation 1/2003 EC in the European electricity and gas markets') available at http://ec.europa.eu/competition/sectors/energy/inquiry/communication_en.pdf.

[21] Sector Inquiry Communication (n1) para 12.

[22] Sector Inquiry Communication (n1) paras 14-17.

[23] Ibid paras 18-20.

[24] Ibid paras 21-23.

[25] Ibid paras 25-26. The Commission though acknowledges that publishing information requires caution as it may give rise to coordination problems.

[26] Ibid paras 27-30.

[27] Ibid paras 31-34.

entry barriers and creating a level playing field in balancing markets.[28] Finally, problems were identified in the Liquefied Natural Gas (LNG) markets.[29]

In order to tackle the identified problems, the Commission employed positive and negative actions. Following the sector inquiry, the Third Energy Package was adopted repealing the two previous Directives on the internal market in electricity and gas,[30] the cross border regulation[31] and the Regulation on access to gas transmission networks.[32] Finally, it established the Agency for the Cooperation of Energy Regulators (ACER).[33] The Third Energy Package introduced provisions on unbundling of energy production and supply from energy transmission. It allowed Member States to choose between ownership unbundling (OU) or allowing the Transmission System Operator to choose between an Independent System Operator (ISO) and Independent Transmission Operator (ITO).[34] It also set up the European Networks of TSO for electricity and gas (ENTSO).[35] ACER's role is supportive to the role of national regulators and needs to be strengthened in the future.[36]

In addition, the Commission invoked its competition law enforcement powers and opened investigations against a number of incumbent energy companies in Europe.[37] Whereas the latter proceedings are distinct from the sector inquiry, nonetheless they were triggered by the latter.[38] The use of negative infringement actions has intensified after the completion of the Commission sector inquiry in the energy sector. This can be explained from a political

[28] Ibid paras 35-37.

[29] Ibid paras 38-39.

[30] Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC [2009] OJ L211/55. Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC [2009] OJ L 211/94.

[31] Regulation (EC) No 714/2009 of the European Parliament and of the Council of 13 July 2009 on Conditions for Access to the Network for Cross-border Exchanges in Electricity and Repealing Regulation (EC) No 1228/2003 [2009] OJ L211/15 (Electricity Regulation).

[32] Regulation (EC) No 715/2009 of the European Parliament and of the Council of 13 July 2009 on Conditions for Access to the Natural Gas Transmission Networks and Repealing Regulation (EC) No 1775/2005 [2009] OJ L211/36 (Gas Regulation).

[33] Regulation (EC) No 713/2009 of the European Parliament and of the Council of 13 July 2009 Establishing an Agency for the Cooperation of Energy Regulators [2009] OJ L 211/1.

[34] See Commission (EU), Interpretative Note on Directive 2009/72/EC concerning common rules for the internal market in electricity and Directive 2009/73/EC concerning common rules for the internal market in natural gas – The unbundling regime (Staff Working Paper) (2010).

[35] Electricity Regulation (n31) Art. 5(2); Gas Regulation (n32) Art 5(2).

[36] Energy Union Strategy (n2) 9. ACER plays also a role in the enforcement of Regulation on Wholesale Energy Market Integrity and Transparency (REMIT) (Regulation (EU) No 1227/2011).

[37] See section III on the discussion of the relevant decisions.

[38] See, for example, Commission, 'Antitrust: Commission market tests commitments by GDF Suez to boost competition in French gas market' (Press Release) (IP/09/1097). See also N Kroes, 'Introductory remarks on Final Report of Energy Sector Competition Inquiry' (SPEECH/07/4).

perspective, in the light of the Member States' power-play underlying the adoption of the Third Energy Package and watering down the provisions on ownership unbundling.[39]

[39] Hancher and de Hauteclocque (n19) 18.

III. Competition decisions in the Energy Sector

1. Introduction: energy sector inquiry and beyond

Given that the Second and Third Energy Package necessarily and unavoidably reflected political compromises, the Commission may needed to consider alternative routes in liberalizing energy markets and thereby use competition law in a regulatory manner. While such an approach may be welcomed as a way to address the competition concerns highlighted in the inquiry, it does raise serious questions in terms of subsidiarity and the division of powers (in particular if the commission is overstretching the application of the competition provisions).

As the application of competition law intensified following the Commission energy sector inquiry, this section focuses on the decisions adopted by the Commission following its energy sector investigation and discusses the application of Article 102 TFEU first in the gas and then in the electricity sector. The discussion covers also on-going high profile cases involving an alleged infringement of Article 102 TFEU. In the light of the identified problems in the Energy Sector Inquiry, it is easily explicable that follow-on Commission efforts were largely based on Article 102 TFEU.[40] A discussion of the relevant case law is warranted in order to discern possible trends in the Commission approach to theory of harm and remedies. This would then allow conclusions to be drawn on the application of abuse regulation in the energy sector and on whether the Commission has overstepped its boundaries in the respective application. The ensuing discussion reveals that, safe in a couple of cases, where the Commission came up with a yet untested theory of harm or based its investigation on an alleged collective dominant position, the rest of the case law discussed, in principle, abusive practices that have been dealt with by the Commission and the EU courts and are, thus, based on established principles.

2. Gas cases

Table 1: Gas cases

Case	Proceedings	Outcome	Concerns
Distrigaz (2007) COMP/B-1/37966	Commitment	Behavioural remedies	Distrigas' gas supply activity in Belgium Long-term supply contracts → foreclosure
RWE gas foreclosure (2009) COMP/B-1/37966	Commitment	Structural Remedies	RWE's activity on German gas transmission and supply market(s) - RWE's core grid area in North Rhine-Westphalia Refusal to supply transmission services to third parties (Obstacles to third party access to the natural

[40] Post its energy sector inquiry, the Commission has pursued few cases based on 101 TFEU. See the EPEX Spot and Nord pool Spot power exchanges decision. Commission Decision of 5 March 2014 [2014] OJ C 334/5 (Case COMP/39.952) Power Exchanges. E.ON/GdF (Case COMP/39.401) Commission Decision of 8 July 2009 [2009] OJ C 248/5. Case T-360/09 E.On Ruhrgas Commission (judgment of 29 June 2012) and T- 370/09 GDF Suez SA v Commission (judgment of 29 June 2012); On the application of 101 TFEU by the Commission and NCAs see J Ruiz Calzado, L Kjølbye, J Samsó Lucas, 'Energy and restrictive practices : an overview of EU and national case law' (e-Competitions N° 70451).

			gas transmission network; maintenance of an artificial network fragmentation, failure to release transportation capacity to allow customer switching) Margin squeeze practices to the detriment of competitors in the downstream gas supply markets
GdF (2009) 39.316	Commitment	'Behavioural' remedies	GdF activity in the French markets for import and supply of gas in the balancing zones of the GRTgaz transport network <u>Refusal to supply third parties (implicit or explicit)</u> - long term reservation of import capacity in France - strategic underinvestment in additional import capacity
E.On gas foreclosure (2010) 39317	Commitment	'Behavioural' remedies	EON's activity in the German gas supply and transmission markets <u>Refusal to supply</u> - Long term capacity bookings
ENI (2010) 39.315	Commitment	Structural remedies	ENI's activity in the Italian gas supply and transmission markets <u>Refusal to supply</u> - Capacity hoarding - Capacity degradation - Strategic underinvestment
Upstream gas supplies in Central and Eastern Europe (Gazprom) 39816	SO (22 April 2015)		Gazprom's activity in the gas markets in Central and Eastern European countries - preventing cross-border trade (gas flow from CE EU countries to others) / territorial restrictions (export bans and destination clauses) in is supply agreements with wholesalers and industrial customers - market separation → charge unfair prices in five member states (excessive prices – compared to charging prices to Gazprom's costs or to benchmark prices – because of indexing gas prices to a basket of oil product prices) - gas supplies to Bulgaria and Poland conditional on 'obtaining unrelated commitments from wholesalers concerning gas transport infrastructure'.
BEH gas	SO (23		BEH's activity in gas supply and gas

39849	March 2015)		infrastructure markets in Bulgaria

i. Commitments

Distrigaz was the first Commission commitment decision in the energy sector following the Report on the energy sector inquiry, although the Commission has already started its investigation earlier.[41] Therefore, this case cannot be enlisted as a pure follow-up case to the sector inquiry.

Distrigas was found dominant on the gas supply market to large customers in Belgium. The Belgian gas supply market could be possibly subdivided into separate markets for industrial customers, electricity producers and resellers, but the issue was left open. In the gas supply market, the vast majority of customers have only one supplier and therefore, room for competition is limited and can only take place when the existing contract expires. Distrigas' long-term supply contracts limited customers' incentives to switch and foreclosed access for new entrants following the liberalization of the gas market.[42]

Distrigas' dominant position in the gas supply market stems from its exclusive right for transporting, underground storing of gas and supplying to large customers in Belgium pre liberalization, and it still maintains its position as the largest gas importer and supplier in Belgium.[43] Following the opening of proceedings Distrigas submitted commitments, which were amended following the market testing phase.[44] The main commitments concerned a) the returning of adequate volumes to the market annually, b) the 5-year maximum contract duration with industrial customers and electricity generators (new installations were excluded), c) the 2-year maximum duration of contract with gas resellers and d) the prohibition of using resale and use restrictions in supply contracts. They were made binding for a period of 4 years (until 2010). The Commission was satisfied that the commitments adequately addressed the identified concerns and were proportionate.[45]

[41] The Commission has initiated proceedings and sent its SO on 27 February 2004. See Commission Decision of 11.10.2007 relating to a proceeding pursuant to Article 82 of the EC Treaty (Case COMP/B-1/37966 - Distrigaz) http://ec.europa.eu/competition/antitrust/cases/dec_docs/37966/37966_639_1.pdf (accessed 5 March 2015) ('Distrigaz Commitments Decision'). The Commission issuing a SO may suggest that the Commission was considering an Art 7 decision. See H Schweitzer, 'Commitment Decisions under Art. 9 of Regulation 1/2003: The Developing EC Practice and Case Law' (2008) EUI Working Papers LAW 2008/22, 5.

[42] Distrigaz Commitments Decision, paras 2, 5. On market definition see ibid paras 11-12. On the finding of dominance see ibid 13-15. On practices that raised concerns in this case and focused on tied volume contracts, the possible indefinite duration of the contracts in the light of tacit renewal clauses contained therein. In relation to the latter, the Commission stated that it has undertaken a conservative approach for calculating their foreclosure effects. See ibid paras 18-24.

[43] Ibid para 3. Distrigas is also a gas supplier in France, Germany and the Netherlands. It is a member of the Suez group that includes Electrabel (main electricity generator and supplier in Belgium) as well as Electrabel Customers Solutions NV (gas and electricity reseller). Ibid. The conditional clearance of Suez/GdF merger in 2006, included (among other commitments) the divestiture of Distrigas. Ibid para 4.

[44] Ibid para 9. Eight responses were submitted, which largely welcomed the proposed set of commitments. Ibid paras28. Some of the respondents would favour more far reaching remedies (ownership unbundling and improving access to storage and gas) but the Commission stated that these were outside the scope of the investigation. Ibid para 29.

[45] Ibid para 34.

In *RWE gas foreclosure*, the Commission initiated proceedings against RWE's behavior in the German gas transmission markets, shortly after its Report on the energy sector inquiry,[46] though inspections were held while the sector inquiry was ongoing.[47] RWE was dominant on gas transmission and supply market(s) in Germany within its network area and concerns were expressed about alleged refusal to supply transmission services to third parties as well as margin squeeze practices affecting competitors in the downstream gas supply markets.[48] RWE offered commitments to dispel Commission concerns to which it expressed its disagreement. Commitments were modified following comments by interested third parties,[49] and included primarily RWE's commitment to divest its gas transmission system business to a suitable purchaser, which was considered to be proportionate, since no other less intrusive alternative was available.[50]

The next case, *GdF/Suez*,[51] concerned the French markets on the import and supply of gas and the Commission's approach raises similarities with the previous *RWE gas foreclosure*. The Commission identified concerns and alleged abuses appear to be murkier. According to the Commission preliminary assessment GdF Suez might have abused its dominant position in the markets for import and supply of gas in the balancing zones of the GRTgaz[52] transport network by foreclosing for a long time access to gas import capacities. This foreclosure resulted from the long-term reservation of most gas import capacity, the determination of the reception capacity as well as the allocation of long-term capacity and the strategic under- investment in additional import capacity.[53] In relation to the allegation on strategic underinvestment, the GdF commitment decision is dubious, in that the Commission introduced a new type of abuse, without apparently undertaking a detailed analysis. In its

[46] Commission Decision of 18 March 2009 relating to a proceeding under Article 82 of the EC Treaty and Article 54 of the EEA Agreement (Case COMP/39.402 – RWE Gas Foreclosure) ('RWE Commitments Decision').

[47] Ibid para 4.

[48] Ibid para 2. RWE is a vertically integrated German based company, active in the production and supply of electricity and gas. On market definition see ibid 12-16. On dominance see paras 17-19. On practices raising concerns see paras 21-36. The Commission was concerned about RWE's TSO capacity management practices keeping transport capacity for itself that amounted to a refusal to provide access to its network (essential facility). The Commission's preliminary assessment indicated that RWE understated the *maximum technical capacity offered to third parties*. It may also have failed to operate *an efficient congestion management system on its network*. In relation to margin squeeze practices the Commission suggested that RWE may have intentionally set transmission tariffs at an artificially high level that may have been even higher for its downstream competitors. It also operated a rebate scheme that in practice benefited only RWE Energy. It also operated a system of balancing fees that may deter competitors from entering the downstream supply market.

[49] Ibid paras 9, 39. Seven responses were received that largely welcomed the commitment package.

[50] Ibid para 50.

[51] Commission Decision of 3.12.2009 relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union and Article 54 of the EEA Agreement (Case COMP/39.316 – Gaz de France) ('GdF Commitments Decision'). On this case see K Talus, 'Long-term natural gas contracts and antitrust law in the European Union and the United States' (2011) 4 J World Energy Law and Business 260, 278.

[52] GRTgaz is a subsidiary of GdF Suez, operating the gas transport network in France. Ibid para 1.

[53] Ibid para 2. On market definition see ibid paras 11-17. For the analysis of the Commission's identified concerns see paras 24-40.

decision it is merely stated that 'GDF Suez's behaviour regarding the Montoir LNG terminal could be regarded as a refusal to supply an essential input by means of a strategic limitation of investments in additional capacity, and might constitute an abuse of its dominant position'.[54] Gdf Suez committed to release transport capacities to third parties for a substantial period of time and through different mechanisms.[55]

EON concerned the German gas supply and transmission markets.[56] The Commission was concerned that EON's long term capacity bookings on EON's gas transmission network may have foreclosed competitors from transporting and selling gas to customers and therefore distorted competition in the downstream gas supply market.[57] The adopted commitments, following their revision after the market testing phase, as a first step, focused on the capacity release into the gas transmission grid. The second step included the reduction of EON's capacity bookings.[58]

Similar to the previous cases, *ENI* concerned alleged abuses by the Italian incumbent operator in the gas transmission and supply markets in Italy.[59] The Commission concerns focused on ENI's practices refusing third party access to available and future capacity, thereby foreclosing competitors and limiting competition in the downstream gas supply markets. This may have included refusal to grant access to existing capacity on the transport network (capacity hoarding), granting access in a non-useful manner (capacity degradation) and strategic under-investment.[60] The proposed commitments included the substantial divestiture of ENI's shareholdings in the TSOs.[61] Thus, the Commission discussed in more detail than in previous cases the proportionality of the proposed commitments.

ii. On-going cases

Apart from the above cases, there are a couple of ongoing cases in the gas markets and cases that were settled informally. On 4 September 2012 the Commission has opened proceedings against the incumbent Russian gas producer and supplier, Gazprom, for alleged breach of EU competition rules, in light of its practices in the gas markets in eight Central and Eastern European countries. While the crisis in Ukraine stalled developments, the Commission has

[54] Ibid para 40. See also ibid para 33 stating that 'GDF Suez never took into consideration, and de facto rejected, genuine proposals by third-party shippers to co-finance the construction of the Fos Cavaou terminal. So, while the terminal was being built, GDF Suez did not explore the possibility of increasing its reception capacity in order to facilitate third-party access to this infrastructure'.

[55] Following the market testing phase commitments were revised.

[56] Commission Decision of 4.5.2010 relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union and Article 54 of the EEA Agreement (Case COMP/39.317 – E.ON Gas) ('EON Commitment Decision'). Talus (n51).

[57] Ibid para 2. On market definition see paras 13-22. On the assessment of dominance see paras 23-28. On the Commission identified concerns see paras 31-41.

[58] Ibid, paras 50-60. The comments received did not make the Commission to change its preliminary assessment. Ibid para 50.

[59] Commission Decision of relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union ('TFEU') and Article 54 of the EEA Agreement (Case COMP/39.315 – ENI) ('ENI Commitment Decision').

[60] Ibid para 2. On market definition see ibid paras 23-28. On ENI's dominant position see ibid paras 29-35. On the Commission concerns see ibid paras 39-61.

[61] Ibid paras 63-71.

sent a SO on April, 22nd 2015. In its SO the Commission accuses Gazprom that it has been engaging in both exclusionary as well as exploitative abuses. In particular, that territorial restrictions (export bans and destination clauses) in is supply agreements with wholesalers and industrial customers preventing cross-border trade and the ensuing market separation allows Gazprom to charge excessive gas prices in five member states compared to charging prices to Gazprom's costs or to benchmark prices. This happened because of indexing gas prices to a basket of oil product prices, a rather contested point. The Commission also alleges that Gazprom made gas supplies to Bulgaria and Poland conditional on obtaining unrelated commitments in relation to wholesalers investing in gas transport infrastructure.[62] This is a very high profile cases, with important political ramifications.[63] The stakes are high for both parties involved. Gazprom covers around 30 per cent of the EU's gas consumption, whereas the said consumption represents more than 60 per cent of the Gazprom's gas revenues.[64]

The second ongoing case is BEH gas and concerns the Commission's investigation in Bulgarian Energy Holding (BEH), Bulgargaz and Bulgartransgaz, BEH's gas supply and gas infrastructure subsidiaries respectively as they might prevent competitors' access to key gas infrastructures in Bulgaria.[65]

3. Electricity cases

Table 2: electricity cases

Case	Proceedings	Outcome	Concerns
German electricity wholesale and balancing market (2008) 39388-39389	Commitment	Structural remedies	EO.N's collective dominant position on the German wholesale electricity market – EO.N's dominant position in the secondary balancing market in its network area Wholesale electricity market - Capacity withholding (by limiting the production in certain plants) with a view to raising prices; - Deterring investment in generation capacity by third parties through long term supply contracts or by allowing new competitors to participate in an EON power plant Balancing markets Discriminating in favor of affiliated companies;

[62] Commission (EU), 'Commission sends Statement of Objections to Gazprom for alleged abuse of dominance on Central and Eastern European gas supply markets' (Press Release, 22 April 2015) (IP/15/4828).

[63] For an analysis of the Gazprom case see A Riley, 'Commission v. Gazprom: The antitrust clash of the decade?' (CEPS) (285) (31 October 2012). For recent developments see JVasagar and C Oliver, 'Gazprom chief warns EU over pricing challenge' (Financial Times, 13 April 2015).

[64] J Farchy and A Barke, 'Gazprom and the EU test energy ties that bind' (Financial Times, 22 April 2015).

[65] See Commission (EU), 'Antitrust: Commission opens proceedings against Bulgarian Energy Holding and its subsidiaries Bulgargaz and Bulgartransgaz' (Press Release)(5 July 2013). Commission (EU), Commission sends Statement of Objections to Bulgarian Energy Holding and subsidiaries for suspected abuse of dominance on Bulgarian natural gas markets (23 March 2015) (Press Release).

			Impeding power producers from other Member States from exporting balancing energy on EON balancing markets.
EDF (2010) 39386	Commitment	Behavioural remedies	EDF's conduct on the French market for electricity supply to large industrial customers Long term supply contacts - Exclusivity clauses - Resale restrictions
Swedish Interconnectors (2010) 39351	Commitment	Behavioural remedies	SvK's conduct on the Swedish electricity transmission market - Curtailing export capacity - Discrimination between export and domestic transmission of electricity
CEZ (2013) 39727	Commitment	Structural remedies	CEZ's conduct on the Czck electricity generation and supply markets Pre-emptive bookings on the transmission network - foreclosure
Deutsche Bahn	Commitment	Behavioural Remedies (+public compensation)	DB's conduct on the supply market traction current on the German railway network and the provision of services for rail freight and long distance passenger transport Margin Squeeze
BEH Electricity 39767	SO (12 August 2014)		BEH's contractual resale restrictions – Bulgarian non-regulated wholesale electricity market

i. Commitments

German electricity wholesale and balancing market is the first decision in the electricity markets following the Energy Sector Inquiry, [66] though the investigation took place while the sector inquiry was on-going.[67] EON offered commitments to dispel Commission concerns in relation to capacity withholding (by limiting the production in certain plants) with a view to raising prices and deterring investment in generation capacity by third parties on the wholesale electricity market in Germany. The latter was achieved through long term supply contracts or by allowing new competitors to participate in an EON power plant. In German balancing markets, EON might have been discriminating in favor of affiliated companies and impeding power producers from other Member States from exporting balancing energy on EON balancing markets.[68] In relation to the wholesale electricity market in German, EON was considered to hold a collective dominant position, together with RWE and Vattenfall

[66] See Commission Decision of 26 November 2008 relating to a proceeding under Article 82 of the EC Treaty and 54 of the EEA agreement – Cases COMP.39.388 – German Electricity Wholesale Market and COMP.39.389 – German Electricity Balancing Market (German electricity wholesale and balancing market commitment decision).

[67] Ibid para 4.

[68] Ibid paras 1, 26-45, 50-55.

Europe.[69] This point is problematic given the complexities in establishing collective dominance and the vague discussion on collective dominance conditions,[70] and may buttress criticism against the Commission far-fetched use of commitment decisions.[71]

In this case, the Commission made extensive references to the findings in its sector inquiry.[72] It also made more concrete references to consumer detriment.[73] EO.N offered far reaching structural commitment; it divested a large part of its generation capacity and its network that were adopted following amendments after comments of third parties.[74]

EDF concerned the electricity supply market to large customers in France.[75] The alleged abusive practices concerned long term supply contracts excluding alternative suppliers.[76] These contained de jure and de facto exclusivity clauses as well as prohibitions on resale of electricity by large customers. EDF offered to open part of its supply contracts to the markets (average of 65%), directly or through a buying group. It committed that new supply contracts will not exceed a 5-year maximum duration and will not contain exclusivity clauses. It also removed resale restrictions. Commitments will be implemented for 10 years (starting 1 January 2010) and will be supervised by the Commission and the French regulator.[77] In EDF the proportionality analysis appears more detailed than in other cases.[78]

The next cases have, arguably, a less strong link with the Commission sector inquiry. Swedish Interconnectors concerned the conduct of the Swedish TSO (Svenska Kraftnät ('SvK') and the alleged abuse focused on impeding cross-border electricity transmission capacity in order to address internal congestion and thereby discriminating between different users.[79] The Commission investigation followed a complaint by a Danish group of

[69] Ibid para 2.

[70] On the discussion of collective dominance see ibid paras 13-24. In relation to Vattenfall's position, the Commission even left the issue open, as evidence were submitted during the market testing phase pointing to structural and cost differences between Vattenfall, EON and RWE. German courts have also confirmed that EON and RWE are collectively dominant.

[71] See n below.

[72] See for example ibid paras 11-12 (market definition) and 19 (price determination).

[73] Ibid para 34, 39, 44, 50, 51, 53. In paragraph 44 it was stated that '…the generation strategy of EON was directly linked to its price strategy…As prices on the wholesale level have a substantial influence on retail prices, EO.N's strategy of deterring investments by third parties does not only harm the retailer, i.e. the direct customer, but also the final end-customer'.

[74] Ibid paras 55-57, 75-76.

[75] Commission Decision relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union and Article 54 of the EEA Agreement (Case COMP/39.386 – Long-term contracts France) (EDF commitment decisions) para 1. Investigations started while the sector inquiry was on-going. Ibid para 7.

[76] Ibid para 2.

[77] Ibid paras 43-51. The Commitments were modified after the market testing phase. Ibid para 66.

[78] Ibid paras 67-102.

[79] Commission Decision of 14 April 2010 relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union and Article 54 of the EEA Agreement (Case 39351 – Swedish Interconnectors) paras 1-2, 27, 42-45.

companies.[80] In light of this, SvK undertook to subdivide the transmission system into two or more bidding zones and once these zones are in operation, SvK will not limit export capacity on interconnectors.[81] Commitments were amended following comments from third parties and were also subjected to a more detailed proportionality review.[82]

CEZ concerns the Czech electricity generation and supply market in the Czech Republic.[83] CEZ's practices raising concerns focused on pre-emptive bookings on the transmission network resulting in foreclosure of competitors from the electricity generation and supply markets.[84] Similar to Swedish Interconnectors, a complaint has been submitted to the Commission, albeit in this case, following the initiation of the Commission investigation.[85] CEZ offered structural commitments to address Commission concerns; in particular, it offered to divest part of its production capacity.[86] Commitments were modified following third-party comments.[87] Proportionality review in CEZ, in contrast with previous decisions, is limited.[88]

Deutsche Bahn concerns DB Energie's pricing system for the supply of traction current to railway undertakings in Germany (specific type of electricity used for trains).[89] Commission investigation was triggered by three complaints; one by a railway transport operator, one by a German association of railway companies and a buying alliance by railway companies for traction current.[90] DB Energie operates the special network necessary for traction current distribution and also purchases electricity and resells it to railway undertakings.[91] The relevant upstream market comprised the supply market traction current on the German railway network and the relevant downstream markets comprised the provision of services for rail freight and long distance passenger transport.[92] This case concerned an alleged margin squeeze. The Commission relied heavily on the as-efficient-competitor test in Telia Sonera and concluded that '[t]he results of the as-efficient competitor

[80] Ibid para 6.

[81] With the exception of West-Coast-Corridor. Ibid paras 47-48.

[82] Ibid paras 75-97. See C Gauer and L Kjolbye, Energy in J Faull and A Nikpay (eds), Faull and Nikpay: The EU Law of Competition 1581, 1598 on the importance of adopting a cross-border approach in relation to managing network capacity in the light of EU's renewable energy aspirations.

[83] Commission Decision of 10 April 2013 addressed to CEZ, a.s. relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union and Article 54 of the EEA Agreement (AT/39727 - CEZ).

[84] Ibid para 1, 22-33.

[85] Ibid paras 4-5.

[86] Ibid paras 38-39.

[87] Ibid paras 56, 65, 67, 76-77.

[88] Ibid paras 78-82.

[89] Commission Decision of 18 December 2013 relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union (TFEU) Case COMP/AT.39678/Deutsche Bahn I Case COMP/AT.39731/Deutsche Bahn II.

[90] Ibid para 6.

[91] Ibid para 17.

[92] Ibid para 27.

tests conducted for the rail freight and rail long distance passenger transport markets, which highlight that an as-efficient competitor would have probably experienced unsustainable profitability levels due to the DB Group's pricing practices, should be interpreted in the context of the specific conditions of the rail sector to assess the potential anti-competitive effects of these practices'[93] and even that, in the light of the nature of the recently liberalized rail market 'the margin squeeze practice has in reality a stronger negative impact on competition than the as efficient competitor test allows to identify'.[94] It also addressed the potential effects of such practice and the lack of any objective justifications.[95] In order to address Commission concerns Deutsche Bahn offered the following main commitments; the introduction of a new pricing system for traction current separating electricity supply prices and grid access fees (as the German Regulatory Authority approves the latter); seizing discounts and applying a uniform price; maximum one year contract duration. In addition, before the introduction of the new system customers may terminate their contracts after providing a six week notice period and DB Energie will reimburse customers not belonging to the DB group 4% of their yearly traction current invoice (one – off – payment) four months after commitments entering into force. Commitments also provided for unbundling (accounting and information separation) of DB Energie's activities as the manager of the traction current network and the supplying of electricity.[96]

In the market testing phase some respondents commented that 'an Article 9 Decision would not be appropriate for an alleged 10-year infringement and would not facilitate their potential private damages claims' and also complained that the level of payment was not sufficient.[97] This may partially explain the 'public compensation' approach taken in that case. The Commission dispelled this concerns, since it was sufficient for the one-of-payment to address margin squeeze in the initial transition phase and open the market to competition. Thus, 'public compensation' here is akin to a regulatory tool and not as the Commission conceded 'compensation for harm suffered through possible anticompetitive behavior'.[98] It resembles a regulatory tool, since it provides benefits to market actors that do not redress actual harm suffered, since no violation was found. Proportionality assessment was limited in this case as well.[99]

ii. Ongoing cases

In *BEH Electricity*, the Commission sent a statement of objections raising concerns in relation to territorial resale restrictions contained in BEH's electricity supply contracts. These restrictions may affect competition on the non-regulated wholesale electricity market in Bulgaria.[100]

[93] Ibid para 55

[94] Ibid para 56.

[95] For the assessment of the practices raised concerns see ibid paras 42-66.

[96] Ibid para 70.

[97] Ibid paras 72, 78.

[98] Ibid paras 92-93.

[99] Ibid paras 97-102.

[100] Commission (EU), 'Antitrust: Commission sends Statement of Objections to Bulgarian Energy Holding for suspected abuse of dominance on Bulgarian wholesale electricity market' (12 August 2014)

iii. Infringement decisions

Romanian Power Exchange/OPCOM is the first and only case applying art 102 TFEU in relation to energy markets that was concluded with a formal infringement decision and the imposition of a fine.[101] According to the Commission decision, OPCOM, the only operator of the power exchange in Romania committed an abuse on the services market facilitating short-term electricity trading in Romania by discriminating against non-Romanian companies. OPCOM required that in order to participate in the short-term electricity trading market (OPCOM's power exchange), companies needed a Romanian VAT registration and, thus, have a permanent establishment in Romania despite the fact that non-Romanian traders have a VAT registration in their home state. OPCOM's contact restricted competition on the Romanian wholesale electricity market.[102] The Commission concluded that 'that OPCOM enjoyed *a margin of discretion* as to whether or not to impose a VAT registration requirement on participants to its Day-Ahead and Intraday markets, and that the subsequent approval of the requirement by the Energy Regulator cannot remove the VAT registration requirement from the scope of Article 102 of the Treaty'.[103]

iv. Other cases

In July 2007, the Commission initiated proceedings against EDF and Electrabel for practices in their respective markets in France and Belgium. In particular, the Commission expressed concerns about clauses contained in long term supply contracts with large customers that may have a foreclosure effect. Very limited information is available on this case in the public domain. The Commission closed its investigation 4 years later.[104] In March 2009, the Commission raided the premises of EDF suspecting abusive price rises on the wholesale electricity market in France.[105] To date, no other information is available on this case.

The Greek Lignite Case concerns the application of 106 TFEU, and the recent ECJ ruling appears to suggest that the Commission retains substantial flexibility in the application of that provision.[106]

4. Case classification

i. Type of abuse

The above exposition of the relevant cases in the energy sector suggest that foreclosure considerations are at the heart of the Commission's approach. In gas cases, foreclosure may be linked to long term supply contracts (*Distrigaz*), different refusal to

[101] Commission Decision of 5 March 2014 addressed to S.C. OPCOM S.A. and C.N.T.E.E. Transelectrica S.A. relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union (TFEU) (AT.39984 - Romanian Power Exchange/OPCOM).

[102] Ibid paras 1-3.

[103] Ibid para 152.

[104] Case 39387 Long term electricity contracts in Belgium. Commission (EU), 'Antitrust: Commission initiates formal proceedings against Electrabel and EDF for suspected foreclosure of the Belgian and French electricity markets' (26 July 2007) (MEMO/07/313); DG Comp, Closure of Proceedings (3 February 2011).

[105] Case 39442 French electricity wholesale market. Commission (EU), Antitrust: Commission has carried out inspections in the French electricity sector (11 March 2009) (MEMO/09/104).

[106] Case C-553/12P Commission v DEI (judgment of 17 July 2014).

supply practices (*RWE*, *GdF*, *EON*, *ENI*) and margin squeeze (*RWE*). In discussing alleged refusal to supply, the Commission made references to established case law. Nonetheless, this may appear problematic when the refusal to supply was attributed to strategic underinvestment on the part of the incumbent (*GdF*, *ENI*), a theory of harm yet to be discussed in an infringement decision and tested before the European courts. In the on-going *Gazprom*, the Commission has alleged the incumbent Russian energy giant of preventing cross border trade in gas through the inclusion of territorial restrictions in its gas supply agreements as well as charging excessive prices.

Similarly, in electricity cases, problems pertaining to foreclosure (*CEZ*), long term supply contracts (*German wholesale market*, *EDF*), practices curtailing cross border trade in electricity (*German balancing market, Swedish interconnectors*) and margin squeeze (*Deutsche Bahn*) have been discussed.

ii. Remedies

Structural remedies were adopted in 2 out of 6 gas cases (*RwE* and *ENI*). The divestiture of ENI's shareholdings in the TSO may be seen as problematic, to the extent that it is a far reaching remedy given to address (amongst other alleged abuses) a yet untested type of abuse, that of strategic underinvestment.

The approach to remedies in the electricity cases resembles the one in gas cases. Structural remedies were offered in 2 out of 5 cases, including in the *German electricity wholesale and balancing market*, where the Commission preliminary found EON to be collectively dominant in the German wholesale market. In *Deutsche Bahn* an innovative compensatory remedy was offered, whereby DB Energie undertook to compensate certain customers by means of reduction to their electricity invoices.

IV. Commitment proceedings: limits in promoting a single energy market

1. Introduction

Based on the above exposition and categorization of the Commission decisions applying Article 102 TFEU in the energy sector, this section examines the limits of such an *intra-competition law enforcement* approach. The approach is called *intra-competition law enforcement* since it is the EU competition law enforcement framework that allows the more flexible application of competition law through commitment proceedings. The use of competition law provisions with a regulatory mindset is not a new development.[107] This paper does not deal with the broader question of whether this is a permissible application of the competition law provisions or whether it stretches the limits of those provisions and falls outside their permitted remit.[108] It rather makes a more modest claim. The starting point is the current competition law enforcement framework and the argument is that institutionally the Commission is allowed to engage in such a regulatory enforcement approach. Therefore, criticisms directed to the Commission should not lose sight of this reality.

In fact, criticism on regulatory application need to account for the fact that prior to the adoption of Article 9, there were instances of informal settlements. Therefore, Article 9 Reg 1/2003 has formalized the settlement process and can be viewed as an improvement in that regard.[109] Whatever limits are placed on Art 9, rest with the Commission and EU courts, and even if the latter were arguably reluctant to place sufficient limits on the Commission, one may consider that such an approach is necessary in the light of the nature of commitments. This is supported by an analogy with the remedies adopted in merger control.

This section first provides a snapshot of 'negotiated settlements' prior to Article 9 Regulation 1/2003 (with a focus on settlements in the energy sector), following which it briefly sketches the procedure under Article 9 Reg 1/2003. After setting the background, it argues that commitments indeed depict a degree of 'nuanced regulatory power', however the latter is unavoidable and yet it has contributed to the liberalization of EU energy markets. Procedurally the Commission is afforded the power to pursue such an approach, which appears to be endorsed by the EU courts as well. With all their shortcomings, commitments have contributed to energy market liberalization.

[107] P Ibanez Colomo, 'On the Application of Competition as Regulation: Elements for a Theory' (2012) 261 with further references therein in relation to the telecommunications sector.

[108] Indeed this debate has been covered in detail by many commentators. See (n--) above – [add]

[109] H Schweitzer (n--) 2; W Wils, Settlements of Antitrust Investigations: Commitment Decisions under Article 9 of Regulation No. 1/2003 in Wils, Efficiency and Justice in European Antitrust Enforcement, 2008 25, 27-28.

Table 3: Competition law enforcement in the energy sector: levels of formality

2. Pre-commitments - Formalizing 'informal' settlements – benefits

Prior to Regulation 1/2003, the Commission has closed cases in the energy sector without issuing an infringement decision. This practice is reflected in policy statements at the time. The – then- Competition Commissioner Mario Monti has commented that 'during the initial delicate transition phase from monopolised to liberalised energy markets, the focus should lie, in some occasions, on Commission's interventions improving effectively the market structure, rather than on formal procedures imposing fines'.[110]

Commission investigations following the first and second liberalization package reflect this rhetoric. Settled cases include *Marathon/Ruhrgas/GDF et alia* and *Gas Natural and ENDESA*. In the former case, GdF and Ruhrgas offered commitments in order to improve third party access to gas infrastructure and the case was informally settled.[111] This case may be seen as the predecessor of *GdF* and *EON*, where a more 'formalized' commitment decision was issued. The second case concerned long term supply contracts between the Spanish gas company GAS NATURAL and the Spanish electricity generator ENDESA. Commission concerns centered on the incumbent dominant gas supplier potential to foreclose the Spanish

[110] M Monti, 'Applying EU Competition Law to the newly liberalised energy markets' (6 October 2003)(Speech at World Forum on Energy Regulation) 3. In ENEL / ENI / GdF the Commission adopted a formal prohibition decision but did not impose a fine. Case 38662 GdF

[111] See Commission (EC), 'Commission settles Marathon case with Gaz de France and Ruhrgas' (Press Release) (30 April 2004) (IP/04/573).

gas supply markets. The Commission closed its investigation after the parties have addressed its concerns and amended the respective contracts.[112]

GFU concerned joint sales and marketing arrangements between Norwegian gas producers and was also settled informally.[113] The Commission has also investigated other joint marketing arrangements in the gas sector and chose to settle these cases informally.[114] Other cases settled involved territorial sales restrictions,[115] and refusal of access to gas infrastructure.[116]

3. Commitments under Reg 1/2003

Commitment proceedings have been discussed extensively in the literature.[117] This section will present the proceedings in outline and allude to some contested issues. Article 9 Regulation 1/2003 provides that '[w]here the Commission intends to adopt a decision requiring that an infringement be brought to an end and the undertakings concerned offer commitments to meet the *concerns* expressed to them by the Commission *in its preliminary assessment*, the Commission may by decision make those commitments binding on the undertakings. Such a decision may be adopted for a specified period and shall conclude that there are no longer grounds for action by the Commission'. Commitment decisions do not

[112] See Commission (EC), 'Commission closes investigation on Spanish company GAS NATURAL' (Press Release) (27 March 2000) (IP/00/297) (Case 37542). On this case see K Talus, 'Long-term natural gas contracts and antitrust law in the European Union and the United States' (2011) 4 J World Energy Law and Business 260, 270-.

[113] Press Release (IP/02/1084), 'Commission successfully settles GFU case with Norwegian gas producers' (Brussels, 17 July 2002) (Case 36072).

[114] Press Release (IP/03/566), 'Commission and Danish competition authorities jointly open up Danish gas market' (Brussels, 24 April 2003) (Case 38187 PO/DUC-DONG); Press Release (IP/01/578), 'Enterprise Oil, Statoil and Marathon to market Irish Corrib gas separately' (Brussels, 20 April 2001).

[115] Press Release (IP/02/1869), 'Commission settles investigation into territorial sales restrictions with Nigerian gas company NLNG' (Brussels, 12 December 2002); Press Release (IP/03/1345), 'Commission reaches breakthrough with Gazprom and ENI on territorial restriction clauses' (Brussels, 6 October 2003); Press Release (IP/05/195), 'Commission secures improvements to gas supply contracts between OMV and Gazprom' (Brussels, 17 February 2005) (Case 38085 PO/Territorial restrictions).

[116] Press Release (IP/01/1641), 'Commission settles Marathon case with Thyssengas' (Brussels, 23 November 2001); Press Release (IP/03/547), 'Commission's competition services settle Marathon case with Gasunie' (Brussels, 16 April 2003); Press Release (IP/02/401), 'Commission closes investigation into UK/Belgium gas interconnector' (Brussels, 13 March 2002).

[117] J Temple Lang, 'Commitment Decisions under Regulation 1/2003' (2003) ECLR 347; R Whish, 'Commitment Decisions under Article 9 of the EC Modernisation Regulation: some unanswered questions in Johansson, Wahl and Bernitz (eds), Liber Amicorum in Honour of Sven Norberg – A European for All Seasons (Bruylant 2006) 555; Cook, 'Commitment Decisions: the law and practice under Article 9' (2006)29 World Comp 209; W Wils, 'Settlements of EU Antitrust Investigations: Commitment decisions under Article 9 of Regulation 1/2003' (2006) 29 World Comp 345; GS Georgiev, 'Contagious Efficiency: The growing reliance on US-style antitrust settlements in EU law' (2007) Utah L Rev 971; H Schweitzer (n--); W Wils, 'The Use of Settlements in Public Antitrust Enforcement: Objectives and Principles' (2008) 31 World Comp 335; Rab, Monnoyeur and Sukhtankar, 'Commitments in EU Competition Cases' (2010) 1 JECLAP 171; F Wagner Von-Papp, 'Best and Ever Better Practices in Commitment Procedures After Alrosa: the Dangers of Abandoning the "Struggle for Competition Law" ' (2012) 49 CMLRev 929; N Dunne, 'Commitment Decisions in EU Competition Law' (2014) 10 JCL&Econ 399.

rule on the existence of an infringement and are not appropriate in cases where the Commission intends to impose a fine.[118] In relation to the latter point, this has been interpreted restrictively so as to mean that commitment proceedings are not appropriate for hard-core cartel cases.[119]

The undertakings may express their willingness to offer commitments, following which the Commission holds a state of play meeting and -after assessing the parties' genuine willingness to engage in commitments- issues a preliminary assessment.[120] In its preliminary assessment, the Commission identifies its concerns that the parties need to address through the offering of commitments.[121] The Statement of Objection can also serve as a preliminary assessment, so the parties can still offer commitments at that point,[122] though the decisional practice to date suggests that in the majority of cases no statement of objections was sent.

Following the offering of commitments, the Commission is obliged under Article 27(4) Reg 1/2003 to 'market test' these, and invite interested parties to submit comments. If, following the market testing phase, the commitments are deemed insufficient, the Commission will invite the parties to offer amended commitments.[123] The market testing of commitments offers an important safety valve for resolving the competition concerns identified. In fact, commitments in the energy sector suggest that the Commission takes comments received into consideration.

In commitment procedures, it is important to strike a balance between promoting efficiency and effectiveness while safeguarding the rights of the undertakings concerned as well as ensuring procedural guarantees for third parties (including complainants).[124] Commitments have been criticized for not sufficiently taking into account the interests of the latter.[125]

4. Commitment proceedings: a step too far?

Commentators have criticized the increased use of commitment proceedings as a shift from the 'orthodox antitrust paradigm' towards a 'more "regulatory" conception of competition law'.[126] While it is true that commitment proceedings depict elements of a regulatory approach and allow the Commission an increased leeway in solving contentious cases, the advocated shift is not that clear, primarily because the orthodox paradigm was always

[118] Recital 13 Regulation 1/2003.

[119] DG Competition, 'Best Practices on the Conduct of Proceedings Concerning Articles 101 and 102 TFEU', para 101 and n57; ECN, Recommendation on Commitment Proceedings, para 7.

[120] Commission (EU), Antitrust Manual of Proceedings (March 2012), 28, 162.

[121] Best practices paras 104-108.

[122] Ibid paras 109-110.

[123] Ibid paras 114-118.

[124] ECN, paras 10, 12, 17.

[125] Lianos (effectiveness) 26.

[126] Dunne (n--) 399, 411. [add]

contaminated by more informal approaches. In fact, the formalization of settlements through Article 9 Reg 1/2003 has instilled more legal certainty in the process.[127]

i. Procedural economy at any cost?

As the CJEU clearly stated in *Alrosa*, Article 9 procedures are 'based on considerations of procedural economy'.[128] Considerations of procedural economy inevitably impact upon the Commission assessment, and this is reflected in the Opinion of AG Kokott in Alrosa, where she stated that 'the Commission is not required to agree to commitments the appropriateness of which could be assessed only after a thorough examination by the Commission' and '[it] is not required, in relation to decisions under Article 9 of Regulation No 1/2003, itself to seek less onerous alternatives to the commitments offered to it', since that would defeat the very objective of Article 9 procedures, ensuring 'a quick and effective resolution of the competition problems while avoiding a considerable investigation and assessment effort on the part of the Commission'.[129]

The different nature of Art 9 procedures is reflected on the scope of proportionality review. If the scope of proportionality review was the same under both Article 7 and Article 9 decisions, then Article 9 would be deprived of its practical effect.[130] According to the CJEU, '[a]pplication of the principle of proportionality by the Commission in the context of Article 9 of Regulation No 1/2003 is confined to verifying that the commitments in question address the concerns it expressed to the undertakings concerned and that they have not offered less onerous commitments that also address those concerns adequately. When carrying out that assessment, the Commission must, however, take into consideration the interests of third parties'.[131]

Criticism aired against commitment proceedings that they go beyond what is necessary, may be dispelled through the market testing mechanism.[132] In the energy cases described above, third party comments were taken into account through the market testing process. The CJEU went on to stress Commission's broad discretion when accepting or rejecting commitments,[133] which inevitably impacts on the rights of third parties. Nonetheless, Alrosa raises the question whether the said discretion renders third parties' rights rather futile.

The CAT's analysis in *Skyscanner* may provide an interesting middle ground approach between the competition authority's discretion in commitment procedures and

[127] See Commission (EU), 'Antitrust Manual of Proceedings' (March 2012), 16. Commitment decision, para 6.

[128] Case C-441/07P Commission v Alrosa [2010] ECR I-6012, para 35. For a criticism on whether commitments actually aim at enhancing procedural economy see Lianos (neffectiveness) 24.

[129] Opinion of AG Kokott in Case C-441/07P Commission v Alrosa [2010] ECR I-5953, paras 53, 56, 58.

[130] Case C-441/07P Commission v Alrosa [2010] ECR I-6012, paras 26, 38. Opinion of AG Kokott in Case C-441/07P Commission v Alrosa [2010] ECR I-5953, paras 49, 50-52. See also Antitrust Manual of Proceedings (n--) para 46.

[131] Ibid, para 41.

[132] In this vein see Alrosa (n--) para 59. Arguably the subsequent rejection of the commitment packages in Google and the sending of a formal SO may attest to this fact. [Expand]

[133] Ibid para 94.

examining considerations brought to its attention by interested parties. In *Skyscanner*, the CAT was given for the first time the opportunity to consider a commitment decisions adopted by the [OFT].[134] Skyscanner had a 'sufficient interest' to challenge the commitments decision (s.47 CA 1998).[135] One of the grounds for the challenge was 'procedural impropriety' alleging that the [OFT] failed to take into account Skyscanner's comments on the impact of the commitments.[136] Under Schedule 6A CA 1998, the CMA has a duty to consult and consider representations. This process is akin to the 'market testing' phase under Article 27(4) Reg 1/2003, but provides explicitly for the CMA's duty to consider representations made.

The CAT held that, even though apparently the [OFT] followed all the required procedural steps by holding two rounds of consultation and showing efforts to address the comments received, it failed to address particular objections on price transparency and meta-search (price comparison) engines.[137] The [OFT] contended that they could not address these objections without evidence of possible harm,[138] but the CAT rejected this argument as '[i]f a consultation response raises an important and obvious point of principle, it is for the authority to examine it further'.[139] In *Skyscanner*, the CAT imposed limits upon the CMA discretion in commitment proceedings and the [OFT] warned against encroaching upon the authority's discretion to weight different considerations.[140] The CAT rejected this argument by distinguishing between the weight attached to each consideration and the manner in which it is taken into account and stated that in this case, the [OFT] failed to properly take into account Skyscanner's point.[141] Nonetheless, this distinction is rather delicate and it may raise the stakes for the CMA in commitment proceedings.

The CAT has relied on *Alrosa* and arguably *Skyscanner* may have been decided in favour of the appellant because of the way the case was argued. Nonetheless, *Skyscanner* can be read as signaling towards improving the market-testing phase. This has the potential to increase the legitimacy of commitment decisions and presents a middle ground solution, as it calls for market actors to take the initiative in scrutinizing commitments.

ii. Regulatory Remedies?

Commitment procedures have been criticized for allowing the Commission to extract far-reaching remedies based on a preliminary assessment.[142] In particular, commitment proceedings in the energy sector have been coined as the most problematic quasi-regulatory

[134] [2014] CAT 16.

[135] However, one should note the differences between *Alrosa* and *Skyscanner*. Alrosa's position as a 'third party' is particular to the EU competition law enforcement procedure. Ibid para 38.

[136] Ibid paras 44, 68.

[137] Ibid paras 74, 81.

[138] Ibid para 86.

[139] Ibid para 90.

[140] Ibid para 94.

[141] Ibid para 95.

[142] Wagner von Papp (n--) 22.

use of Article 9.[143] Yet, it is herein submitted that such use has certainly regulatory (as opposed to quasi-regulatory) attributes; nonetheless this is a permitted – and even desirable - characteristic of remedies adopted under Article 9 Reg 1/2003.

Commitments present characteristics that are akin to regulatory remedies, i.e. they are not imposed ex post following the finding of a competition law violation yet they are not imposed completely ex ante either. As the Court stated in *Alrosa*, '[t]hose two provisions of Regulation No 1/2003 (Art 7 and Art 9 respectively)…pursue different objectives, one of them aiming to put an end to the infringement that has been found to exist and the other aiming to address the Commission's concerns following its preliminary assessment'.[144]

In distinguishing between Article 7 and Article 9, AG Kokott clearly acknowledged that Article 9 'gives the Commission the possibility of effectively addressing concerns over competition for the future'.[145] This brings commitment procedures closer to the ex ante nature of merger control and underlines its regulatory nature.[146] As AG Kokott conceded, 'there is no fundamental difference as regards the assessment of commitments offered by undertakings between proceedings under Article 9 of Regulation No 1/2003 and merger control proceedings' and the Commission should be granted "the same margin of assessment in the context of Article 9 of Regulation 1/2003 which it enjoys, according to case-law, in connection with the assessment of commitments in merger control".[147] However the analysis under Article 9 is not truly ex ante but rather occupies a middle ground between a pure ex post and a pure ex ante analysis. This is because Article 9 is triggered by a potential infringement, but in the end the Commission does not rule on the existence of the infringement but only accepts commitments to address its preliminary concerns. Thus, commitment procedures serve the model of 'regulatory competition'.[148] They have long been incorporated in the competition law enforcement arsenal and their frequent invocation renders commitments part and parcel of the system. They undoubtedly share elements of regulatory control but this does not render them necessarily alien to competition law enforcement, as they present a 'hybrid' between merger regulation and infringement decisions.

Table 4: Nature of enforcement

Ex ante	Commitments	Ex post
Mergers		Infringement

[143] Dunne (n--) 431. See also Sadowska's arg (World Competition). For a different view see Colomo (n--) and E Robertson, Does antitrust regulation violate the rule of law?

[144] Case C-441/07P Commission v Alrosa [2010] ECR I-6012, para 46. On this case see F Cengiz, Judicial Review and the Rule of Law in the EU Competition Law Regime After Alrosa' (2011) 7 Eur Comp J 127.

[145] Opinion of AG Kokott (n--), para 50.

[146] In this vein See Lianos 47-48 I. Lianos, Competition law remedies in Europe: Which Limits for Remedial Discretion?, in I. Lianos, & D. Geradin (eds.), Handbook of EU Competition Law: Enforcement and Procedure (Edward Elgar, 2013). See also Skyscanner (n--) para 87 where the CAT stated that '[W]e […] agree that a situation of this kind is more akin to a regulatory decision than to an infringement or exemption finding'.

[147] Opinion of AG Kokott (n--) paras 71-72.

[148] See Cave and Crowther (n--).

The regulatory flavor in commitment proceedings is clear and even expressly recognized in some cases. For example, in *EDF* the Commission stated that ' [b]y way of introduction, the observations received stressed the importance of ensuring that EDF's commitments are linked in an appropriate manner to future legislative or regulatory reform, both in France and at Community level. *The Commission takes the view that these remarks are relevant, and evidently takes account of the legislative or regulatory framework, as well as its foreseeable evolution, in its analysis of the proposed commitments.* Nonetheless, the Commission takes the view that the observations going further than this are disproportionate, or outside the scope of these proceedings with regard to the objections set out by the Commission in the Statement of Objections'.[149] It is quite unclear though, where the Commission strikes the balance between proportionate 'competition' remedies and disproportionate 'regulatory' remedies.

An analogy can be drawn from the approach to remedies in merger cases. In *EDP* the Commission blocked the merger, whereby EDP and ENI proposed to acquire joint control of GDP.[150] EDP challenged the Commission decision on different grounds, amongst which the Commission misuse of powers, as the commitments required aimed at the liberalization of gas and electricity markets.[151] The General Court stated that '[a]ccording to consistent case-law, the concept of misuse of powers refers to cases where an administrative authority has used its powers for a purpose other than that for which they were conferred on it. A decision may amount to a misuse of powers only if it appears, on the basis of objective, relevant and consistent factors, to have been taken for such a purpose […]. Where more than one aim is pursued, even if the grounds of a decision include, in addition to proper grounds, an improper one, that would not make the decision invalid for misuse of powers, since it does not nullify the main aim'.[152] The question for the Court then was, whether the commitments offered dispelled Commission's competition concerns, and it appears that they failed on that ground. However, it appears that the Court would accept the 'regulatory' potential of commitments, as long as their primary aim was consistent with the aim of the Merger Regulation.[153]

iii. Legal certainty?

A further criticism aired against commitments in the energy sector is that they rest in rather vague theory of harm, which obfuscates the application of Article 102 TFEU. Arguably this is true when the Commission comes up with new categories of abuses that have not been tested and proved in other cases.[154] Nonetheless, a closer look at the decisions (tables 1 and 2 above) reveals that this was the case in 2 cases involving alleged strategic underinvestment.

[149] EDF Commitment Decision (n--) para 54. See also Swedish Interconnectors (n--) paras 65-66.

[150] Case COMP/M.3440 – EDP/ENI/GDP.

[151] Case T-87/05 EDP v Commission [2005] ECR II-3753, para 86.

[152] Ibid para 88.

[153] Ibid para 96. The Court acknowledges that the applicant also accepts this fact when stating ' the applicant accepts that the resolution by the commitments of the competition concerns raised by the concentration and the pursuit of the opening of the markets to competition may co-exist'. Ibid para 92.

[154] In this vein see Dunne (n--) 419.

Strategic underinvestment theory is problematic, especially when coupled with far reaching remedies.[155]

In the rest of the cases, the theory of harm has been tested in other cases and even if the evidential burden for the Commission in commitment proceedings is lower, this does not impact upon legal certainty. Even if refusal to supply as a category of abuse is controversial and subject to criticism,[156] it has been discussed by the CJEU and the Commission rather extensively.[157]

[155] Dunne (n--) 421.

[156] Dunne (n--) 419.

[157] See, for example, …

V. Towards an integrated flexible enforcement model: compensatory remedies

Commitment procedures allow the Commission to pursue a more flexible enforcement approach in energy cases. The above discussion has depicted that the rational and remedies adopted are regulatory in nature and has allowed the Commission to achieve outcomes that were unattainable in the political arena. For example, E.ON and RWE agreed on the divestiture of their transmission networks while Germany – at the same time – was opposing the introduction of ownership unbundling in the Third Energy Package.[158] Despite criticisms, we submit that this is a legitimate application of EU competition law that even if tainted with a regulatory flavor, it has been effective in attaining the desirable solutions.

Given that in commitment procedures, the Commission does not rule on the existence of an infringement, remedies are rather flexible and prospective in nature. *Deutsche Bahn* shows that such remedies also have a compensatory potential.[159] One may contest that a compensatory remedy does not bode well with the prospective nature of commitment decisions in that it assumes a certain form of violation and certain damage flowing therefrom. However, as discussed above, it all depends on the way the compensatory remedy is constructed and indeed in *Deutsche Bahn* it appears to retain its regulatory characteristics. After all, redressing damages may be seen as part of the 'competition law concerns' that the undertakings are willing to address through the offering of commitments.

Public compensation as a flexible remedy may be used in cases where complaints have been received. In addition, it is appropriate for cases where serious consumer harm is to be feared. Public compensation would also be appropriate to dispel concerns of third parties expressed in the market-testing phase. Lianos has argued that if competition law remedies transcend the limits of adjudication and take up a more regulatory role, then this needs to be counterbalanced by increased participatory rights given to affected third parties.[160] Here, it is submitted that these participatory rights should be supplemented with additional compensatory rights.

Furthermore, compensatory remedies may account for adverse impact of commitment decisions for follow-on damages actions, but they might blur defendants' incentives to make use of commitments, since one of the perceived benefits of commitments proceedings for defendants is the avoidance of private litigation. The latter though may be avoided through appropriate structuring of the remedies offered and ultimately this is an additional consideration that can be factored in the incentive calculus. Embedding public compensation in the enforcement armory improves the compensatory potential of the enforcement system as a whole and is also in line with private enforcement initiative. From a fairness and access to justice perspective this should be factored in the analysis. It presents a pragmatic enforcement approach which is built on current tools, yet presents an improvement.

[158] On this point see Hancher and de Hauteclocque (n19) 10. Talus (n110) 266.

[159] On this case see text to n—above.

[160] Lianos (neffectiveness) 4.

VI. Concluding remarks

In the last decade, the Commission has investigated a large number of cases in the energy sector under Art 102 TFEU. The majority of cases were resolved through commitments, whereas the Commission has recently sent two SO and concluded another case through a formal infringement decision and the imposition of a fine. These recent developments may suggest a shift towards a more formal application of Article 102 TFEU in the energy sector, although at this stage it would be rather preliminary to reach such a conclusion.

Irrespective of this emerging shift to formalism – that is yet to materialize, if at all - the analysis in this paper suggested that, despite criticisms for the regulatory use of commitments in the energy sector, the latter has contributed to the liberalization of EU energy markets and brought direct and indirect benefits to affected parties. This insight may serve to balance some of the criticism aired on this subject.

The exposition of the relevant cases revealed that the Commission retains, and in some instances, expands its approach by proposing innovative remedies. The competition law enforcement framework allows such an approach; further encouraged by the CJEU through the proposed 'light' proportionality review. Therefore, the EU paradigm suggests that we have moved to an unavoidable meddling of competition and regulation. Thus, it is time to acknowledge their respective limitations and infuse more transparency in the existing approach, through an enhanced role afforded to third parties at the market testing phase. The enforcement of Article 102 TFEU in the energy sector is complementary to secondary energy regulation and has contributed to energy market liberalization, notwithstanding the criticism aired against a regulatory and opaque approach to competition law enforcement. This paper has argued that certain regulatory elements are unavoidable in competition law enforcement. Thus, the solution may lie at tackling the opaqueness of the procedural enforcement through commitments. In addition, such an approach has the potential to bring additional benefits to affected parties through flexible remedies, such as public compensation and it is suggested that there is potential for a wider application of such remedies in the context of commitment proceedings in the energy sector.