Energy day: First sectoral high-level meeting within the ECN

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On 21 September 2004, the Directorate-General for Competition organised a high-level meeting relating to energy with the national competition and regulatory authorities (NCAs and NRAs respectively). The purpose of the meeting was to discuss the main outstanding obstacles to effective competition in electricity and gas, as well as work sharing between the authorities concerned. The importance of this event was due to three major events that occurred over the last few months: first, the modernisation of the rules for the competition law enforcement, second a series of crucial legislative measures adopted at European level, and third the enlargement of the EU with ten new members.

Major recent developments

The modernisation with the entry into force of the new regulation for the implementation of the EC competition rules on 1 May 2004 has lead to a framework in which a larger number of authorities are enabled to fully apply competition rules, also to the energy sector. Therefore the need for co-operation within the network of European competition authorities (ECN) with regard to coherent enforcement and division of tasks has become more important. The purpose of the meeting was, first, to exchange views and experiences in order to identify the most crucial problems to tackle in the short and medium term and, second, to debate about how to determine the authority or authorities best placed to deal with the key problems identified. The coordination should concern not only the allocation of cases, but also their subsequent investigation and conclusion. The Energy Day was thus a kick-off meeting for closer co-operation between competition authorities. However, it was designed in a way to reflect the wider picture of the energy markets, so that the national energy regulators were invited and closely involved in the process.

The second set of EC directives aiming at the further liberalisation of the gas and electricity markets was adopted in June 2003 and had to be transposed in national law by July 2004. These directives foresee, amongst others, the extension of the unbundling obligations between network and transport activities within the energy companies: from now on, these companies should be operating through different legal entities and under separate management and organisation. The second main novelty, concerning the network, is the move away from negotiated third party access to mandatory regulated third party access. This access regime is to be monitored and carried out by NRAs. The ultimate aim of these directives is, beyond the creation of an integrated European energy market, to ensure that all energy customers in the EU can benefit from competitive offers both as regards services and prices. Households should also benefit from market opening, at the latest by July 2007.

Main outcome of presentations and discussions

The Directors-General of DG COMP and DG TREN, Philip Lowe and François Lamoureux, stated in their opening speeches that the liberalisation of the energy markets will only become a lasting success if both the competition tools and national energy legislation are enforced effectively in the crucial period ahead of us. Vigorously fighting cartels and abusive behaviour as well as strict scrutiny of mergers and acquisitions are therefore key elements for the market opening. Mr Lowe stressed that this will certainly be a policy priority for DG COMP in the near future. Mr Lamoureux added that if the combined impact of the directives and the competition rules do not lead to tangible results, it can not be excluded that new legislation should be adopted with more far-reaching obligations on the companies and wider powers for the regulators.

The morning panel was chaired by Sir John Mogg from the UK energy regulator (Ofgem) and discussed the respective roles and tasks of the different authorities. The question of ‘who does what?’ was considered to be particularly relevant in the energy sector, where certain competition problems can be addressed either with regulatory tools or with antitrust tools. In this respect, a distinction must however be drawn between supply and transport. Supply markets cannot be considered as natural monopolies. It should therefore be determined to which extent pioneering antitrust and merger enforcement provide sufficient tools to foster competition in the current gas
and electricity market constellation. The transport networks by contrast have to be generally regarded as natural monopolies, because it is unlikely that any newcomer will be able to replicate the existing infrastructure, due, amongst others, to economic and environmental constraints. Sector-specific regulation is thus warranted in order to allow for market entry by suppliers not related to the company owning the network. The use of antitrust tools in this area nevertheless remains possible to the extent transmission system operators are acting in an autonomous way, without state compulsion. More particularly, overlaps could persist mainly in the area of network-related abuse cases regarding access and pricing issues.

The panellists emphasised the need to create a framework for co-operation between DG COMP, NCAs, NRAs, and possibly other authorities such as consumer bodies. It was regarded as important that these authorities are independent from business. Several participants stressed the need for NCAs and NRAs to exchange views on the use of their respective competences. For example, if no case allocation system is foreseen and no co-operation takes place, there is a risk that NCAs and NRAs might not come to the same conclusions or even to contradictory conclusions. This could lead to legal uncertainty which makes investment decisions unnecessarily difficult. On the other hand, it must also be avoided that certain damaging practices would not be addressed by any authority due to a lack of coordination. Specific issues also addressed include possible measures by NCAs and NRAs to enhance transparency in the market, to tackle the dangers of strategic behaviour and similar forms of abuse by large market players, as well as to improve market monitoring.

The afternoon panel was chaired by Alberto Heimler from the Italian Competition Authority (AGCM) and addressed selected substantive competition problems in the energy sector. After the removal of the main legal barriers to market entry like legal monopolies, the national energy regulators are expected to focus their activities on network-related entry barriers. However, this appears not to be sufficient to solve all the competition problems in the energy sector which can stem from restrictive agreements and abuse of dominance as well as from anticompetitive market structures. Hence the importance of effective antitrust and merger control.

Moreover, the information gathered in preparation of the Energy Day shows that some national competition authorities have gained considerable experience in this field over the last few years. Almost all of them have dealt with merger cases in gas or electricity. Various competition authorities have also looked into presumed abusive behaviour by energy companies, e.g. long-term agreements, refusal to supply cases, as well as access pricing issues. However, not all those cases have shown a successful outcome. The fact that competition problems remain is evidenced notably by the low degree of market entry by newcomers, low switching rates in many countries and the limited amount of liquidity in many national energy markets. Many EU Member states are also experiencing continuously increasing wholesale and retail prices. In view of tackling this type of issues, the Commission has already dealt with a number of cases regarding restrictive agreements and abusive behaviour in the past years. Examples include upstream competition for gas production and gas supply, downstream competition in transport agreements, and access to gas networks. The Commission has also dealt with a number of important merger cases and finally also looked into State aid in the energy sector.

The panel discussion focussed on two selected issues which are to be considered as most important for developing and sustaining competition in the energy sectors at this stage. These issues were, on the one hand, long-term supply agreements in the gas sector, with the related question of the gas-oil price link, and on the other hand, merger control.

In his key note address, Competition Commissioner Mario Monti first explained how the Commission has used the different instruments available in the European competition tool box in the energy area in a coordinated fashion. (1) He underlined that the Commission has a number of specific powers not available to national competition authorities which allow it to tackle also government-induced distortions in the market. He went on to highlight that the Competition DG would from now on focus on the most severe type of infringements, which was likely to lead to more formal decisions and less settlements than in the last years. Mario Monti finally touched upon a recurrent issue underlying many recent energy cases treated by the Commission’s competition services: the apparent tension between competition principles and measures to ensure security of energy supply. One of the main challenges for competition authorities in this area is to avoid being drawn into a purely dogmatic application of

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(1) This speech is available on the DG Competition website, http://europa.eu.int/comm/competition/index_en.html.
antitrust rules without full consideration to the
effects of its intervention and, at the same time,
avoid the trap of too prudent an antitrust policy
because of overestimation of the security of supply
arguments.

First conclusions and next steps

As a conclusion of the presentations and discus-
sions of this first high level meeting, Deputy
Director-General Götz Drauz underlined that
liberalisation, initiated by means of legislative
measures must be made operational by achieving
effective competition. This task will only be
completed once all energy customers are able to
benefit from choice between operators, better
service and eventually lower prices. Both competi-
tion authorities and energy regulators play a key
role in this respect. The big challenge ahead is to
apply the antitrust rules in a way that fits the
specific market structure and functioning of the
gas and electricity sector.

The discussions at the Energy Day were only the
starting point for a closer co-operation between all
the authorities concerned and the upcoming
regular ECN energy sub-group meetings will
present the opportunity to go into greater detail.