The Commission's *GDF* and *E.ON Gas* decisions concerning long-term capacity bookings
Use of own infrastructure as possible abuse under Article 102 TFEU

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1. Introduction

The Commission's commitment decisions of December 2009 and May 2010 in the *GDF* and *E.ON Gas* cases dealt with foreclosure concerns on the French and German gas markets. Both cases are noteworthy in several respects: not only are they part of a remarkable series of energy antitrust decisions adopted under Article 102 TFEU in the wake of the Energy Sector Inquiry ([2]) (nine major energy decisions since 2007 ([3]) but a closer look at the theory of harm also shows that *GDF* and *E.ON Gas* involve some novel and innovative elements that further develop the theory of refusal to supply under Article 102 TFEU ([4]).

All nine above-mentioned abuse cases in the energy sector concern types of anticompetitive behaviour (such as '*primary/secondary capacity hoarding*', '*strategic underinvestment*', '*capacity withholding*' or '*capacity degradation*' ([5]) that involve complex legal and economic issues. The *GDF* and *E.ON Gas* decisions relate to a particularly interesting theory of harm, namely anticompetitive effects resulting from *long-term capacity booking practices*. Both decisions clarified that there can be limits on the extent that dominant companies can reserve infrastructure capacity on a long-term basis ([6]).

([1]) The content of this article does not necessarily reflect the official position of the European Commission. Responsibility for the information and views expressed lies entirely with the authors.

([2]) See DG Competition, Final Report on Energy Sector Inquiry, 10.1.2007 ('Sector Inquiry Report'), http://ec.europa.eu/competition/sectors/energy/inquiry/full_report_part1.pdf.

([3]) Despite being concluded by way of a commitment decision, all nine cases were comparably complex, not only in terms of the pursued theory of harm, but also in terms of fact-finding, the assessment of possible justifications and, last but not least, the interplay with national regulation.

([4]) See, for energy cases based on an alleged 'refusal to supply', also Cases COMP/39.315 — *ENI* and COMP/39.402 — *RWE Gas Network Foreclosure*.

([5]) See e.g. the article on the RWE Case in CPN 2009, No 2, pp. 32 *et seq.* (http://ec.europa.eu/competition/publications/cpn/2009_2_7.pdf).

([6]) See in detail Cases COMP/39.316 — *GDF Suez*, decision of 3 December 2009 (http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_39316) and COMP/39.317 — *E.ON Gas*, decision of 4 May 2010 (http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_39317).

2. The facts: long-term bookings preventing entry

One main finding of the Commission's Energy Sector Inquiry was that the lack of transport capacities in Europe, mainly caused by the incumbents' own bookings, prevented competitors from gaining access to the pipelines necessary to reach their gas customers ([7]). The Commission therefore decided to open a number of 'ex-officio' antitrust investigations to address this issue ([8]).

The *E.ON Gas* and *GDF* cases tackled the problem that almost the entire capacity on their gas networks was booked, on a long-term basis, by E.ON's and GDF's own supply businesses, leaving virtually no room for third party transport ([9]).

The Commission's investigation concerning GDF, the leading gas supplier in France and owner of the largest gas transmission networks in France via its subsidiary GRTgaz, showed that the vast majority of the available capacities at the main entry points into the French gas transmission network had been booked on a long-term basis by a single customer — the sales business of GDF, the dominant gas supplier in France. Since these capacities were essentially reserved until 2019 by GDF, competitors had very few chances to acquire the transport capacities necessary for successful market entry and there were

([7]) In fact, the Sector Inquiry had already found that the newly created third party access rights and non-discrimination rules, intended to open up the incumbents' transmission networks, often had only a limited effect, as vertically integrated gas companies could successfully prevent access to their pipelines, using various foreclosure strategies: see the Sector Inquiry Report, pp. 79 *et seq.*

([8]) See Cases COMP/39.315 — *ENI*, COMP/39.402 — *RWE*, COMP/39.316 — *GDF Suez* and COMP/39.317 — *E.ON Gas*.

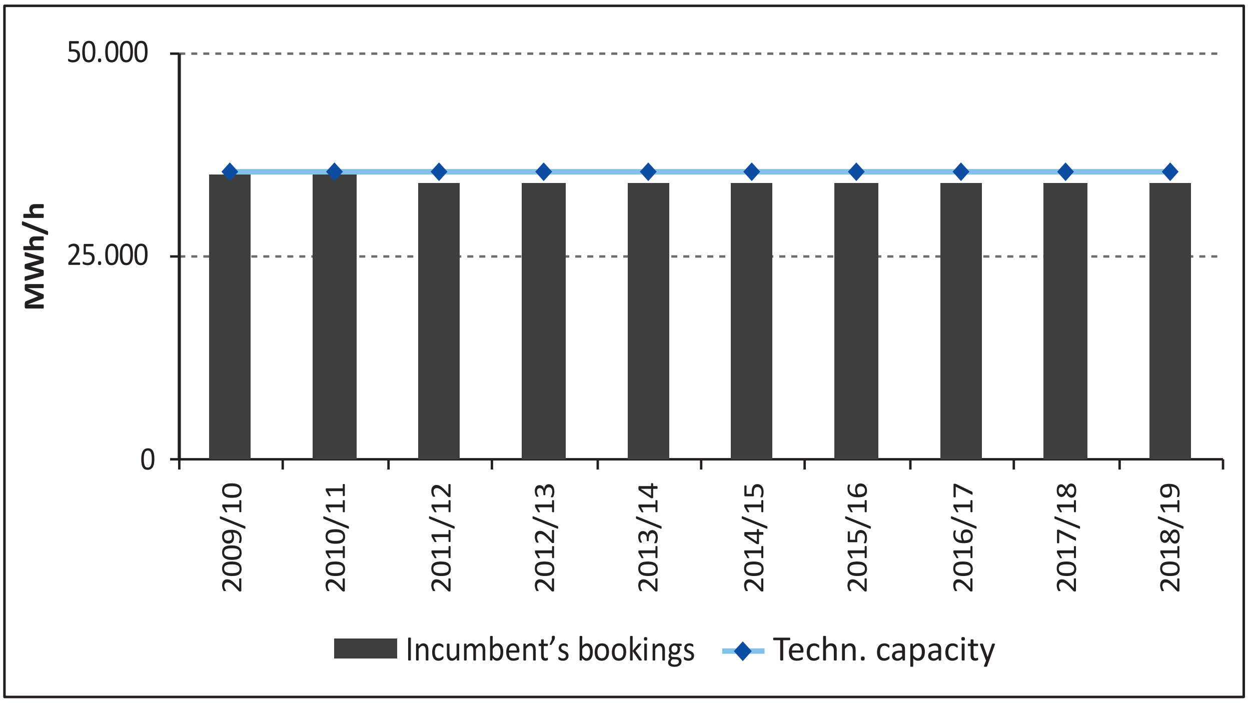
([9]) See in this context also the Sector Inquiry Report, pp. 74 *et seq.*, and Case COMP/39.402 — *RWE*, paragraph 24.

no prospects for this situation to change in the foreseeable future [10].

A similar pattern could be found in the *E.ON Gas* case. E.ON is a leading European energy company active in the production, transport and supply of electricity and gas at European level. In Germany, E.ON is the largest supplier of natural gas and operates the largest German gas transmission network. The Commission's investigation also found that E.ON had reserved the bulk of capacities [11] on its L- and H-gas [12] networks for its own supply business.

The lack of free capacity contrasted with steady and significant unsatisfied demand by transport customers and was one of the main reasons for the very limited success of new entrants in the gas markets in France as well as within the E.ON network area. The following chart shows a typical booking situation that illustrates the tight capacity position [13]:

Typical booking situation in long-term capacity booking cases



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(10) It should be noted that the *GDF* decision addressed not only long-term capacity booking concerns, but also other foreclosure concerns related to two of GDF Suez's liquefied natural gas (LNG) terminals, *Fos Cavaou* and *Montoir de Bretagne*. The Commission found that GDF Suez decided on the maximum import capacity and the procedures for allocating this capacity at the *Fos Cavaou* LNG terminal in a manner that may have foreclosed competitors from access to gas import capacities (by way of example, GDF Suez did not carry out — despite significant third party demand — an open, transparent and non-discriminatory procedure to allocate capacity at the new *Fos Cavaou* terminal, e.g. an 'open season' procedure). The Commission also found evidence that GDF Suez may have strategically limited its investments in additional import capacity at the *Montoir de Bretagne* LNG terminal (according to the Commission's preliminary assessment, GDF Suez decided, following an open season procedure, not to develop any additional import capacity at the *Montoir de Bretagne* terminal despite evidence that the extension of capacity there would have been sufficiently profitable).

(11) Only 'firm' and 'freely allocable' entry capacities were taken into account in the calculation: see paragraphs 11, 14 and footnote 39.

(12) Low-calorific gas ('L-gas') and high-calorific gas ('H-gas') are two gas qualities which differ in terms of energy content and which are usually transported in separate gas networks.

(13) The line illustrates the technically available capacity while the black bars show the extent to which the capacities were already booked by the incumbents.

3. Legal assessment: refusal to supply

The behaviour to which the Commission objected foreclosed competitors from access to the gas supply markets dominated by GDF and E.ON respectively.

In both cases the Commission found that the incumbents' gas networks could be classed as *essential facilities* [14]. An essential facility is a network or other type of infrastructure to which access is indispensable to compete on a given market. Although undertakings normally have the right to choose their trading partners freely, it is a well-established concept under EU law [15] that holders of an 'essential facility' can be required under competition law in certain circumstances to grant access to this facility.

In line with the approach taken by the Commission in previous decisions, a refusal to grant access to an essential facility is likely to constitute an abuse under Article 102 TFEU if (i) access is objectively necessary to be able to compete effectively on a downstream market, (ii) the refusal is likely to lead to the elimination of effective competition on the downstream market and (iii) the refusal is likely to lead to consumer harm. In cases where regulation already imposes an obligation to supply on the dominant undertaking and/or where the incumbents erected their gas transmission networks in a period during which their market position was largely protected by a regional monopoly granted by the State (as with gas pipelines) such detailed analysis may not be necessary [16].

The Commission took the view that the gas transmission networks of GDF and E.ON could be classed as an *essential facility* since access to them was objectively necessary to carry on business in the gas supply markets within the respective grid areas [17]. In fact, the Commission had already previously considered gas networks as being natural monopolies. Transport capacity on a transmission grid is a necessary input for gas suppliers to transport gas to their (potential) customers. Competing gas suppliers wanting to supply customers in the grids of the gas incumbents had no alternative than to use the gas networks' entry points to reach customers within these networks. The Commission rejected all claims that the transport infrastructure could be reproduced by competitors, inter alia because of the high investment costs, the planning risk and the duration of the construction of high-pressure pipelines [18].

In both cases the Commission found that GDF and E.ON not only controlled the markets for gas transport (via their affiliated TSOs), but that both companies also held a *dominant position* on various national gas import and supply markets supplied by their grids, which they could maintain or reinforce by foreclosing access to the transmission grid.

The refusal to supply — GDF's and E.ON's long-term capacity bookings and GDF's behaviour relating to its two LNG terminals at *Fos Cavaou* and *Montoir de Bretagne* — was in all cases found to be likely to *eliminate competition* and, given the importance of the pipelines for underdeveloped supply competition, there could be no doubt as to the risk of consumer harm.

The decisions found, finally, that there was no obvious *objective justification* for the alleged anticompetitive behaviour, according to the Commission's preliminary assessment [19].

Although the concept of anticompetitive long-term contracts is well established in antitrust law, it is worth noting that the main competition concern in both cases is markedly different from previous cases involving anticompetitive long-term contracts (such as the 'classic' beer cases [20]) or the Commission's recent energy cases concerning long-term supply contracts [21]. While it is common ground in European competition law that long-term *supply* contracts can be a means to foreclose competitors from their customer base [22], the GDF and E.ON investigations did *not* concern such long-term *supply* contracts with

(14) See Guidance on the Commission's enforcement priorities in applying Article 82 EC Treaty to abusive exclusionary conduct by dominant undertakings ('Article 82 Guidance Paper'), OJ C 45, 24.2.2009, p. 7, at paragraph 76.

(15) See e.g. Case IV/34.689 — *Sea Containers v Stena Sealink* — interim measures (OJ L 15, 18.1.1994, p. 8) and Case IV/33.544 — *British Midland v Aer Lingus* (OJ L 96, 10.4.1992, p. 34). See also Article 82 Guidance Paper, paragraph 76. It may be noted that the United States has drastically limited the scope of application of the essential facilities concept since the Supreme Court's famous '*Trinko*' judgment: see: http://www.fcc.gov/ogc/documents/opinions/2004/02-682-011304.pdf.

(16) See Article 82 Guidance Paper, paragraph 82: '*In certain specific cases, it may be clear that imposing an obligation to supply is manifestly not capable of having negative effects ... This could ... be the case where the upstream market position of the dominant undertaking has been developed under the protection of special or exclusive rights or has been financed by state resources. In such specific cases there is no reason for the Commission to deviate from its general enforcement standard of showing likely anticompetitive foreclosure ...*'

(17) See in this respect also the judgment of the Court in Case C-7/97 *Oscar Bronner* [1998] ECR I-7791, paragraph 46.

(18) See in this context also e.g. Case COMP/39.402 — *RWE*, paragraph 15; Case COMP/39.316 — *GdF Suez*, paragraph 27; BNetzA, decision of 5 December 2008 — BK4-07-106 (no competition on E.ON's transmission grid).

(19) It should be noted that both decisions — as commitment decisions under Article 9 of Regulation 1/2003 — only summarised the alleged anticompetitive behaviour. It was, therefore, not necessary for the Commission to discuss the issue of objective justifications in detail.

(20) See e.g. the 'beer' case C-234/89 *Delimitis v Henninger Bräu* [1991] ECR I-935.

(21) Cases COMP/37.966 — *Distrigaz* and COMP/39.386 — *EDF*.

(22) See e.g. Case C-234/89 *Delimitis v Henninger Bräu* [1991] ECR I-935 or Case COMP/37.966 — *Distrigaz*.

downstream customers, but reservations of *transport capacity* by the integrated company on its own transmission infrastructure. Thus, in these cases it was not the (downstream) customer base that was foreclosed, but the access of third parties to GDF's and E.ON's transport infrastructure. It may also be noted that, unlike in the case of long-term *supply* contracts, the long-term *capacity* contracts were concluded within the same company, i.e. the TSO and the gas supply branch of GDF and E.ON, which played a role for the choice of legal basis in the cases ([23]).

4. Remedies: release of capacity bookings

In order to allay the Commission's competition concerns, both GDF and E.ON decided to offer commitments to the Commission under Article 9 of Regulation 1/2003. The market test of the commitment proposals confirmed that they were suitable to entirely resolve the identified competition issues without being disproportionate.

The remedies that were considered adequate by the Commission to solve the issue of long-term capacity bookings consisted in a *significant reduction of the capacity bookings* of GDF and E.ON in their respective networks. In both cases, it was agreed to reduce the booking share of GDF and E.ON to a maximum of 50 % on their H-gas networks ([24]). Since such large reductions of long-term bookings require extensive preparation and time, e.g. for contractual rearrangements or capacity increasing measures ([25]), the remedy consists of two steps: in a *first step* ('Immediate Release'), GDF and E.ON will release significant capacities (around 10-15 % of the total capacity) at the most important entry points already at short notice (at the latest with effect as of October 2010/2011); in a *second step* ('Final Reduction'), GDF and E.ON will further reduce their overall share in the bookings of long-term entry capacity in the relevant networks to a maximum of 50 % by 2014 and 2015 respectively. GDF and E.ON also committed not to exceed these thresholds for ten years thereafter.

The release has to be carried out according to the national rules for capacity allocation (with some supplementary specifications). Due to the complexity of these network-related remedies, in each case a trustee will supervise the implementation.

Although not involving a business divestiture, the remedies are of a structural nature insofar as the release is irrevocable and the future booking situation will not remain dependent on the behaviour of GDF or E.ON ([26]).

5. Conclusion

The *GDF* and *E.ON Gas* cases (together with other commitment decisions in the energy sector) are a good illustration of the fact that commitment decisions under Article 9 of Regulation 1/2003 not only allow the Commission to solve a competition problem in a fast and efficient manner ([27]), but can also contribute to developing the Commission's antitrust case law further and to providing useful guidance on its interpretation of competition rules, notably with regard to Article 102 TFEU and the concept of refusal to supply. Since access to energy infrastructure remains a major barrier to competition in European energy markets, the Commission will continue its enforcement activities in this sector.

([23]) Article 101 TFEU, for example, does not usually cover agreements within the same company. In foreclosure cases concerning integrated TSOs and shippers belonging to the same parent companies, the application of Article 101 TFEU is therefore not evident. It may, however, be argued that TSOs and shippers in *unbundled* companies should be considered as separate companies also under competition law (pursuant to the Gas Regulation the transport business has to be legally unbundled from the gas supply business — see e.g. Article 9 of Directive 2003/55 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).

([24]) Due to the different characteristics of the market for low-calorific gas, a slightly different target was chosen for L-gas in the E.ON case: see Case COMP/39.317 — *E.ON Gas*, paragraph 69; on the different remedy for low-calorific gas in the *GdF Suez* case, see Case COMP/39.316 — *GdF Suez*, paragraphs 85 *et seq*.

([25]) In both cases, the reduction of the own booking share could also be achieved by expanding the available capacity, e.g. through investments in additional capacities.

([26]) It should be noted that, as the anticompetitive foreclosure in the *GdF* and *E.ON* cases resulted from the booking practices, a divestiture of GDF's and E.ON's gas transmission networks (as was considered an adequate remedy in the *RWE* and *ENI* cases) would not have resolved the competition problems identified, since the network would have remained fully booked and therefore inaccessible for competitors, even if the network was owned by another undertaking.

([27]) For a more detailed discussion of the use of commitments in antitrust cases, see Koch/Gauer: 'Energy liberalisation and competition law — the Commission's recent antitrust case practice', in: Simon Hirsbrunner, Dirk Buschle, Christine Kaddous (eds.): *European Energy Law/Droit européen de l'énergie*, Brussels, Bruylant, Paris, L.G.D.J., Basel, Helbing & Lichtenhahn, forthcoming. See for a decision under Article 7 of Regulation 1/2003 e.g. Case COMP/39.401 — E.ON/GDF.