

EU Competition law and Energy: Recent cases and issues

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



Overview of enforcement

- Sector enquiry 2005-2007
- 8 commitment decisions (Article 102 TFEU)
*Distrigas (2007), E.on (2008), GdF Suez (2009),
RWE (2009), E.on (2010), ENI (2010), EdF (2010),
Svenska Kraftnät (2010)*
- 1 prohibition decision with fines (Article 101 TFEU)
GdF / E.on (Megal pipeline) (2009)
- 2 Article 106 TFEU decisions
Greek Lignite (2008, 2009)



Overview of topical issues

- Definition of essential facilities
- New abuses:
 - Strategic underinvestment
 - Capacity bookings
- Competition and regulation
- Commitments v. prohibition

Essential facilities and refusal to supply

The ENI case



The ENI case

The theory of harm

- Vertically integrated incumbent controlling essential facility
- Refusal to supply:
 - Capacity hoarding
 - Capacity degradation
 - Strategic underinvestment
- Leading to the foreclosure and harm for competition and consumers

The commitments

- Divestiture of ENI's share in the relevant international pipelines

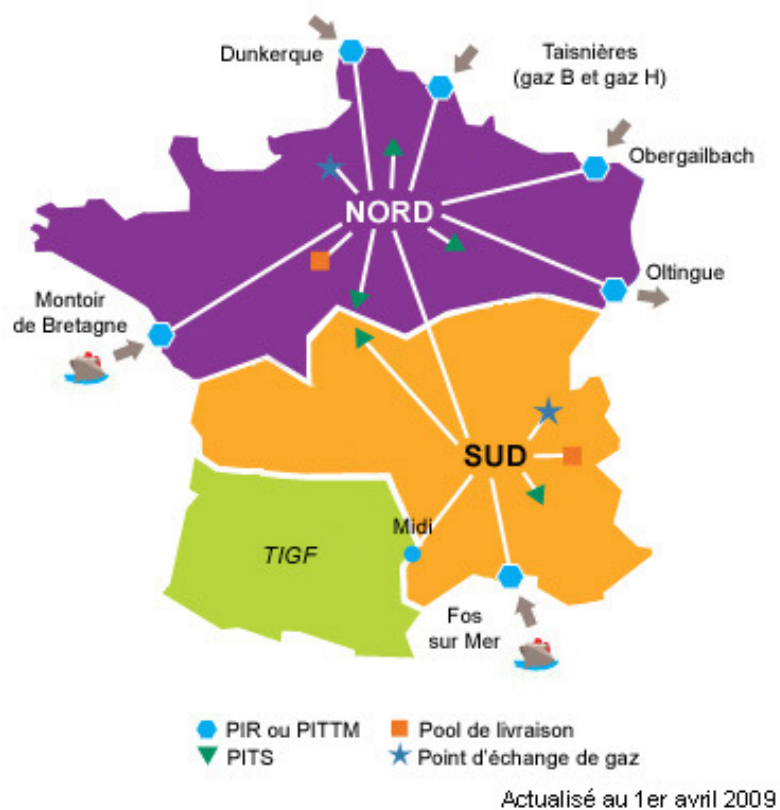


ENI Decision 29.09.2010

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GDF and E.ON gas foreclosure cases

Les points contractuels et les zones d'équilibrage en 2009



GDF and E.ON gas foreclosure cases

The theory of harm

- Refusal to supply by way of long-term bookings of almost all capacities on an essential facility
- Leading to the perpetuation of the dominance on the downstream markets

The remedies

- Objective: Make downstream markets contestable and increase investments incentives
- Immediate release of significant capacities at a mix of entry points
- Long term release: at least 50% of the long term capacity must be made available to third parties



Defining essential facilities

- *ENI*: All international gas import infrastructure to and into Italy = the essential facility
- Commission found no competitor could duplicate the infrastructure.
- What about part of it (e.g. for a region)? Would that be viable? (*Bronner discussion*)
- Suggested in decision that a duplicate infrastructure would lack sufficient volume to match ENI's system. Does it have to?



Defining essential facilities (2)

- *GdF*: Whole gas infrastructure and import capacity in France = essential facility
- Commission notes incumbent's rights are historic and/or date from pre-liberalisation, when shielded from competition (*Article 82 EC Guidance, para. 82*)
- Need to balance incentives to invest in infrastructure with third party access and incentives for competitors to build competing infrastructure (see AG Jacobs in *Bronner, Case C-7/97, para 57.*)



Strategic underinvestment

- *ENI*: Claim of strategic limitation of investments to protect itself from downstream competition (despite significant and credible long-term capacity demand from third parties).
- Similar *ENI* case brought by Italian Competition Authority: *Trans-Tunisian Pipeline* (2006). There, the incumbent had already committed to improve capacity and appears to have changed its position.
- *GdF Suez*: Similar claims re
 - (i) failure to invest in more capacity at one LNG terminal; and
 - (ii) deciding not to develop additional capacity at another terminal despite an “open season procedure” and request for firm capacity.
- Core idea is “share it or expand it”, when development profitable viewed in terms of transport service alone!



Capacity booking: use of capacity for incumbent's own needs (1)

- *E.on* Decision, para. 40 and fn 46

“... the mere fact that the current capacities may have been actually used by the essential facility holder for its supply business is not sufficient to exclude an abuse under Article 102 TFEU...”

... a dominant essential facility holder is under the obligation to take all possible measures to remove the constraints imposed by the lack of capacity (e.g. by limiting the duration and volume of its own bookings or by expanding its capacities).”

See also *ENI* Decision, para. 56 and fn 43; *RWE* Decision, para.23 and fn 25



Capacity booking: use of capacity for incumbent's own needs (2)

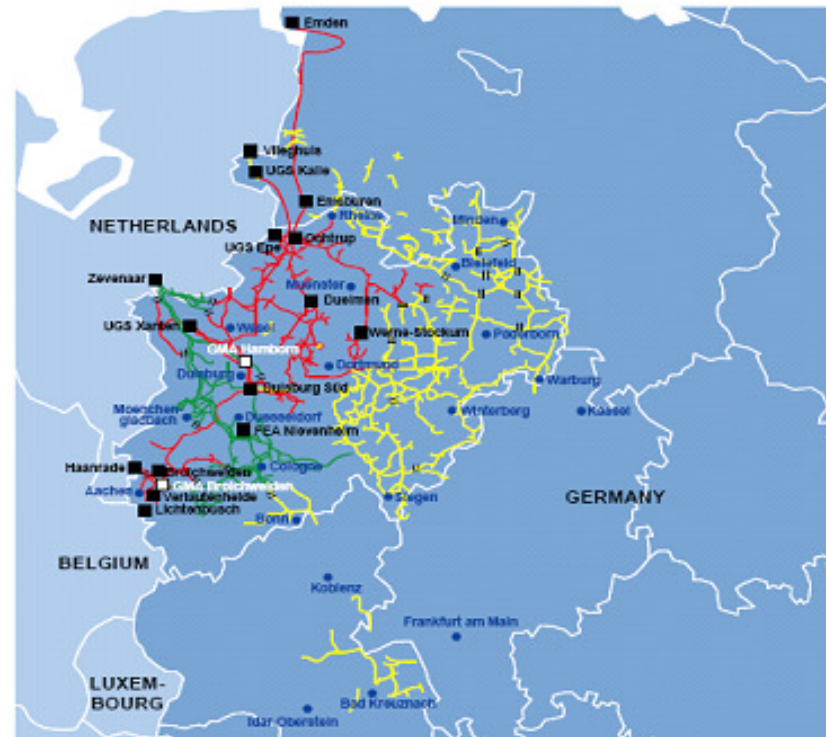
- Controversial - Not just “use it or lose it”.
- Impact of downstream commitments?
- Impact of upstream commitments?
- References to cases like *ABG*, *Sealink*, *Rødby* and *Frankfurt Airport* not entirely clear, but theme is that a dominant company has to take all reasonable steps to accommodate the new or expanding competitor.
- NB In *Frankfurt Airport* there was recognition that a monopoly or restricted access may be justified in some cases (lack of space; limits to co-existence of several competitors)



Competition and regulation

The RWE case

RWE's German Gas Market Areas



The RWE case

The theory of harm

- RWE vertically integrated incumbent
- Refusal to supply:
 - Primary capacity hoarding
 - Inadequate capacity management (RWE)
 - Margin squeeze (RWE)
- Leading to the foreclosure and harm for competition and consumers

The remedies

- Structural remedies are necessary and proportionate
- Divestiture of RWE gas transmission network



RWE Decision 17.03.2009

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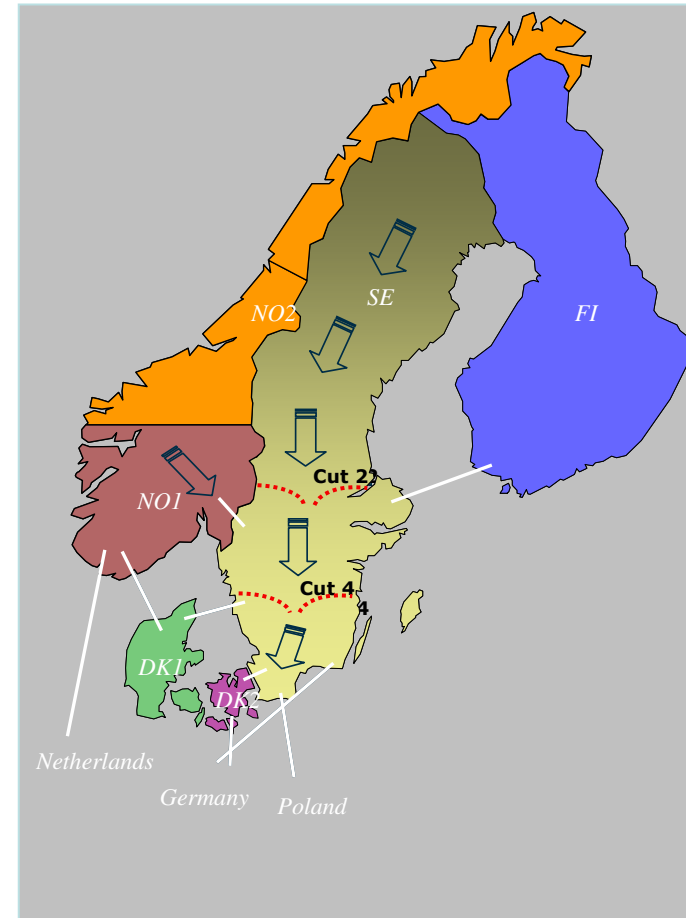
Issues

- Regulation and Article 102 TFEU
 - Complying with the national regulatory framework yet infringing Article 102 TFEU
- Are the powers of the Commission affected by the Council's regulatory choices (e.g. ITO v. unbundling)?



The Swedish interconnectors case

- Cheap hydro generation is located in the north
- Nearly all consumption is located south
- To keep Sweden as one price zone, the Swedish TSO SVK curtails on average 58% of available transmission capacity to neighbouring countries



The Swedish interconnectors case

Theory of harm

- Discrimination between transmission to consumers located inside and outside (the network of) Sweden without objective justification
- Segmentation of the internal market
- Reduces net consumer welfare
- Distorts generation and network investments signals

The remedies

- Subdivide the Swedish network into two or more bidding zones
- Cease curtailing trading capacity
Reinforce West-Coast-Corridor network by 30 November 2011
- In the interim period apply counter trade to reduce curtailing



SvK Decision 14.04.2010

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The Swedish interconnectors case

- A case focussed on discrimination and market integration
- Addressee: Svenska Kraftnät
- Article 102 TFEU and non profit-maximizing conduct



Issues (2)

- Possible impact of REMIT proposals (*Proposed Regulation on Market Integrity and Transparency*)
- What is market manipulation?... transactions which secure “abnormal or artificial” price levels, unless shown to be legitimate or accepted market practice... (Article 2.2 (a))
- Reference to the controversial *E.on* (2008) case
 - Alleged withdrawal of capacity from EEX Power Exchange, even though available and profitable... achieving higher prices on overall portfolio due to price increases caused by the withdrawal generation



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