

An Overview of Recent Energy Case Law from the CJEU

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*This talk does not contain any official position of the Court of
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Competition



C-331/21, *EDP – Energias de Portugal e.a.*, 26 October 2023

- Art 101 TFEU – Market sharing (non-compete) and cross-promotion agreement between an electricity supplier (EDP) and a food retailer (Modelo Continente, part of Sonae Group) >> restrictive of competition by object for Portuguese NCA
- The agreement coincided with the end of regulated tariffs >> strengthened the anticompetitive nature
- notion of potential competition: interpretation of *Generics UK* (C-307/18)
 - Legal test: where there, in the absence of the agreement, concrete possibilities for market entry (not just a mere possibility, or an intent – which can be taken into account), taking into account the structure of the market and the economic/legal context?
 - Existence of non-compete is indication of potential competition
 - Sonae Group had been supplying electricity in the past (might be proof of viable entry strategy today and not too high barriers to entry) and owned a co-generation plant

C-331/21, *EDP – Energias de Portugal e.a.*, 26 October 2023

- The association agreement cannot be considered as two (vertical) cross-agency contracts and thus does not escape the 101(1) TFUE prohibition as:
 - EDP and Modelo Continente do not operate upstream or downstream of each other
 - Cost of implementing the scheme is borne by the two companies (in agency agreement, agent bears no risk)
- The non compete could be an ancillary restraints only if it is objectively necessary for the implementation of that association and proportionate to its objectives
 - According to the parties, the non compete was necessary to cover the risk of Modelo Continente using the information regarding electricity consumption patterns
 - Where there any less restrictive alternative?
- Market-exclusion agreements in a liberalization context, signed by a dominant player, are probably restrictive by object

T-136/19, *Bulgarian Energy Holding e.a. / Commission*, 25 October 2023

- Complaint by Overgas, a Bulgarian gas supplier linked to Gazprom
- BEH is a vertically-integrated company, dominant on gas infrastructure (even if not always the owner) and supply markets (findings upheld by GC)
- Theory of harm: «constructive» refusal to grant third-party access to 1/ the Romania-Bulgaria transit pipeline (owned and operated by Romanian TSO but fully booked by Bulgargaz against an annual fee according to 2005 international agreement between BL and RO), 2/ Bulgarian gas transport network, 3/ (only) national gas storage facility (Chiren)
 - >> abuse of dominance (single and continuous infringement) in the gas retail market over 2010-2015 (Eur 77 Mns fine)
- GC annulled the decision in its entirety because, in short, Bulgargaz dominant on the gas transit pipeline but Commission did not demonstrate difficulties (that were real!) to use it could be imputed to Bulgargaz

T-136/19, *Bulgarian Energy Holding e.a. / Commission*, 25 October 2023

- Definition of the relevant markets: primary and secondary capacity markets on the transit pipeline are a priori one and the same relevant market, or at least it does not change the appreciation of Bulgargaz dominant position
- Bulgargaz dominant on the transit pipeline:
 - Exclusive right to use the transit pipeline >> only supplier of capacity on the secondary market
 - Transgaz needed consent of Bulgargaz to market unused capacity
 - In case of consent, Transgaz could market only short term and interruptible capacity

T-136/19, *Bulgarian Energy Holding e.a.* / Commission, 25 October 2023

- How to characterize the abusive conduct on the pipeline? >> interpretation of the *Bronner* case law when the dominant undertaking does not own the «essential facility»:
 - COM framed the abuse as a *Bronner*-type case, so 3 cumulative conditions: refusal to deal makes entry impossible in related market, indispensability / no feasible alternative, no objective justification
 - *Bronner* conditions are very restrictive, not to hamper innovation
 - COM usually escape the *Bronner* box in essential facility-type of cases and define autonomous types of abuse (*Lithuanian railways*, *Google Shopping*, etc.), in particular in energy (see commitment decisions such as *ENI...*)
 - GC said OK in the present case as:
 - the pipeline is a true essential facility
 - BEH controls the facility
 - The annual fee amounts to an investment in the pipeline

T-136/19, *Bulgarian Energy Holding e.a. / Commission*, 25 October 2023

- But COM did not establish unlawful refusal to deal on the pipeline :
 - A lot of it was attributable to Transgaz behaviour
 - Since 2013, Overgas obtained access despite limited secondary market
 - Bulgargaz did not oppose access request and was rather constructive in granting access
 - Mere exploratory questions with regard to request for access are not enough to show a sufficiently advanced intention to enter the Bulgarian gas market (notion of potential competition)
>> obligation to supply implies an explicit request and refusal
 - Re negotiation of the international agreement in 2005: State action defence
- COM did not totally establish either refusal to deal on the transmission market and, for the most part, at Chiren:
 - not enough to back the finding of a single and continuous infringement on the inter-related markets
 - Even if BEH sometimes adopted an anticompetitive *modus operandi*, it was incapable of restricting competition as rivals lacked access to the pipeline for reasons which are not attributable to proven abusive conduct
- Procedural irregularities:
 - access to file: documents related to meetings with Overgas + functioning of the ‘information room’

State Aid Cases

‘start of works’

Case C-11/22 Est Wind Power 12 October

- ECJ follows AG - is EWP an ‘existing producer’ of energy entitled to benefit from State aid for construction of a wind farm?
- ECJ required to interpret para 19(4) of EEAG (2014) concept of start of works’
- Note national court asks Comm for an opinion
- ECJ - emphasis is on whether preparatory works are completed and if significant and irreversible commitment to construction of project has been made

Procedures

‘interested party’

T-322/22 UNSA - June 2023

- Trade union lodged complaint with Commission re amendments to the French ‘ARENH’ scheme in 2022
- Concept of ‘interested party’ does not include a trade union
- No significant departure from existing case law

Procedures

AG in C-693 and C-698/21 *Naturgy Energy*

- The Commission should NOT have opened a formal investigation – i.e. no need to have had serious doubts about aid to de-sulphurise coal plant?
- NE claims the GC could not have found that Comm gave sufficient reasons for opening the formal decision - in particular on ‘selectivity’ of the measures
- Comm argues that as the opening decision is only preliminary – it can develop its reasoning in formal stage
- AG sides with NE – especially given implications for aid beneficiary of decision to open proceedings

Case C-700/2 České dráhy - 7 Dec 2023

Railway sector case

- Important ruling on limitation periods
- Comm cannot recover after 10 years – see Art 17 of PR 2015
- In 2008 CD had sold some of its railway operations to the national railway administration – deal challenged in national courts for failure to notify to EC for clearance
- Dual role of EC and national courts –in applying state aid rules – EU limitation periods do not apply at national level (subject to equivalence and effectiveness principles)

Covestro and Concept of Aid

- AG C-790/21P and C-791/21P **German transmission tariffs cases** – network charge exemptions in 2011 (Art 19 Stromgesetz)
- Note preliminary issue of admissibility – when does 2-month period start to run to challenge a decision – date it is made available or date of publication in OJ? AG -> the latter
- Problems derived from early case law on when tariffs were **state resources**:
- Had previous case law introduced two **cumulative** tests – so that the mere existence of a **tax or levy** was not enough – in addition had to show **state control over the financing mechanism** - or were these alternative tests?

- AG – 2 **tests are alternative**
- Was the tariff a ‘tax’? Or a ‘network fee’? What is decisive is whether the tax relates to the use of the network or is a mandatory charge
- AG clarifies earlier case law – EEG 2021 and DOBELES HES
- In EEG 2021 – collection of the surcharge was voluntary
- [see also C-794/21 INFINEON and C-800/21P GERMANY]

Administrative Law Cases

ACER Board of Appeal - standard of review

- Case T-212/20 OPG v ACER
- ACER selects GSA platform Prisma appeals
- 2018 - ACER BoA annuls ACER decision on gas booking platform at German Polish border (NRAs had failed to reach a decision) ACER had failed to provide evaluation criteria for tenders
- 2019 ACER takes new decision – two new operators selected
- 2019 OPG appeals to BoA; BoA upholds decision
- NB recast ACER Reg 2019 now in force - Art 28 changes BoA powers

- Key issue – should BoA have only carried out a marginal review of a complex technical assessment?
- No – a full review is required – as already established in **Case C-46/21 Aquind** of March 23.

Joined Cases C-212/21 P and C-223/21 P **Client Earth**

- Important victory for CE as ECJ upholds earlier ruling of GC and dismisses EIB's application (supported by EC) to annul on all counts ...
- General Court annulled the decision of EIB of 30 October 2018, which had rejected as inadmissible the request for an internal review of the resolution of the EIB's Board of Directors of 12 April 2018 approving the financing of a biomass power generation plant in Galicia (Spain)
- EIB and EC maintained that an EIB financing decision did not constitute an 'administrative act' (Article 2(1)(g) of Regulation No 1367/2006) and could not therefore be the subject of an internal review conducted by the EIB.
- ECJ affirms that the EIB is subject to a duty to conduct an internal review of its financing decisions, where such a review is sought by an environmental NGO.

Procuring a Platform

T-1/23 Enmacc v Commission

- On basis of Council Reg 2022/2576 EC sets up platform to co-ordinate gas purchases in wake of energy crisis of 2022.
- Its Art 5 allows EC to select a temporary provider following a procurement procedure – in accordance with its Art 6 and 7.
- EC uses a shortened/shortcut procedure -> negotiated procedure without prior publication of a contract notice as normally required. Justified by urgency of situation; EC did not however use ‘urgent open procedure’.
- Only operators who were invited to tender could participate – EC denied request of Enmacc to lodge a bid so latter challenges before GC
- Was EC letter denying Enmacc’s request an actionable decision ? [Note GC defers on this]
- Was the situation really urgent? EC had itself delayed launching the platform?
- Not clear whether platform addressed security of supply issues

A Snapshot of *Selected* Pending Cases

A Snapshot of Selected Pending Cases (1)

Crisis:

EU emergency measures

- Regulation 2022/1854 (price intervention – use of Art 122 as legal basis):
 - T-759/22, *Electrawinds Shabla South EAD/Council*; T-775/22, *TJ e.a./Council*; T-795/22, *TV & TW /Council*; T-802/22, *ExxonMobil/Council*, T-803/22, *TZ/Council*
 - C-633/23, *Electrabel e.a.* (calculation of windfall profits)
- Regulation 2022/1369 (coordinated demand reduction): C-675/22, *Poland/Council* [See also cases C-442-444-445/23]

National state aid schemes

- T-596/22, *RH e.a./Commission* (Spain)
- T-240/23, *LichtBlick/Commission* (Germany)

A Snapshot of *Selected* Pending Cases (2)

'Taxonomy' cases:

Delegated regulation 2021/2139 (bioenergy, forestry):

- T-575/22, *Robin Wood e.a. / Commission*, T-579/22, *ClientEarth / Commission*
- T-583/22, *Fédération environnement durable e.a. / Commission (Aahrus)*

Delegated regulation 2022/1214 (nuclear):

- T-567/22, *ATPN/Commission* 30 March 2023 ; T-628/22, *Repasi/Commission* 21 June 2023 : inadmissible
- T-214/23, *Greenpeace/Commission* ; T-215/23, *ClientEarth / Commission*
- T-625/22, *Austria/Commission* (lots of interveners)

A Snapshot of *Selected* Pending Cases (3)

Regulatory:

- T-526/19 RENV, *Nord Stream 2 / Parlement et Conseil*
- C-48/23 : *Alajärven Sähkö e.a.* - powers/independence of regulators (Finland, remuneration of TSOs)
- C-428/22, *Devnia tsiment* - who should constitute minimum oil stocks? (Bulgaria)
- C-371/22, *G* (Frais de résiliation anticipée – what does it mean to be able to switch supplier easily?) >> AG opinion of 7 September 2023
- Many other cases (energy taxation, consumer protection, TSO obligations, EU ETS, etc.)...

A Snapshot of *Selected* Pending Cases (4)

The Aarhus cases

Review of climate plans by EC (mainly based on Aarhus Regulation):

- T-331/22, *NLVOW/Commission* ; T-345/22, *Stöttingfjällets Miljöskyddsförening/Commission* ; T-346/22, *Föreningen Svenskt Landskapsskydd/Commission*; T-344/22, *Stichting Nationaal Kritisch Platform Windenergie/Commission*

Review of Council Regulation (EU) 2022/2577 of 22 December 2022 laying down a framework to accelerate the deployment of renewable energy

- T-534/23, *Föreningen Svenskt Landskapsskydd e.a. / Conseil* (+ plea of illegality ex Art 122, 192, 194) ; T-535/23, *CEE Bankwatch Network et Ökobüro / Conseil*

A Snapshot of *Selected* Pending Cases (5)

ACER cases:

- T-283/19, *Germany / ACER* (follow up T-631/19 *BNETZA/ACER*)
- T-446/21, *Commission de régulation de l'énergie / ACER*; T-472/21, *RTE / ACER*; T-482/21, *TenneT TSO et TenneT TSO / ACER*; T-476/21, *TransnetBW / ACER*; T-485/21, *BNetzA / ACER*; T-483-4/21, *Polskie sieci elektroenergetyczne / ACER* (Methodology for coordinating operational security analysis)
- C-282/23 P *APG/ACER* (European platform for the exchange of balancing energy)
- T-95/23, *RWE Supply & Trading / ACER* ; T-96/23, *Uniper Global Commodities / ACER* (Methodology for fixing price of balancing energy)
- T-556/23, T-557/23, *Swissgrid / ACER* (exclusion from the EU platform for the exchange of balancing energy)
- T-600/23, *BNETZA / ACER*; T-612/23, *Germany / ACER* (day-ahead & intraday CCM for the CORE region)

A Snapshot of *Selected* Pending Cases (6)

Competition:

- Mergers: T-5/21 e.a.: *EON/RWE asset swap* (second wave)

State aid:

- C-790/21 P, *Covestro DE/Commission e.a* (network charges exemption)
- C-701/21 P & C-739/21 P, *Commission / DEI* (preferential tariffs / arbitration)
>> AG opinion of 7 September 2023 (appeal dismissed)
- C-59/23 P, *Austria/Commission* (HU nuclear)
- T-409/21, *Germany / Commission*; T-690/21, *LW Capital / Commission*
(COGEN support scheme in DE)
- C-693/21 P and C-698/21 P, *EDP España / Naturgy Energy Group et Commission* (coal support in Spain – duty to state reasons): AG opinion of 13 July 2023

Thank you for your attention



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