

Antitrust Enforcement in the Energy Sector: Keeping the heat up in the EU?

The Future of Energy Sector Enforcement

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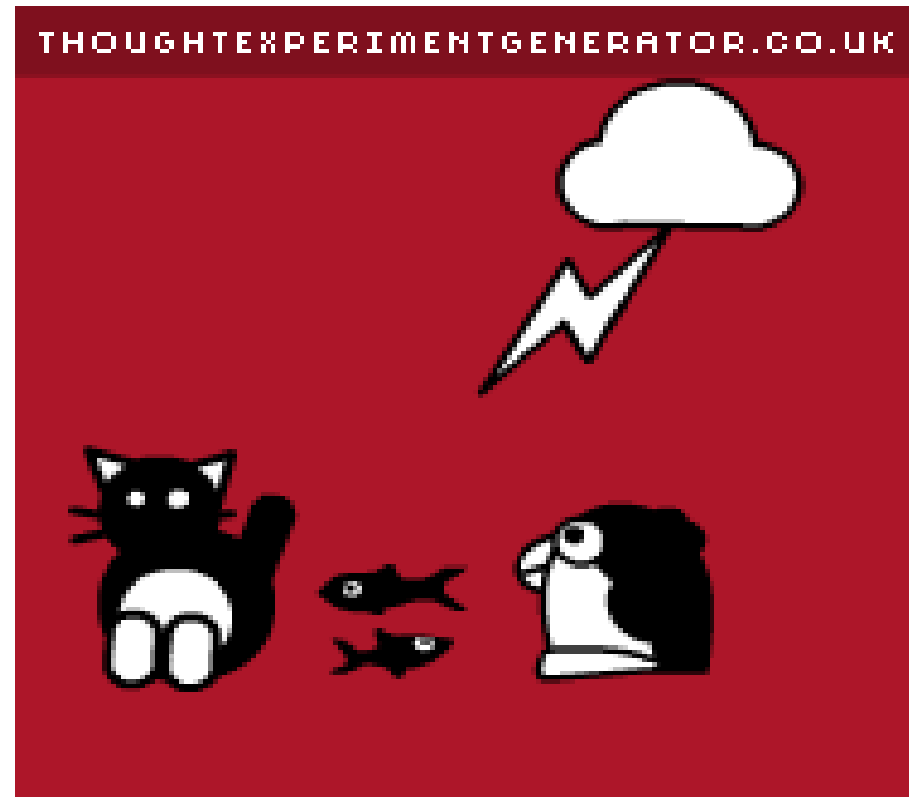
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The US and EU antitrust regimes – a comparison?



- Like comparing Penguins and Cats
- They both have the desire to eat the fish but have very different ways of going about getting them

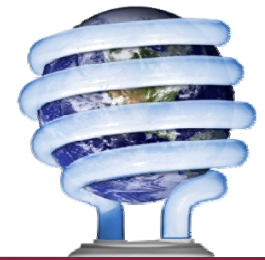


Key differences EU/US

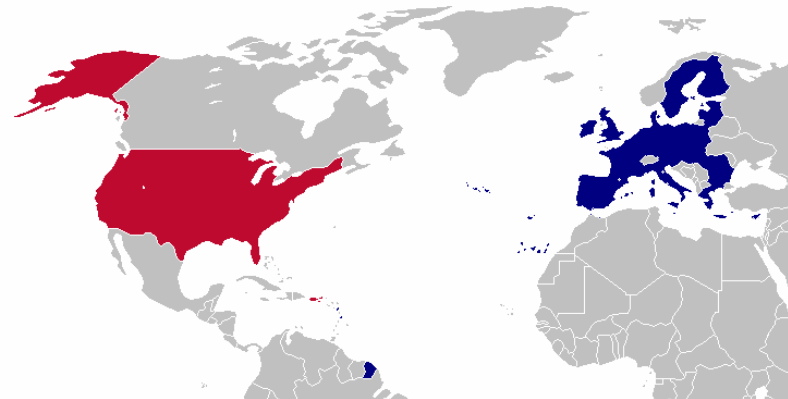


- Different entities
- Different enforcement structures
- Different enforcement environments
- Different energy industry characteristics
- Different antitrust focus

The EU – a different type of entity



- The EU is a confederal entity of 27 states, in contrast to the US which is a strong federal entity of 50 states.
- The EU does not have comprehensive powers – these are limited by the Member States, by Treaty



The EU system of antitrust enforcement – a different structure



- A single EU-level enforcement agency – the European Commission, through its Directorate General for Competition
- But EU antitrust law is also enforced by national competition authorities of the 27 EU Member States drawn together in the European Competition Network



Different enforcement environment



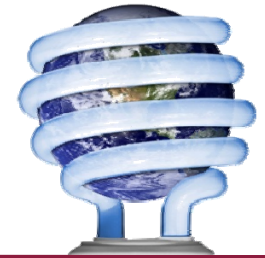
- Commission coming to end of 5 year term – 4.5 years in office
- European Commissioner for Competition - Neelie Kroes:
 - in office since November 2004
 - reputedly keen to stay on for the second 5 year term proposed by the Commission President
- Vigorous enforcement throughout –
 - record fines (Intel, 13 May 09 - €1.06 billion (abuse of dominance); St Gobain 2008 - €898 million for cartel conduct);
 - modernisation;
 - active review of policy – guidelines

Different enforcement environment



- Weak spot - private damages actions
 - Directive due shortly – requiring implementation in all 27 Member States
- No criminal powers
 - Individual Member States have criminal jurisdiction

Different enforcement environment - international outlook

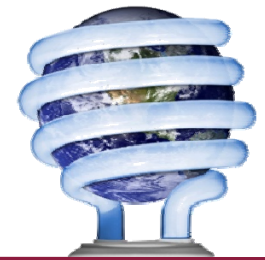


- Kroes:

- We need global responses. On the competition policy front the trend is in the right direction. A closer network of competition systems is slowly emerging after decades of work. Global rules on state aid would also be helpful.
- The current global crisis will not be solved through local regulation or through a protectionist re-nationalisation of global markets- scale up the regulatory response so that it fits better to a world where we are all in the same boat



EU regime – financial crisis

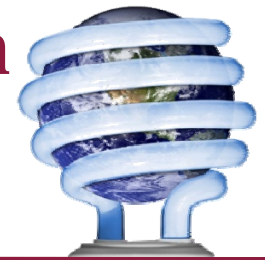


- Kroes:

- If the current financial and economic crisis has taught us anything, it is that there is a high price to pay when regulation fails, and that competition policy is essential for keeping our economy working well.
- We have spent the last five years developing, updating and streamlining our competition systems. Now we are cashing in on them as their efficiency and flexibility help us to cope with the current volatile market conditions,



Key Industries for Antitrust Enforcement in the EU

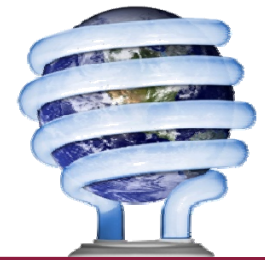


- Industries include:

- Insurance
- Financial services
- Pharmaceuticals
- Media
- Telecoms
- **Energy**



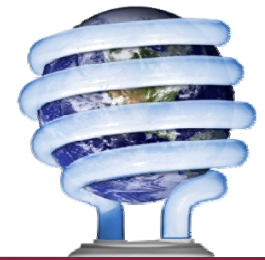
Different energy industry characteristics



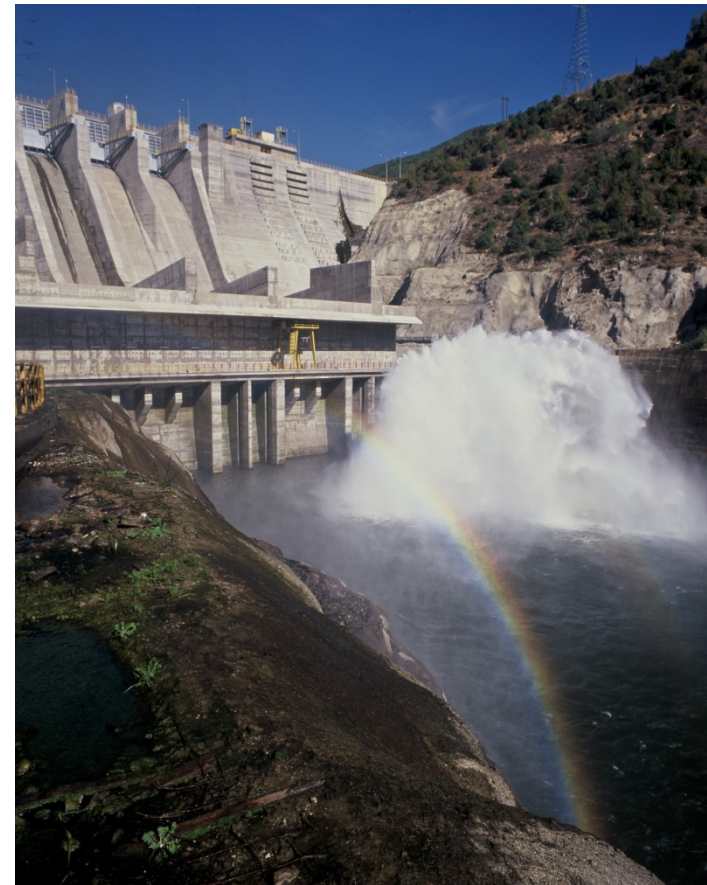
- Drivers differ from those in the US
- Majority of oil/gas supplies not within EU control
 - Finite EU resources - increasing demand
 - Increasing reliance on imports of oil and gas -- the EU as a whole is a significant importer of oil and derivative products - in particular from Russia (30%), Norway (17%), the Middle East (19%) and North Africa (12%)
 - Prices volatile
 - Policy is to develop diversified sources and pipeline routes, increase storage, develop alternative energies within EU control



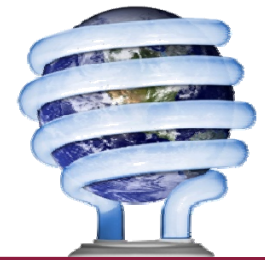
Different energy industry characteristics



- Insufficient competition between firms in different Member States
 - Increases prices and vulnerability of individual Member States to blackouts
 - Policy is to open up the EU common market to all firms
- Aged and inadequate infrastructure
 - Creates vulnerability to blackouts
 - Policy is to invest and open up connections between Member States
- Sustainability in the face of increased demand and climate change
 - Policy is to encourage renewables, energy efficiency and new technology



Different energy industry characteristics



- Energy Industry Is Closely Watched
 - Driven by a policy of “reliable access to energy at reasonable prices for all Europeans” in a climate of growing demand, insecure and scarce supply, increasing prices and global warming
- Three objectives:
 - Security of supply of oil, gas and electricity
 - Availability of affordable energy
 - Environmental sustainability and combating climate change

Antitrust policy in the energy sector



- Kroes:
 - Since I took office, it has been one of my main goals, together with Commissioner Piebalgs and the rest of the Commission, to try to move the process forward towards better and more competitive energy markets.

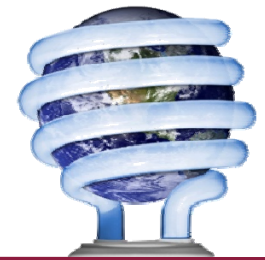


Energy sector – antitrust scrutiny



- Strong enforcement of antitrust powers in the energy sector
 - Energy sector inquiry
 - Several successful antitrust investigations
- Strong enforcement of merger law
 - Particularly vigorous pursuit of Member States' protection of national champions

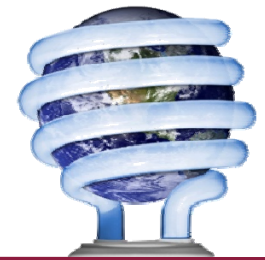
EU Energy Inquiry



- Reported January 2007
- Found shortcomings requiring antitrust action:
 - Market concentration
 - Vertical foreclosure
 - National markets segregated
 - Lack of transparency (general information, price formation)
 - Limited retail competition
 - Balancing markets that favour incumbents
 - Underdeveloped LNG facilities



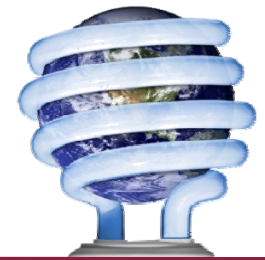
Use of antitrust powers to resolve vertical issues



- Vertical integration – political reluctance to legislate to require unbundling
- The E.ON case:
 - Commission decision finding abuse of dominance
 - As a transmission system operator - provided preferential transmission services to its own affiliate
 - As an electricity wholesaler – withdrew capacity to raise prices
 - Radical structural remedy: commitments to -
 - divest the E.ON transmission system business
 - divest a range of generation capacity



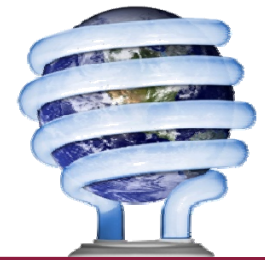
Use of antitrust powers to resolve vertical issues



- The RWE case:
 - Commission decision finding abuse of dominance
 - Refusal of access to RWE gas transportation system
 - Margin squeeze through artificially high transmission tariffs
 - Another radical structural remedy: divestiture of RWE's entire Western German high-pressure gas transmission network

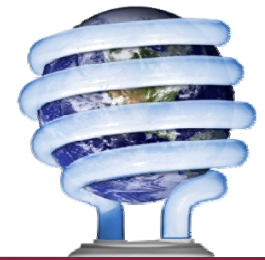


Use of antitrust powers to resolve vertical issues



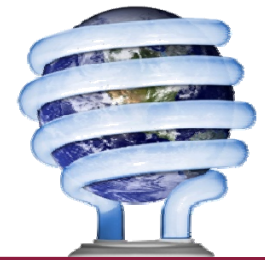
- **Kroes:** This very substantial set of remedies will fundamentally change the landscape of German gas markets, with the prospect of more competition and more customer choice. I am particularly satisfied that the divestment constitutes a clear-cut and lasting solution to the concerns the Commission raised, ensuring that RWE will no longer be able to use the control of its network to favour its own gas production affiliate over its competitors
- ENI – similar issues; the same remedy?

Use of antitrust powers to resolve market foreclosure



- Long term contracts
 - Distrigaz in Belgium – commitment to:
 - abandon long-term gas supply contracts (maximum to be 5 years)
 - wholesale to alternative suppliers
 - give customers unilateral termination rights with prior notice and without indemnity
 - EDF in France – amendment of agreements to grant an opt-out for customers wishing to contract with other suppliers

Use of antitrust powers to open up an EU-wide market



- Interconnectors – early stage investigation of interconnector issues in Sweden
- Regulation

Use of antitrust powers to stop collusion



- Market sharing: E.ON/GDF
 - agreement to keep out of each other's home market for the supply of natural gas transported over the MEGAL pipeline, jointly owned by E.ON and GDF
 - still to be decided



Use of antitrust powers against governments



- Sonatrach (Algeria)
 - Supply contracts restricted sales of gas outside territory of EU buyers
 - Dialogue Neelie Kroes / Algerian Minister for Energy and Mines resulted in agreement to:
 - Deletion of territorial restrictions from all existing contracts and no insertion in future contracts
 - Restrict profit sharing mechanisms having the effect of restricting sales outside territory
- Gazprom – similar issues

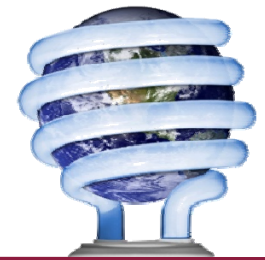
Use of antitrust powers against governments



- Malta fuel monopoly
 - former state monopoly Enemalta – exclusive rights over the import, storage and wholesale of petroleum products
 - Commission infringement proceedings
 - Malta settled by putting in place new procedures to allow other market participants to apply for licences
- Dawn raids on EDF in France, 2009
 - suspected of taking action to raise prices on the French wholesale electricity market
- State aids investigations



Energy Mergers: national interests



- Bids for Endesa – curbing national protectionism
 - Competing bids
 - Bid by Gas Natural cleared by Spanish merger authorities (two thirds rule) - with few regulatory conditions
 - Bid (higher value) by E.ON cleared by European Commission - but with a long list of regulatory conditions
 - Commission action against Spain – Spain withdrew conditions eventually but E.ON did not acquire Endesa
- Abolition of the two-thirds rule?

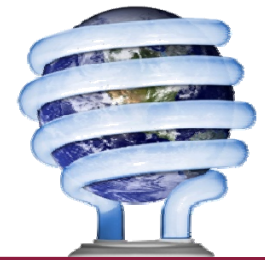
Energy Mergers: nuclear



- EDF/British Energy
 - BE – UK’s nuclear power generator
 - EDF – French state-owned with significant nuclear expertise (lost to the UK)
 - Concerns regarding:
 - ability to withdraw generation capacity to raise prices
 - increased internal use of electricity that would otherwise have been sold to the market – reducing liquidity
 - ownership of most sites likely to be suitable for new nuclear build – no access for competitors
 - rights to connections to the electricity transmission network beyond combined capacity expansion plans – blocking competitors



Energy Mergers: nuclear



– Remedies

- Sale of two power stations
- Commitment to sell minimum volumes of electricity in the wholesale market for a certain period of time to aid liquidity
- Divest a site potentially suitable for building a new nuclear power station
- End one grid connection agreement



Conclusion



- Continued vigorous enforcement of competition rules in the energy sector
- Further structural change likely through antitrust commitments
- Substantial fines
- Encouragement of private damages
- Increased action by Member States

Questions?

