Abuse of Dominance in the Energy Sector

- A European Perspective -

presented by
ICN Unilateral Conduct Working Group

Tuesday, November 8th, 2011
Introductory Remarks

• This Teleseminar will be recorded and posted on the ICN website

• Audience will be muted during the presentation portions of the teleseminar

• Audience lines will be unmuted during Q&A sessions following the opening presentations and case studies
Program

- **Moderator:** Gerrit Brauser-Jung, Former Head of Competition Law and Regulation Unit, Bundeskartellamt, Germany

- **I. Introduction**

- **Presentation by Oliver Koch,** European Commission DG Competition, Energy Unit - The Commission’s Antitrust Enforcement in the Energy Sector

- **Presentation by Juan Alcázar,** Inspector Jefe of the Industry and Energy Unit of the Spanish Competition Commission - Coordination between the Spanish National Competition Commission (CNC) and the National Energy Commission (CNE)

- **Comments by George Addy,** from Davies Ward Phillips & Vineberg, Toronto to open Q&A Session
Program

II. Case Studies

Case Study - Case A358 – International transport of gas, ENI – TTPC, presented by Carlo Bardini, Deputy Director of the Directorate for Energy of the Italian Competition Authority

Comments by Assimakis Komninos from White & Case in Brussels to open Q&A Session

Case Study - Case 641-645/08–Centrica’s Cases, presented by Juan Alcázar, Inspector Jefe of the Energy Unit of the Spanish Competition Commission

Comments by George Addy from Davies Ward Phillips & Vineberg, Toronto to open Q&A Session
The Commission’s Antitrust Enforcement in the Energy Sector

ICN UCWG Webinar
Abuse of Dominance in the Energy Sector
The EU experience
8.11.2011

Dr Oliver Koch*,
European Commission - DG Competition
Unit B-1 - Energy and Environment

* All views expressed are personal and do not commit the European Commission
I. EU Energy Antitrust Enforcement: *Recent Case Examples*

II. EU Energy Antitrust Enforcement: *Issues*

=> *Competition in the energy sector is underdeveloped - even 10 years after liberalisation*

- Highly Concentrated markets (monopolies/oligopolies)
  - No market integration: most markets still national or smaller
    - Vertical integration (grids): incentives for network foreclosure
      - Insufficient investments / wrong investment signals
      - Missing transport capacities for entrants
    - Lack of transparency, etc.

=> *Lack of competition* on downstream markets
‘primary capacity hoarding’

‘pre-emptive long-term booking’

‘abusive maintenance of pricing zones’

‘strategic underinvestment’

‘capacity degradation’

‘capacity withholding’
<table>
<thead>
<tr>
<th>Case</th>
<th>State-of-play</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Exclusionary abuses (network related)</strong></td>
<td>– Remedy decision (2009)</td>
</tr>
<tr>
<td>– ENI (hoarding / ”underinvestment”)</td>
<td>– Remedy decision (2009)</td>
</tr>
<tr>
<td>– E.ON (long-term capacity bookings)</td>
<td></td>
</tr>
<tr>
<td>– Distrigaz (long-term supply contracts)</td>
<td>– Remedy decision (2010)</td>
</tr>
<tr>
<td>– EDF</td>
<td></td>
</tr>
<tr>
<td><strong>Exploitative abuse</strong></td>
<td>– Remedy decision(2008)</td>
</tr>
<tr>
<td>– EON Electricity (capacity withholding/balancing)</td>
<td>– Remedy decision (2010)</td>
</tr>
<tr>
<td>– Swedish Interconnectors</td>
<td></td>
</tr>
<tr>
<td><strong>Art. 101 TFEU</strong></td>
<td>– Fines decision (2009)</td>
</tr>
<tr>
<td>– EON / GdF (market sharing)</td>
<td>– Remedy decision (2008 / 2008)</td>
</tr>
<tr>
<td><strong>Art. 106 TFEU</strong></td>
<td>– Opening of Proceedings (2011)</td>
</tr>
<tr>
<td>– Greek Lignite (insufficient access to lignite)</td>
<td>– Inspections (2011)</td>
</tr>
<tr>
<td><strong>New investigations, inter alia:</strong></td>
<td></td>
</tr>
<tr>
<td>– CEZ (electricity wholesale)</td>
<td></td>
</tr>
<tr>
<td>– CEE Upstream Gas Markets</td>
<td></td>
</tr>
</tbody>
</table>
EU Energy Antitrust Enforcement: *Types of Cases*

- Customer foreclosure
- Network foreclosure
- Others
1. Customer Foreclosure Cases: Distrigaz / EDF

**The theory of harm**

- **Long term exclusive supply contracts** with industrial consumers by incumbents leading to foreclosure of the market

- **Resale restrictions** reinforcing illiquidity of the wholesale market (EDF)

**The remedies**

- Limitation of long-term supply contracts: around 2/3 of volumes must come back to the market/year

- max. 2-5 years duration for new contracts

- No more resale restriction
2. Network Foreclosure Cases

- Gas networks are **essential facilities**

- **Refusal to supply** in various forms
  - Capacity hoarding
  - Margin squeeze
  - Inadequate capacity management
  - Strategic limitation of investments
  - Long term capacity bookings by the incumbent shipper

- Lack of available capacity or long term upstream contracts are **no objective justification**

- Four different cases: RWE, ENI, GDF, E.ON gas
“Classic” Foreclosure Cases: RWE and ENI

The theory of harm

• RWE and ENI are *vertically integrated* incumbents

• Refusal to supply:
  – Capacity hoarding (both)
  – Inadequate capacity management (RWE)
  – Margin squeeze (RWE)
  – Strategic underinvestment (ENI)

• Leading to the *foreclosure* and harm for competition and consumers

The remedies

• *Structural remedies:*
  – *Divestiture* of RWE’s gas transmission network
  – *Divestiture* of ENI’s share in the relevant international pipelines

• Remedies were *necessary* (no other equally efficient remedy) and *proportionate* (no excessive burden)

=> similar abuse impossible
Example:
Evidence for "secondary capacity hoarding"
Long-Term Booking Cases: GDF and E.ON

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: around 50% of the long term capacity must be made available to third parties
- (!) Grid divestiture would not have solved the issue
Example:
Booking Situation resulting from Long-Term Bookings

<table>
<thead>
<tr>
<th>Year</th>
<th>Techn. capacity - Bookings</th>
</tr>
</thead>
<tbody>
<tr>
<td>2009/10</td>
<td>25,000</td>
</tr>
<tr>
<td>2010/11</td>
<td>25,000</td>
</tr>
<tr>
<td>2011/12</td>
<td>25,000</td>
</tr>
<tr>
<td>2012/13</td>
<td>25,000</td>
</tr>
<tr>
<td>2013/14</td>
<td>25,000</td>
</tr>
<tr>
<td>2014/15</td>
<td>25,000</td>
</tr>
<tr>
<td>2015/16</td>
<td>25,000</td>
</tr>
<tr>
<td>2016/17</td>
<td>25,000</td>
</tr>
<tr>
<td>2017/18</td>
<td>25,000</td>
</tr>
<tr>
<td>2018/19</td>
<td>25,000</td>
</tr>
</tbody>
</table>
3. Other Cases: E.ON Capacity Withholding/Balancing

**The theory of harm**

- E.ON (collectively) dominant

- **Withdrawal of available generation** capacity with a view to increasing electricity wholesale prices

- Leading to price increases and harm for consumers (exploitation)

**The remedies**

- Structural remedies are necessary and proportionate

- Divestiture of ~20% of E.ON’s German generation portfolio (power plants along the entire merit curve)
Illustration: Withholding of capacity

<table>
<thead>
<tr>
<th>Fuel Type</th>
<th>Offer</th>
<th>Price</th>
<th>Demand</th>
</tr>
</thead>
<tbody>
<tr>
<td>Hydro</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Nuclear</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Lignite</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Coal</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Gas</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

€/MWh

MW
Illustration: Withholding of capacity

€/MWh

Demand

Price

Offer

Hydro Nuclear Lignite Coal Gas

MW

20
Illustration: Withholding of capacity

- Price
- Demand
- Offer
- Hydro

€/MWh vs MW
3. Other Cases: Swedish interconnectors

- 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.
### 3. Other Cases: Swedish interconnectors

<table>
<thead>
<tr>
<th><strong>Theory of harm</strong></th>
<th><strong>The remedies</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>• Discrimination between transmission to consumers located inside and outside (the network of) Sweden without objective justification</td>
<td>• Subdivide the Swedish network into two or more bidding zones</td>
</tr>
<tr>
<td>• Segmentation of the internal market</td>
<td>• Cease curtailing trading capacity Reinforce West-Coast-Corridor network by 30 November 2011</td>
</tr>
<tr>
<td>• Reduces net consumer welfare</td>
<td>• In the interim period apply counter trade to reduce curtailing</td>
</tr>
<tr>
<td>• Distorts generation and network investments signals</td>
<td></td>
</tr>
</tbody>
</table>
3. Other Cases

• GDF/E.ON: Collusion (market sharing)

• Greek Lignite (anti-competitive state measures)

• ongoing cases
II. EU Energy Antitrust Enforcement: 

Issues
• Boundaries of competition law in regulated markets – “Regulatory Defence?” (e.g. „Deutsche Telecom“ judgement)

• Advantages of antitrust enforcement in regulated markets

• Risks of antitrust enforcement in regulated markets
Issue: Regulation <-> Competition Law

**DG COMP**

Competition Law

- Individual enforcement of Article 101 and 102 (Obligation under EU Treaties)
- Individual (significant) cases => Remedies

**Commission (DG ENER)**

Regulation / Monitoring

- General improvement of competitive conditions
  - 3rd Package
  - Codes
  - Guidelines
  - Infringement Procedures

**Competition on energy markets**

**Competition experience**
Thank you very much for your attention
Recent Commission Cases (Energy)

Commitment decisions (Article 102 TFEU)


Recent Commission Cases (Energy)

Prohibition decision with fines (Article 101 TFEU)


Decisions based on Article 106 TFEU


Opening of proceedings (Article 102 TFEU)

Articles (European Competition Newsletter)


Coordination between the Spanish National Competition Commission (CNC) and the National Energy Commission (CNE)

Modified by Law 2/2011, of March 4th, of Sustainable Economy -

Juan Alcázar
Distribution of functions

- Control of anticompetitive practices
- Non-discriminatory access to essential facilities
- Periodic assessment of market power
- Technical regulation
- Economic regulation

Functions of Competition Authority

Shared functions

Functions of Regulator
Delimitation of functions

- **Competition**: competitive practices and merger control - instruction, resolution, monitoring and arbitration (art. 24 LDC)
- **Consultative function** (art. 25) on issues of competition (regulatory projects, department stores, quantifying damage compensation, etc.)
- **Competition Promotion** (art. 26) research studies, industry reports, public assistance, proposed regulatory changes, ex post evaluations, etc.

- **Technical regulation**: energy planning, licensing of facilities, security of supply, quality of service, technical inspection of facilities, etc.
- **Competition**: ensure respect for the principles of free competition, inform merger operations, conflict of access to transport and distribution network.
- **Others**: reimbursement of costs of transportation and distribution, authorize investments in companies in regulated sectors, unbundling, fixation of rates, tolls and payments for energy activities
Coordination between the CNC and sectoral regulators

- **Competition Regulation**
  - Article 17 LDC: Coordination with sectoral regulators
    - Mutual transmission of information on actions
    - Non-binding opinions pursuant the application of sectoral regulation and the LDC
    - Regular meetings of the Presidents
    - Other formal and informal coordination mechanisms

- **Amended by Law 2/2011, of March 4th, of Sustainable Economy**
  - Substitutes mandatory and non-binding reports for decisive
  - It contains specific provisions for monitoring
  - Allows the drafting of reports on the initiative of sectoral regulators
Coordination between the CNC and sectoral regulators (II)

- **Competition Regulation**
  - Article 17 LDC: Coordination with sectoral regulators
    - **COOPERATION** in the exercise of its functions in matters of common interest, respecting, in any case, the powers conferred to each of them. “
      - Cooperation vs Coordination
    - **“MUTUAL TRANSMISSION,” ex oficio or at request, of information about their respective actions.”**
  - Intervention of the sectoral regulators in the proceedings before the CNC:
    - Merger control
    - Antitrust
    - Monitoring
Coordination between the CNC and sectoral regulators (III)

- **Competition Regulation**
  - **Article 17 LDC**: Coordination with sectoral regulators
    - **ANTITRUST**: shall notify the CNC acts, agreements, practices or conducts from which they may have knowledge that could be contrary to the Competition Act, providing all the facts at their disposal and attaching, when appropriate, the decisive opinion.
    - **MERGER CONTROL**: The National Competition Commission shall request the sectoral regulators the issuance of the corresponding decisive report in the context of merger control cases of companies operating in the area of jurisdiction
    - **MONITORING PROCEDURE**: Regulators may issue a report on its own initiative when, as a result of changing market structure or the regulation developed by the former, it is considered that the conditions or commitments imposed by the CNC have become unnecessary or should be changed
Coordination between the CNC and sectoral regulators (IV)

- **Competition Regulation**
  - Article 17 LDC: Coordination with sectoral regulators

  - **MONITORING PROCEDURE:** Regulators will also be asked during the monitoring procedure of the resolutions of the National Competition Commission:
    - Upon detecting the existence of a breach of the conditions or commitments imposed by the resolution under surveillance
    - When having fulfilled the conditions or commitments imposed and the ID is above to propose the termination of the surveillance
    - When the authorized company requests any suspension, modification or waiver of the obligations imposed by the resolution under surveillance

Proceedings before the CNC

Proceedings before the CNE

- Request for report to the CNC on the circulars, instructions, decisions or resolutions that may have significant impact on competitive conditions in the markets.
Law 2/2011, of March 4th, of Sustainable Economy

- **Decisive Reports:**
  - **STS:** technical reports, non-binding but necessary for the decision-making body to decide, to the extent they provide specific technical knowledge in a particular subject or discipline
  - Decisive for the technical content but never for the sense of the decision: essential to avoid interference with skills that are not their own
  - **Added value:** providing data and technical advice
    - Allows the ID the formation of a lawsuit to make proposals to the Council and to put at the disposal of the Council all the necessary data for its decision
    - Do not review the procedure
  - Best moment for the issue: Usually before SO(to complete it). Case by case approach.
  - **Mechanism:** at the request of the ID, which must indicate the scope to which it extends.
Law 2/2011, of March 4th, of Sustainable Economy (II)

- **Coordination mandates:**
  - **Article 16 RDC:** Coordination between Presidents of CNC & the sectoral regulators:
    
    “3. The Presidents of the National Competition Commission and the respective sectoral regulators will meet at least annually to discuss the general guidelines that will guide the action of the institutions they govern and to establish, where appropriate, formal and informal mechanisms for coordination of their actions. The invitation, operation and conclusions of these meetings will be held as provided in Article 24 of Law 2/2011, of March 4th, of Sustainable Economy”

  - **Article 24 LES:** Meeting to discuss market developments in their respective sectors, to exchange experiences regarding the regulatory and supervisory measures applied and share experiences that contribute to a better understanding of markets and a more effective decision making in the field of their respective powers.

  - **Rotation system,** starting with the chairman of the senior institution. The conclusions of the meeting will be published by the participating institutions
Law 2/2011, of March 4th, of Sustainable Economy (III)

- The Regulators and the National Competition Commission will agree and establish the necessary protocols to facilitate the implementation of the provisions set forth in Article 17 of Law 15/2007.
  - Collaboration agreements
  - Ad hoc meetings
  - Technical training courses and education
  - Regular meetings
  - Joint market researchs
Regulatory conduct defence

- Coordination: Art. 26.2 LDC: “The National Competition Commission shall ensure the consistent application of competition law at the national level, particularly through the coordination of action with sectoral regulators and the bodies of the Autonomous Communities and cooperation with competent courts.”


<table>
<thead>
<tr>
<th>Ex- Ante</th>
<th>Ex- Post</th>
</tr>
</thead>
</table>
| Imposes anticompetitive behavior | - In some cases, exemption to the application of competition law (Regulation rank!)
- Active legitimation: Art. 12. 3 LDC: “The National Competition Commission is entitled to challenge before the competent court administrative acts and general rules of lower rank than the law that arise constraints to the maintenance of effective competition in the markets.”
  » Term: 2 months
- Companies have certain degree of discretion
- Competition Law must be obeyed
- Regulation may be considered to adjust the sanction (extenuating circ.) |
Comments by

George Addy

Question & Answer Session
Italian Competition Authority
Case A358 - International transport of gas, ENI - TTPC

(2005-2006)

Carlo Bardini
Case A358 - the background

- A great share of Italian gas consumption is covered by means of import (84% in 2004, today even more)
- In the years of the facts (2002-2003), only three major pipelines bringing gas to Italy from abroad were active, plus a small LNG facility
- One of the existing pipelines brought gas to Italy from Algeria
Case A358 - the background

- Trans Tunisian Pipeline Company Ltd (TTPC) is a firm completely controlled by ENI,
- TTPC owns until 2019 the rights of use of the gas pipelines that brings, passing through Tunisia, natural gas from Algeria to the Mediterranean sea.
- A second pipeline (TMPC, also controlled by ENI, jointly with Algerian gas producer Sonatrach) then brings the gas from Tunisian coasts to Sicily
Case A358 - the background
Case A358 - the origins

- In the year 2002 ENI offered a commitment in the context of a previous antitrust case, SNAM-BLUGAS, which was not a network foreclosure case.
- In particular, ENI had offered to double the capacity of the pipeline bringing gas from Algeria to Italy through Tunisia (TTPC) and the Mediterranean sea (TMPC)
- 2002–2003: TTPC had decided to increase transport capacity of the pipeline (for 6,5 billion cm/year)
- March 2003: TTPC signed with some operators (shippers) transport contracts for the extra capacity (to be used starting from march 2007) including a ship or pay clause
Case A358 - the facts

• In order to enter contracts with TTPC, shippers had to gain a series of pre-requisites, including:
  – all the relevant Italian and Tunisian permits and authorizations
  – contracts for the supply of Algerian gas
  – contracts for the transit of gas through TMPC

• Pre-requisites had to be possessed by June 30th 2003; on TTPC’s request, deadline was then moved to October 30th 2003

• On November 2003 TTPC checked all the applicants. None of them was found to have all the pre-requisites, thus all contracts were terminated
Case A358 - the facts

- According to AGCM, pre-requisites were not indispensable. They had been imposed by TTPC’s owner and controller, Eni, which also dictated the decision of solving the contract.

- Eni feared an excess of gas supply in Italy ("Gas Bubble"), given its long term take-or-pay supply contracts. Thus Eni decided to delay the strengthening of the TTPC/TMPC import system.
Case A358 – the facts

• During the investigation, evidence was found demonstrating ENI’s new plans aimed at delaying the building of the extra capacity of TTPC pipeline.
• In particular, letters were found, sent from ENI to TTPC demonstrating:
  – The influence of ENI over the decisions of its subsidiary
  – The willingness of ENI to stop the construction of the new capacity in order to preserve its downstream position in a context of stagnating demand
  – The use, to this aim, of existing contractual clauses between TTPC and the shippers,
Case A358 - the abuse

- Eni was (and still is) dominant in the national Italian market of wholesale gas supply

  ↓

- Eni’s decision to save its dominant position by foreclosing the access of competitors to import assets was qualified as an abuse of dominance
Case A358 - the abuse

• It is important to note that - contrary to what the Commission has done later on (in the four gas network foreclosure cases started in 2006) - the decision of the ICA did NOT address an hypothesis of underinvestment within an “essential facility” framework.

• The crucial insight here is that the relevant dominant position of ENI in the view of the ICA in the TTPC case was on the downstream market (Wholesale Italian gas market) and not on the input (pipeline/essential facility) market.
Case A358 - the abuse

- According to this approach, ENI was not supposed to have an obligation to build the extra-capacity of TTPC as an essential infrastructure, (and, thus, what was at stake was not the violation of such an obligation).

- Being an undertaking in dominant position in the downstream market, however, ENI had an obligation not to induce its TTPC subsidiary to change a decision autonomously taken with the sole aim of preserving/strengthening ENI’s dominant position.
Case A358 - the abuse

• Thus, the infringement was identified in the adoption of a restrictive behaviour (the retreat from the capacity enlargement decision that had been autonomously taken by ENI itself) that was capable of having the effect of weakening ENI’s competitors in the Italian wholesale gas market.

• As a consequence, in this case the network foreclosure could be sanctioned as an abuse of ENI’s dominant position no matter whether the single pipeline had to be regarded as an essential facility or not.

• This result, of course, rests upon at least two special features:
  – The existence of a dominant position on the downstream market
  – The type of behaviour (here: the change of a previous, autonomously taken, decision)
Case A358 - the abuse

• A further consequence of not resting upon the concept of essential facility was that the argument of a possible “objective justification” of ENI’s behaviour was less stringent.

• In a context of stagnating demand ENI was probably going to have commercial damages from the arrival of new gas into the Italian market, given its reliance on long term take or pay contracts. While this might have been used as a justification against a charge of underinvestment in a new transport infrastructure (in an “essential facility” context), it is less useful as a defense against a charge of positive behaviour (inducing the subsidiary to terminate the contracts with shippers) held by a firm in dominant position in the downstream market.
Final decision was adopted on February 15th 2006. Eni was found guilty of abuse of dominance.

TTPC was forced to build the extra-capacity in two steps:

- 3,2 billion cm by April 1st 2008
- 3,3 billion cm by October 1st 2008

Eni was fined for 290 million euros.
Case A358 - the judicial review

- Administrative judges agreed with the reconstruction of the ICA. However, they ordered the ICA to reduce the amount of the fine, because the violation was not a “typical” one, i.e. it could not be easily perceived by ENI
- On December 2010 the Consiglio di Stato (the Italian superior court) finally ordered to set the fine to 20 million euro
Comments by
Assimakis Komninos

Question & Answer Session
The Centrica’s Cases of the Spanish Competition Commission

Abuse of dominance in the energy sector

Juan Alcázar
Companies

DEFENDANTS:
- Main electricity companies in Spain
- Vertically integrated
- Actively operating in both the commercialization and the distribution market
- Some of them: former state monopolies

COMPLAINANT:
- New entrant in the commercialization market (right after liberalization)
- Offers to be entrusted with the management of the application for third party access to the grid (ATR)
  - Essential facility to be able to supply
Regulation

- Act 54/1997 of 27 November, on the Electricity Sector (*Ley del Sector Eléctrico* – LSE-):
  - Separation of activities:
    - Generation
    - Commercialization
    - Transport
    - Distribution

- Free competition

- Regulated activities

- Regulated Activities: “Transport and distribution will be liberalized by means of the generalization the third party access to the grid. The grid ownership does not guarantee its exclusive use.”

- Free activities: “A transitional period is established for the liberalization process of the commercialization of the electric energy to progressively develop, so that freedom of choice will become a reality for consumers in a ten years term.”

- Principles of the electricity system: *objectivity, transparency and free competition*
Regulation

- Royal Decree 1435/2002 of 27 December, on the conditions of energy acquisition contracts and access to the low tension grid:
  - As of 1 January 2003, consumers will be allowed to freely choose their supplier. A regulated fee is maintained.
  - If a final consumer decides to sign with a commercialization company both energy and grid access, such company can negotiate the access to the grid with the distributor acting as a consumer's agent. The commercialization company contracts with the distributor the regulated access fee and transfers to the distributor the data needed for the supply.
    - Data collection, treatment and transfer must comply with the regulations on personal data protection.
  - Creation of the Points of Supply Information System (Sistema de Información de Puntos de Suministros -SIPS-): “Distribution companies should have a database related to all supply points connected to their grids and the transport networks in their area, constantly updated, containing at least the following information:
Regulation

- The Universal Code given to each access point (“CUPS”)
- The identity of the distribution company
- The location of the access point
- The town and the region where the access point is located.
- The supply and access fees
- The supply voltage
- The accepted extension rights
- The accepted access rights
- Maximum power allowed by the authorized installer bulletin
- Maximum power allowed by the authorization certificate commissioning high voltage installations
- Consumption profile type
- Property of the measuring equipment
- The date of the last reading
- Availability of Power Control Switch
- Consumption during the last calendar year (for off-peak and monthly) ...
 Regulation

- Commercialization companies were able to access to some of the SIPS data:
  - The identity of the distribution company
  - The location of the access point
  - The town and the region where the access point is located.
  - The supply voltage
  - The accepted extension rights
  - The accepted access rights

- **Royal Decree 1454/2005**, ammended the Royal Decree 1435/2002:
  - More data is available to commercialization companies.
  - Commercialization companies can obtain the data for free.
  - Distributors with more than 10,000 clients are required to have telematics systems to access the SIPS databases.
Regulation

• Royal Decree Law 5 / 2005 of 11 March, on urgent reforms to boost productivity and to improve public procurement:
  – Failure to grant such free access should be considered to be a serious infringement and heavily sanctioned.

CÉNTRICA’S COMPLAINTS

• Act 17/2007 of 4 July, ammending Act 54/1997, of 27 November, on the Electricity Sector, to adapt it to the provisions of Directive 2003/54/EC:
  – Distribution companies are due to stop supplying final consumers as of 1 of January 2009 (meanwhile: supply at a regulated rate).
    • The supply is totally carried out by the commercialization companies on free competition terms, and final consumers get to freely choose their supplier.
  – The Office for Changes of Supplier is created: an independent corporation entrusted to supervise and to centralize, manage and register the changes of electricity suppliers.
Regulation

- Ministerial Order ITC/3860/2007, of December 28, on the revision of the electricity fees as of 1 of January, 2008:
  - Measures to facilitate access to SIPS databases:
    - “Distribution companies may not establish any condition to the data access and treatment either by the commercialization companies or by the Office for Changes of Supplier. Neither are allowed to demand any data as a precondition to access to their database”.
    - “Distribution companies should have the necessary resources to enable any commercialization company or the Office for Changes of Supplier to download and treat the data referred to all the supply points connected to the network of the distributor and to the transport network of their area, as well as to conduct a detailed selection of the supply points for which they want to access to its data, depending on the different categories contained in the above mentioned databases”.
    - The commercialization companies must ensure the confidentiality of the information contained therein.
Regulation

- This Ministerial Order was to enter into force as of **January 1, 2008**...
  
  - The Spanish Association of the Electricity Industry (UNESA) appealed against the Order ITC/3860/2007, requesting the freezing of the provisions referred to the access to SIPS.
  
  - On 13 February, 2008 the *Audiencia Nacional* issued a writ ordering the preventive suspension of the Order.
  
  - By order of the *Audiencia Nacional* of **May 12, 2008**, the application for reconsideration against the above mentioned writ, filed by CENTRICA and ACIE, is estimated.
The complaint

- On 19 March 2007 CENTRICA ENERGÍA S.L.U. filed a complaint against the energy distributors alleging anti-competitive practices prohibited by Article 6 of Act 16/1989 and Article 82 of the EC Treaty consisting of denying full unconditional access to the Points of Supply Information System (SIPS) for the electricity distribution and transport networks.
In May 2007 the Investigations Division (Dirección de Investigación –DI-) commenced enforcement proceedings against each of the electricity distributors:

- Case 641/08, Centrica/Endesa
- Case 642/08 Centrica/Unión Fenosa
- Case 643/08 Centrica/Electra de Viesgo
- Case 644/08 Centrica/Iberdrola
- Case 645/08 Centrica/Hidrocantábrico
Relevant **product markets**:  
- The power distribution market in the low tension distribution net (regulated market, organized in regional natural monopolies)  
- The power commercialization market (liberalized market of national scope).  
Distribution companies (until July 1\textsuperscript{st}, 2009):  
- Manage their distribution network  
- Actively participate in the market of power commercialization for domestic consumers and SMEs (fixed regulated fee)

The Distribution Companies maintained a dominant position in their respective distribution regions, and these dominant positions may influence the competitive dynamics in the supply markets in that regions.
The Proceedings

- The Distribution Companies would have hindered Centrica's right to have a free, complete and unconditional access to their respective SIPS, without having an objective and acceptable justification.

- By refusing Centrica's access to the information, the Distribution Companies had reduced Centrica's commercialization capacity.

- The purpose of this conduct would have been benefiting their own respective commercialization companies.
The Proceedings

- *Centrica* (as a power commercialization company) supplies electricity to final consumers. In order to start supplying energy to these consumers, it had to sign first a power supply agreement, and, in order to do so, it is essential to apply formally for a “third party access to the network” (“TPAN”) to the appropriate distributor.

  - In order to start supplying a new client, *Centrica* had to apply (and obtain) the relevant “TPAN” of the distribution companies managing the grid at the point of access where the new client is located.
  
  - Having complete access to accurate information of the client is vital for the selection of each potential new client.
The Council of the CNC declared that the Distribution Companies had only granted Centrica conditioned access to the SIPS making such access more expensive and less attractive:

- The Distribution Companies would have only given Centrica information when receiving individual applications for specific customers that had to be identified through their respective code of access point (“CUPS”)
- In order to access the information contained in the SIPS of an individual potential client, Centrica had to register in the Distribution Companies' website as an authorised user, and identify such potential client by introducing its individual CUPS
- As a result, the Distribution Companies denied Centrica massive and unconditional access to the information contained in the SIPS

- **Removing the possibility of obtaining information of each potential client and allowing only access to information about customers which have already been captured.**

- The Council of the CNC stated that this practice infringed the obligation imposed on distribution companies by Royal Decree 1435/2002.
The Proceedings

• Access to SIPS was of great importance to compete in the commercialization market and it could not be conditioned to any requirements set out by the Distribution Companies, since, as the Council of the CNC pointed out, the SIPS aimed at:
  – allowing the commercialization companies to launch competitive offers to potential customers and
  – reducing the management cost of change of supplier

• The Council of the CNC concluded that allowing the Distribution Companies these practices could have as a consequence the risk of market partitioning and increasing barriers to entry for commercialization companies non-integrated in distribution groups (a risk that was specially high in a newly liberalized market).
The Decision

- The Council of the CNC concluded that the *Distribution Companies* had abused their dominant position in the distribution market by denying access to the information contained in their respective SIPS to *Centrica*
  - *Centrica* was forced to turn to alternative, more expensive and less efficient ways to obtain such information which was strictly needed for its activities
  - *Centrica* was impeded to massively access to relevant information of potential clients, reducing *Centrica's* capacity to compete with the commercialization companies of the groups of the *Distribution Companies*, that are vertically integrated

- The Council of the CNC declared proven the discriminatory practice of the *Distribution Companies*, which gave free access to the information contained in their respective SIPS to the respective commercialisation company of these *Distribution Companies'* group.
The Decision

- The Council of the CNC concluded that the conduct of the *Distribution Companies* constituted a breach of Article 6 of the 1989 Competition Law, as well as a breach of Article 82 of the EC Treaty
  - Trade between Member States would have been affected, since the conduct was capable of hindering the access of potential new entrants to the Spanish power commercialization market

- The Council of the CNC imposed fines of €15 million, €15.3 million, €5 million, €0.5 and €0.8 million on *Iberdrola, Endesa, Union Fenosa, Electra de Viesgo* and *Hidrocanábrico*, respectively.
Comments by

George Addy

Question & Answer Session
Find ICN at:

www.internationalcompetitionnetwork.org