II.5-2: In a May 4, 2010 decision, the European Commission accepts the commitments offered by German energy corporation E.ON to improve competitors' access to its natural gas transportation network

Friday 21 May 2010, by Marie-Anne Frison-Roche, director of the RLR

MAIN INFORMATION

The European Commission conducted a competition inquiry on the competitiveness of European energy markets, because it believed that these markets functioned poorly, especially because they are insufficiently open to competition and their prices are too high. Proceedings were begun in December 2009 against E.ON, and were closed by this corporation's May 4, 2010 legally-binding commitments to the European Commission to improve its competitors' access to its natural gas transportation network. Access to transportation networks, which are essential facilities, is the heart of any regulatory system, and if access was not organized beforehand (*ex ante*), it can be arranged afterwards (*ex post*), as is the case in this affair, *via* an alliance between Competition Law and Contract Law, wherein the commitments take on the form of a sort of co-regulation (*cf. infra* brief summary)

CONTEXT AND SUMMARY

In January 2007, the European Commission published the result of its competition inquiry into European energy markets, because it believed that they suffered from dysfunctional competition, which were especially due to the high degree of market concentration, and vertical integration of production and transportation infrastructures, which hinders both equitable access of competitors to the necessary infrastructures, and a sufficient level of investment in such infrastructures.

We know that more generally, the European Commission wants to see a disassociation between control of production facilities and control of transportation facilities, but that it could not fully enforce its views through its third *Energy Package* legislation.

However, as is always the case after a competition inquiry, the European Commission gave a concrete expression to its suspicions of anticompetitive behavior by opening proceedings against German energy company E.ON for abuse of dominant position (Article 102 of the Treaty on the Functioning of the European Union — TFEU). The Commission accuses E.ON of having self-servingly closed-off the energy market to competitors by making long-term bookings on almost all entry points to its proprietary gas networks.

Thus, market entry is impossible on such a market because entrants cannot access the entry points to the gas transport infrastructure. In such a case, a new entrant proposing competitive prices will not be able to win over new clients— however competitive his offer might be —because he does not have access to the transportation network, which will prevent the market from becoming competitive.

The accused enterprise offered commitments to the European Commission in order to stave off the Commission's concerns. These commitments include a major reduction in E.ON's bookings on the capacities of its gas network's entry prices, which *de facto* gives some leeway to its competitors, who will be able to access the gas transportation infrastructure.

The Commission, on the basis of Article 9 of the Regulation n° 1/2003, accepted these commitments in its May 4, 2010 decision, which renders them legally-binding for the company, and abandons the investigation and proceedings that had been undertaken against E.ON. The Commission's decision is justified by the fact that this type of engagement structurally and decisively facilitates the opening to competition of the German natural gas market, which will profit both domestic and industrial natural gas consumers.

The European Competition Commissioner emphasized that these commitments had been analyzed in close cooperation with the German energy regulator (*Bundesnetzagentur)*. Furthermore, the decision insists upon the fact that "insufficient transport capacity is one of the principle obstacles to competition on the German natural gas market."

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BRIEF COMMENTARY

This decision is instructive for a number of reasons.

First of all, we observe once again that "competition inquiries"—which are undertaken unilaterally, without any procedural guarantees, and without taking into account due process of law—are simply the first step in prosecuting anticompetitive practices. This is the case in the energy sector: we observe the same mechanism in the pharmaceutical sector (*cf. Regulatory Law Review, 2010,* III-2.1), which raises important questions as to at what point must companies' right to due process be respected.

More importantly, this is a perfect example of the harmonious articulation between competition law and regulatory law. Indeed, when a sector is governed by the economically natural monopoly of a transport network (in this case, natural gas networks), competition can be introduced through *ex ante* regulation. But, if sector-specific regulation is not dynamic enough to introduce competition, competition law's *ex post* mechanism of the abuse of dominant position can also be used for this purpose. The opposite path was chosen by the United States through the Supreme Court's doctrine of 'Essential Facilities', created in 1911 as a part of antitrust law, at a time when regulators possessing *ex ante* powers had not yet been created. The finesse of the E.ON decision at hand lies in the insertion of the legally-binding commitment into competition law. Legally binding commitments were only created by the recent European Regulation of 2003 on the modernization of competition law.

Yet, by nature, a commitment—simply an offer made by a company to an authority, who accepts it—is a contract, or an *ex ante* tool. Legislation has carefully provided for numerous sanctions in case the commitments are not upheld in the future. Therefore, it is quite logical that the commitments should be examined both by the competition authority and the regulator for the energy sector, because these commitments are structuring the market for the future, in an *ex ante* perspective, since the contract is certainly an expression of competition law's growing adoption of a regulatory law perspective.

This sort of regulation through commitments is performed by the duo formed by the competition authority and the company making the commitments, which means that it is a sort of co-regulation. It is therefore remarkable that the European Competition Commissioner, Joachim Almunia, explicitly stated that such commitments were an overall solution.

The commitment, because it shares with the contract the possibility for the parties to draw up their respective obligations, is an adequate form of *ex ante* regulation. Here, we can clearly see this fact. Truly, competition law is obliged by nature to use its strength in a very radical manner, especially by

declaring practices and clauses illegal and void *ab initio*; whereas in a commitment, this strength can be used with great finesse, by defining, for example, the exact dates for the gradual opening of the network—which belongs to an owner who is also a producer and a user—to competitors. Thereby, the substantial capacity of E.ON's gas network's entry points organize the future competition on this market: the commitments detail a timeframe and plans for E.ON to abandon 15% of the bookings that it made on its own network, in order to space out the reduction in its bookings over a period stretching from October 2010 to October 2015. The commitments also define the type of natural gas network concerned by these commitments. This is why, after October 2015, E.ON will be able to keep 64% of its bookings for low-caloric-value gas on its gas network.

Thanks to the *ex ante* nature of this contract, and its flexibility and casuistic nature; the contract in the form of a commitment can be an adequate regulatory instrument.