

Comparing the incomparable? An analysis of the enforcement of abuse of dominance rules to the energy and technology sectors in Europe



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The Earth is filled with energy. Production sources from which our daily current energy is produced – such as water, wind, sun and gas, just to name a few – have been around for immemorial time. Energy markets – by which we primarily refer to gas and electricity markets in this article – have also been regulated for a long period of time, and this in a heavy manner.

On the contrary, technology markets – as we currently know them – are barely still teenagers and new technologies emerge every day leaving others behind. Technology markets, and the ICT sector as a whole, are often flagged as one of the most dynamic economic sectors and it is often difficult to make the new innovations fit into already-existing regulatory initiatives. Furthermore, and despite changing circumstances and with the exception of telecommunications, these markets are usually only very lightly regulated.

Despite these stark differences, both sectors have more things in common than one might think. Enforcement of European Union ("EU") antitrust rules in the two sectors is one of them: with the exception of the *Tomra* case (AT.38113 – Prokent AG/Tomra Systems), all Article 102 TFEU-only prohibition decisions since July 1, 2005 have been taken in the energy and ICT sectors. A comparable situation exists in relation to commitment decisions in 102.

Although these numbers might seem striking, this article will show how both markets have similarities and could on occasions be described as being dependent on one another. For example, low electricity prices are necessary to competitively produce and run IT devices and services, but technology is also needed to make energy-usage more efficient, a good example being smart-meters.

At the same time, however, it could be argued that because of their structure and evolution over time, they are very different markets. As such, it is legitimate to ask oneself whether abuse of dominance rules can apply in the same way to such different markets.

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The purpose of the article is therefore to compare two sectors that are *a priori* rather different but which are nevertheless both very high on President Juncker's agenda.² This comparative exercise will allow analyzing whether abuses of dominance are dealt with in the same way and, as such, whether the lessons learnt in one of them are transposable to the other and *vice versa*. But to do so, it is first appropriate to have an overview of these markets and see how they have evolved over time in terms of the prosecution of abuses of dominance under Article 102 TFEU.

I. OVERVIEW OF THE ENERGY SECTOR

Historically, energy markets have been heavily regulated. In the 1990s, at a time when in Europe most energy markets were still national monopolies, it was decided to gradually liberalize and open these markets to competition in three waves.

The first liberalization package (1996 for electricity, 1998 for gas) opened to competition wholesale markets and retail markets with respect to large users. The second package (2003) opened to competition the remaining segments of retail markets. The cornerstone of this package was the unbundling requirement it imposed, whereby incumbents had to legally and functionally separate their network activities from all their other activities.

While the first two packages had achieved significant progress, there were indications that there was still room for improvement. In order to identify the barriers to entry and expansion still persisting in these markets, the Commission launched a sector inquiry in 2005. The results, published in 2007, identified serious shortcomings in these markets, including high market concentration, lack of liquidity in wholesale markets, little integration between Member States' markets, inadequate level of unbundling and existence of long-term contracts.

The sector inquiry served two purposes. On the one hand, it allowed determining the areas where (even) more regulation was required to achieve a European internal energy market. This led to the adoption of the third energy package (2009) which, among other things, strengthened unbundling requirements.

On the other hand, the sector inquiry served as springboard to competition law enforcement. In the three years that followed the sector inquiry, the Commission adopted eight commitment decisions on the basis of Article 9 of Regulation 1/2003. These antitrust cases concerned a number of issues such as long-term supply contracts (AT.37966 – Distrigaz and AT.39386 – Long term contracts in France), long-term capacity bookings (AT.39316 – GDF foreclosure and AT.39317 – E.On gas foreclosure) and capacity hoarding (AT.39402 – RWE gas foreclosure and AT.39315 – ENI).

It could be thought that after such an intensive legislative and enforcement activity, energy markets would be entirely open to competition and would constitute an internal energy market within the EU. However, recent activity on both fronts has shown that we are not yet completely there.

In terms of regulation, 2015 saw the much-awaited launch of the Energy Union, one of President Juncker's ten priorities. The Energy Union is composed of five closely-related and mutually reinforcing dimensions: security of supply, a fully-integrated internal energy market, energy efficiency, emission

² On the current Commission's list of ten priorities the Digital Single Market and the Energy Union and Climate are respectively ranked second and third. For more details see http://ec.europa.eu/priorities/index_en





reduction and R&D. As the Energy Union Strategy itself states, there is an intrinsic and inseparable link between antitrust rules and most of these dimensions and strict enforcement of the Treaty's competition rules will help preventing companies from distorting the internal energy market and ensuring that energy flows freely by addressing territorial restrictions as well as foreclosure issues.³ Early 2016 has also seen the arrival of additional regulatory developments, following the Energy Union Roadmap.

The past few years have also been very active in terms of competition law enforcement in the energy sector. In relation to Article 102, in 2014 the Commission fined the Romanian power exchange EUR 1,031 million for having abused its dominant position by creating an artificial barrier to market entry for EU traders (AT.39984 – OPCOM).

In 2015, the Commission also sent Statements of Objections in two important cases. The first one was sent in March to Bulgarian Energy Holding and its subsidiaries (AT.39849 – BEH gas). In this case the Commission took the preliminary view that BEH may have breached EU antitrust rules by hindering competitors' access to key gas infrastructures in Bulgaria.

The second was sent in April to Gazprom (AT.39816 – Upstream gas supplies in Central and Eastern Europe), in which the Commission took the preliminary view that Gazprom would be breaching EU antitrust rules by pursuing an overall strategy to partition Central and Eastern European gas markets with the aim of maintaining an unfair pricing policy in several of those Member States.

More recently, in December 2015, the Commission adopted a decision rendering legally binding the commitments offered by BEH to end competition restrictions on Bulgaria's wholesale electricity market (AT.39767 – BEH electricity).

It is evident from the above that the existence of sector-specific regulation has not prevented the Commission from strictly enforcing its competition toolkit. Quite the contrary, the Commission has relied in numerous instances on the existence of regulation to shape its antitrust cases, and will continue to do so as, in relation to energy markets, antitrust rules and regulation must go hand-in-hand.

II. OVERVIEW OF THE TECHNOLOGY SECTOR

Commissioner Vestager stated in January 2016⁴ that “technology markets are no different from any others. What is different is the pace of change”. This same pace of change is probably also applicable to antitrust enforcement in the sector.

Since its flagship Microsoft case (AT.37792 – Microsoft) the European Commission has substantially kept up and boosted its enforcement in the ICT sectors and Article 102 has been strictly and consistently enforced. Although there is no overall regulatory framework as regards ICT sectors, telecommunications have been regulated throughout the EU since 1998. Back then Member States agreed to open up their telecommunication sectors and adopted the so-called First Telecoms Package, which included the Liberalization Directive. Implementation of this Package was not easy and the infringement proceedings open

³ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, the Committee of the Regions and the European Investment Bank: A Framework Strategy for a Resilient Energy Union with a Forward-Looking Climate Change Policy, COM/2015/080 final.

⁴ European Commissioner M. Vestager, Competition in a big data world, DLD Conference: January 16-17, 2016.





against the back-then fifteen Member States neared the three digits.⁵ Only four years later, in 2002, a new regulatory framework was adopted. This new framework — the Second Telecoms Package — was made up of five Directives and entered into force in July 2003. This Package significantly boosted competition by, for example, introducing the concept of significant market power ("SMP"), the boosting of portability and the unbundling of the local loop. A Third Package included important reforms to the system in 2009 and that same Package is now again up for reform.

Beyond the regulatory framework in the telecommunications sector, 2015 was a notable year for antitrust enforcement in the technological sector: in April 2015 the Commission sent a Statement of Objections to Google in relation to its shopping comparison services (AT.39740 – Google Search). In the press release announcing the sending, the Commission stated that its preliminary view was that Google was “artificially divert[ing] traffic from rival comparison shopping services and hinder[ing] their ability to compete on the market.” At the same time, the Commission also opened an investigation into Google’s Android mobile operating system (AT.40099 – Google Android). Shortly thereafter, the Commission also opened proceedings against Amazon in order to assess whether the company had engaged in anticompetitive behavior by means of including certain most favored nation clauses in its contracts with publishers (AT.40135 – E-book MFNs and related matters). Finally, only a month later, the Commission also opened two investigations against Qualcomm for allegedly abusing its dominant position by implementing exclusivity payments (AT.40220 – Qualcomm (exclusivity payments)) and engaging in predatory pricing (AT.39711 – Qualcomm (predation)).

This enforcement in the ICT sector is, however, by no means new to the Commission. In fact, one cannot ignore that the sector has also seen the largest fine ever (EUR 1.06 billion) imposed by the Commission against a single company (AT.37990 – Intel) for abusing its dominant position. Moreover, telecommunications companies have also over the past years been frequently sanctioned⁶ and in December 2015, the Commission’s approach to this type of cases got again confirmed in the *Orange Polska v Commission* (Case T-486/11).

If anything is to be described as new under the current enforcement trends this would be, to use Commissioner Vestager’s words, the **pace of change**. Of significant importance would also be the fact that targeted enforcing of competition laws is complemented by the Digital Single Market Strategy.

This strategy, launched on May 6, 2015, is one of the top priorities of the current Commission and has as its main objective to combat the fragmentation that affects the European ICT sectors and that the Commission perceives as a key pillar for future growth and comprises a number of initiatives.

Finally, in what could probably be regarded as a hybrid between competition law enforcement and policy, the digital sector has also seen the comeback of a tool that had not been used since 2008: sector inquiries. The e-commerce sector inquiry, launched in March 2015, focuses particularly on potential barriers erected by companies to cross-border online trade in goods, services and digital content. Conclusion of the

⁵ J-F. Pons, Deputy Director General D.G. IV – Competition, European Commission, *The liberalisation of telecommunications in Europe and the role of the regulators*, April 12, 1999.

⁶ The Commission has intervened on several occasions against incumbents who tried to protect their market position through anticompetitive means: decisions against Slovak Telekom and Deutsche Telekom (2014, AT.39523), Telefónica and Portugal Telecom (2013, AT. 39839), Telekomunikacja Polska (2011, AT.39525), Telefónica (2007, AT.38784), Wanadoo (2003, AT.38233) and Deutsche Telekom (2003, AT.37451, AT.37578, AT.37579).





sector inquiry is scheduled for early 2017 and case-specific enforcement may follow where specific competition concerns are identified.

The Court of Justice's ruling invalidating the Commission's EU-US Safe Harbor data sharing agreement (Case C-362/14) – and the recent proposal to replace it with the EU-US Privacy Shield⁷ – also deserve a special mention for opening up yet another battlefield for change in the ICT sectors.

All these initiatives clearly evidence the enormous interest that currently exists in the ICT sector. They also make clear that even where there is no sector-specific regulation, antitrust rules continue to be enforced vigorously. Moreover, as proven by the case practice and as confirmed by the Court of Justice, the existence of sector-specific regulation does not preclude application of antitrust enforcement.

III. DIFFERENCES AND SIMILARITIES BETWEEN THE ENERGY AND TECHNOLOGY SECTORS

We have seen that while there are dissimilar degrees of regulation in the two sectors at stake, over the last years the Commission has carried out an equally strict enforcement of antitrust rules in both. However, in order to be able to determine whether Article 102 has been – and still is – applied in the same or different way to both sectors, it is first important to analyze the differences and similarities between the two sectors.

The first difference concerns not so much the level of regulation itself, but the direction the sectorial regulation is taking. Whereas several legislative initiatives have been adopted regarding energy and traditional telecoms, other areas of the technology sector remain largely untouched.

Moreover, despite the sheer efforts to liberalize energy markets, there is still a strong presence of national players in these markets as energy companies still find it somewhat daunting to compete in markets other than their own. On the contrary, there are clearly major global players in the ICT sector (although it is less so in telecoms, where the situation resembles more the one present in energy markets).

This could eventually have an impact on market definition in some specific cases. Whereas in energy markets it is still very often the case that the market definition remains national, in technology markets (with the exception of telecommunications) market definitions may tend to be more worldwide. This could turn out to be especially relevant for the purpose of establishing dominance in Article 102 cases.

On the contrary, the chances of putting at risk security of supply are significantly more important in the energy sector given the dependence of the EU on imports. However, as practice has shown, Article 102 cases not only do not put at risk security of supply for European customers but, quite to the contrary, they have significantly reinforced it over the years. Having said that, security (in the form of data security) is also becoming increasingly important in the technology sector. In particular, albeit not a Competition law issue, the Court of Justice's judgment quashing the Data Protection Safe Harbor has boosted the calls to create European technology champions in order to ensure data security.

Finally, in terms of procedure, all Article 102 investigations are bound by the same rules, namely those contained in Regulations 1/2003 and 773/2004. In practice, however, the investigative tools used to initiate

⁷ European Commission Press Release, *EU Commission and United States agree on new framework for transatlantic data flows: EU-US Privacy Shield*, IP/16/216, February 2, 2016.





proceedings are often different in the two sectors. Whereas in the energy sector it is very often the case that the Commission acts on its own initiative (*ex officio* cases), in the technology sector very frequently cases originate in complaints, be it from competitors or customers.

Despite these sectorial differences, the number of similarities between the two sectors is also strikingly large. These similarities may probably also explain the abundance of Article 102 cases throughout both industries.

To start, it is worth noting that both industries are, for example, built on large customer portfolios and are (or have become) anything but niche markets. In fact, the number of users is frequently counted in millions or even billions of individuals.

Moreover, certain players in both industries may exhibit a high degree of locked-in consumers, combined with a low degree of switching. This may remain so even where, as is the case with energy and telecommunication services, legislation increasingly facilitates and fosters switching of providers.

At the same time, high fixed (sunk) costs and low marginal costs can be common throughout both areas. The importance of economies of scale is also omnipresent in both markets, and the literature often refers to some services in these industries as being natural monopolies (essential facilities). Network effects may also be a similarity between the two industries when one thinks for example about the coverage of networks, the accuracy of search results or compatibility issues between platforms.

In fact, it is also interesting to see that, be it for regulatory or other reasons, the existence of one large player per market may be commonplace. Also, such positions can often remain unchanged over time even in the absence of an abusive conduct and despite unbundling and recent deregulatory efforts.

Finally, it is also interesting to mention that European legislation has already identified and protected universal services in both sectors, including the right to be supplied with electricity and, for vulnerable customers, with natural gas⁸ and with communications services at a reasonable quality and an affordable price.⁹

IV. CONCLUSION

At first sight, energy and ICT sectors could be regarded as having nothing to do with each other. However, if one digs deeper and as presented above, both areas share a large number of commonalities and it may not be by chance that both sectors accumulate the highest number of Article 102 investigations of the last years.

Therefore, while it is undeniable that there are differences between the two sectors and that the abusive practices might take differenced forms in the two, the competition concerns that lie at the heart of Article 102 TFEU remain the same. As such, abuse of dominance rules must be applied in the same way to both sectors, even if the tools and market dynamics are different. We are therefore not comparing the incomparable, and despite evolving at different speeds, both sectors have a lot to learn from the other in terms of antitrust enforcement.

⁸ See respectively Directives 2009/72/EC and 2009/73/EC (both part of the Third energy package).

⁹ Directive 2002/22/EC as amended by Directive 2009/136/EC (Citizen rights' Directive).

