Commitment decisions in practice of the European Commission in enforcing the European Union competition law in energy sector

Ondřej Dostal*

Summary: This article describes the use of instrument of commitments in the practice of application of the competition law of the European Union by the European Commission in energy sector. The article explores the reasons for increase in use of this instrument for resolving potential distortions of competition in energy sector, but also in other key sectors of the EU economy, as well as possible pros and cons of this approach. The text offers complex overview of the EU competition law provisions and summaries of documents by the European Commission and the Court of Justice of the European Union related to the topic. The article also enumerates and summarises the cases in which the European Commission accepted the commitments in the energy sector of the EU.

Keywords: commitment, competition, energy, electricity, agreement, gas, abuse of dominant position

1. Importance of the energy sector and its regulation by the competition law

Energy sector is a key sector of economy and its functioning in conditions of undistorted competition is a necessary precondition for proper functioning of all the sectors using energy commodities, most frequently electricity and gas, for their activity. The European Union and its member states share ambitious long-term goals of economic growth, safe and affordable energy for their citizens in simultaneous securing of protection of environment. The European union is at the same time still to considerable extent dependent on supplies of energy commodities from abroad and the importance of effective functioning of competition

* Mgr. Ondřej Dostal, Faculty of Law, Palacký University Olomouc, Czech Republic. Contact ondrej.dostal01@upol.cz. Opinions presented in the article are solely those of the author and do not represent opinion of any third party.

ensuring optimum distribution and use of resources within the Internal market is in these conditions ever-growing. The same applies for all branches of the energy sector from production and wholesale, transmission and distribution, through trading energy products, to retail and connected services.

Energy sector is undergoing significant changes. A prominent circumstance changing the European Union energy sector setup has been represented by the 2020 Strategy and related member state aids to the renewable energy resources and subsequent decline in electricity prices. Technical development enables slow diversion from classical energetics to decentralised solutions of energy needs, although conventional energy resources, including coal and nuclear ones remain indispensable. In current advanced phase of liberalisation through the EU directives the EU national energy markets are still characteristic by usually considerable markets shares of the incumbents, especially in production, distribution and wholesale, and also by relatively high degree of vertical integration. On the other hand, this situation has been constantly relativized by growing interconnectibility of national energy markets within the EU Internal market and related decline in market power of the dominant undertakings.

Independently on this development, the competition law of the European Union applies to the energy sector in its entirety, from prohibition of anticompetitive agreements and abuse of dominance, through control of concentration of undertakings to state aid control and in broader sense also regulation of public procurement. Competition law is also applicable to all economic activities in the energy sector, including the above-mentioned ones, from production to retail. Similarly to other sectors of the EU economy, the role of competition law dwells in prevention of artificial barriers to creating and using benefits of internal energy market, especially free movement of goods and services, which may result from anticompetitive actions of private companies, but also of EU member states.

Intensity of competition law enforcement has been rising hand in hand with the process of liberalisation and especially following the sector investigation of level of competition on electricity and gas markets by the European Commission in 2007. In the situation on the liberalised markets described above the most frequent investigated anticompetitive behaviour is represented by alleged abuses of dominance by incumbents. Besides classical types of abuse of dominance, such as requirements of long term and exclusive offtake, new forms of abuses have been declared in relation to e.g. energy infrastructure maintenance and investments. Seldom a prohibited agreement between energy sector undertakings is detected and punished. On the contrary quite frequent are cases of mergers and acquisitions serving, among others, to diversification of production and investing in energy production related sectors in situation of decrease in prices of electricity and stagnation of classical energy resources. These transactions

may be accompanied by remedies on the part of the concentrating undertakings allowing the European Commission to remove concerns related to the concentration's effects. Frequent are also cases of granting state aid to energy sector by the EU member states, be it for development of renewable energy resources, capacity mechanisms, but also for construction of new nuclear resources or for closing uncompetitive coal mines.

The competition law therefore serves not only as a tool of prosecution ex post, but also a tool supplementing or replacing ex ante regulation of the EU internal energy market. With respect to the importance of the energy sector for the rest of the economy, competition law enforcement in energy sector is a priority of the European Commission or more specifically its Directorate General for Competition.

Competition law cases in energy sector require complex factual and economic analysis of action usually by supranational undertakings with high potential impact on several member states of the European Union. This brings about high demands on notoriously limited capacities of DG COMP. Also due to this fact the European Commission more frequently, and in recent years indeed regularly, has agreed with implementation of commitments by the undertakings whose behaviour gave rise to competition concerns of the Commission. The frequency of use of this tool in energy sector outdoes such use in all other economy sectors dealt with by the Commission in its antitrust investigations. Despite originally intended rather rare, or certainly not overwhelming, use of commitments, this tool is currently the most frequently used instrument of protection of competition on the internal energy market of the European Union with potential impact on conditions of energy supplies for all the EU citizens[1].

2. Introduction to the concept of commitments in the EU competition law

The Council of the EU embedded the concept of commitments in the EU Council Regulation No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (hereinafter Regulation 1/2003 or the Regulation), which came into force with the enlargement of the European Union in May 2004. Also before this date the Commission effectively ended some of the antitrust proceedings by means of commitments,

[1] Based on results of search in competition law cases database of DG COMPETITION available at: http://ec.europa.eu/competition/antitrust/cases/index.html

which, however, did not have explicit support in the predecessor of the Regulation 1/2003, the Regulation 17/1962 then in force[2].

Commitments belong among the alternative ways of resolving disputes on breaching the competition law. Regulation 1/2003 allows the European Commission to make legally binding the commitments proposed by undertakings in reaction to competition concerns of the Commission related to behaviour of the said undertakings. The advantages of using commitments should include quick and flexible solution of possible breach of competition rules, along with savings in costs of the European Commission on conducting the proceedings and using its resources on other cases. In practice the commitments may consist in changing the behaviour of the company on the relevant market (so called behavioural commitments) or changing the structure of an undertaking, for example by means of divesting a part of it (so called structural commitments) or structure of the market (for example by means of establishing a new power exchange as illustrated by one on the examples mentioned below). The structural commitments are considered more effective by the European Commission. An indisputable advantage for undertakings having decided to submit commitments to the Commission is the fact that in case of their acceptance by the Commission the undertakings avoid imposition of a fine up to 10 % of their turnover, and also avoid issuance of a decision stating a breach of competition law. That means, among others, that it would not be possible to use the mentioned decision as a direct proof of breach of competition law before a national court in a dispute on claims for damages caused by a breach of competition law. Both the Commission and the undertakings may also appreciate prevention of a potentially several years dispute that may continue before both instances of the Court of Justice of the European Union. The Commission may in addition rely on substantially lower probability of its commitment decision being challenged before the EU Court – and this is at the same time one of the main points of criticism of commitments, as using them results also in reduction of the Court case law specifying the behaviour of undertakings prosecutable by the competition law. However, the Commission may also choose to go back to the regular sanction proceeding anytime.

The European Commission subjects the proposed commitments to the so called market test consisting in publication of the draft commitments and a call to third parties including competitors to comment on the foreseeable impact of the commitments on the market and their sufficiency for rectifying the wrongful situation. Successfully passing the market test, however, does not close the case completely. The Commission may appoint a trustee for monitoring the

[2] See especially case IBM, 1984, commented in Competition Policy Newsletter of DG Competition, October 1998, page 7, available at: http://aei.pitt.edu/81768/1/1998_October_No_3.pdf

implementation of the commitments and the undertaking implementing the commitments is obliged to report regularly to the Commission about fulfilment of the commitments.

In case of breach of the commitments adopted the European Commission is entitled to impose a fine up to 10 % of their turnover in the preceding year and also penalties up to 5% of average daily turnover in the preceding year.

Use of commitments is, according to the Commission, excluded in case of horizontal agreements, especially so called hard-core cartels, for example on coordination of prices and sharing markets, as in such cases a substantial and irreparable distortion of competition is presumed, which cannot be remedied by implementation of a commitment by suspected companies. Although use of commitments in cases distorting competition in a "non-hard core" way is not excluded, as illustrated by a below-mentioned case, in overwhelming majority of cases the application of commitments has been related to concerns of the Commission as to abuses of dominant position in breach of Article 102 of the Treaty on Functioning of the European Union. This applies also to the energy sector, in relation to which complex cases of potential abuse of dominance by national incumbents have been dealt with virtually exclusively by means of commitments. Details of commitments application are presented in the following chapter.

3. Concept of commitments in the law of the European Union, case law of the Court of Justice of the EU and related documents

3.1. Regulation 1/2003

The concept of commitments is regulated by the Regulation 1/2003 and especially its below-mentioned special provisions, while the commitments proceeding are specified also by further general provisions of the Regulation common for all the competition protection proceedings. Detailed description of the process of adoption of commitments is described in chapter 3.3.below. The possibility of using the commitments is outlined in the preamble of the Regulation, according to paragraph 13 of which *"Where, in the course of proceedings which might lead to an agreement or practice being prohibited, undertakings offer the Commission commitments such as to meet its concerns, the Commission should be able to adopt decisions which make those commitments binding on the undertakings concerned. Commitment decisions should find that there are no longer grounds for action by the Commission without concluding whether or not there has been*

or still is an infringement. Commitment decisions are without prejudice to the powers of competition authorities and courts of the Member States to make such a finding and decide upon the case. Commitment decisions are not appropriate in cases where the Commission intends to impose a fine."

The concept of commitments itself is regulated by Article 9 of the Regulation, according to which

1. *Where the Commission intends to adopt a decision requiring that an infringement be brought to an end and the undertakings concerned offer commitments to meet the concerns expressed to them by the Commission in its preliminary assessment, the Commission may by decision make those commitments binding on the undertakings. Such a decision may be adopted for a specified period and shall conclude that there are no longer grounds for action by the Commission.*
2. *The Commission may, upon request or on its own initiative, reopen the proceedings:*
   (a) where there has been a material change in any of the facts on which the decision was based;
   (b) where the undertakings concerned act contrary to their commitments; or
   (c) where the decision was based on incomplete, incorrect or misleading information provided by the parties.

Article 14 of the Regulation imposes on the Commission a duty *to consult* a draft commitment decision before its issuance with *the Advisory committee for restrictive practices and dominant position* composed of the representatives of offices for protection of competition of the EU member states, while it shall take utmost account of the position of the Committee.

For non-compliance with the commitments it is possible to penalize the relevant undertakings or their associations according to Article 23 of the Regulation *up to 10 % of their aggregate turnover for preceding economic year.* A remarkable trait of this provision consists in the possibility to impose the same amount of fine for breaching commitments imposed by a decision not declaring a breach of competition law as for a proven breach of competition law declared in a sanction decision. Similarly to sanction proceedings the European Commission is pursuant to Article 23 of the Regulation entitled *to impose a daily penalties* not exceeding 5 % of average daily turnover for preceding economic year for every day of delay from the day stipulated by a decision for performance of commitments, in order to make the undertakings or association thereof fulfil their commitments binding on them by the force of the Article 9. If the undertakings or associations thereof

eventually meet their commitments, for the fulfilment of which the penalties were set, the Commission may choose to set the final amount of the penalties lower than the one stipulated by the original decision on penalties.

The Regulation 1/2003 also sets the *obligation to publish the draft commitments* in its Article 27.

3.2. The Implementing regulation for the Regulation 1/2003[3]

Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty (hereinafter the Implementing Regulation) deals with the commitments, or more specifically with preliminary assessment to which the undertakings may react by their commitments, in its Article 2, while issuance of the preliminary assessment is at the same time one of the moments when the Commission shall decide on commencement of the proceeding with the aim to adopt a decision pursuant to chapter III of the Regulation 1/2003.

3.3. Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU[4]

A detailed description and explanation of individual phases of the process of drafting, negotiation and acceptance of commitments is provided by the above-mentioned Notice in paragraphs 65,75, 77, 115 – 117; 118-133; 147 and 150.

3.4. Memorandum of the European Commission on the concept of commitments[5]

The European Commission issued a few months after coming into force of the Regulation 1/2003 an explanatory memorandum stating that the Commission may contemplate adoption of a commitment decision if 1) the investigated undertakings are willing to propose commitments, which dispel the preliminary concerns of the Commission expressed in its preliminary assessment; 2) the case at hand does not require imposition of a fine, which according to the Commission disqualifies from possibility of commitments the so called hard-core

[3] Official Journal L 123, 27/04/2004 P. 0018 – 0024, available at: <http://eur-lex.europa.eu/legal-content/CS/ALL/?uri=CELEX%3A32004R0773>

[4] (2011/C 308/06), available at: http://eur-lex.europa.eu/legal-content/CS/ALL/?uri=OJ%3AC%3A2011%3A308%3ATOC

[5] MEMO/04/217 Brussels, September 2004, available at: http://europa.eu/rapid/press-release_MEMO-04-217_en.htm

cartels; 3) the reasons of effectivity justify that the Commission restraints itself to issuance of a commitment decision and does not go as far as issuing a formal decision prohibiting anticompetitive behaviour. The memorandum also mentions possibility to reassess the situation anytime should a substantial change occur in any of the facts on which the decision was based, and also a possibility to relieve the undertaking from commitments that are no longer appropriate, i.e. do not meet their purpose (for example as a result of earlier than expected rectification of the state of competition on the relevant market).

The Commission also emphasizes that national courts must enforce the commitments by any means necessary under national law, including interlocutory injunction, and that the undertakings which have adopted commitments may still face enforcement of competition law by national competition authorities and courts provided that such proceeding does not preclude uniform application of the EU competition law.

3.5. Speech by the commissioner for competition[6]

The essentials of the Commission's approach to application of commitments are summarized in a speech by the former member of the European Commission responsible for protection of competition, Joaquín Almunia. According to the Commissioner, both the Commission decisions on sanctions and commitments are based on solid proofs and theory of harm, while in proceedings terminated by sanctions the analysis by the Commission must be more extensive in line with the case law of the Court of justice of the European Commission. The Commission prefers acceptance of commitments on markets where securing quick and effective restoration of competition and consumer welfare is of special importance; therefore among the sectors influenced by commitments decisions is also the energy sector. The ultimate goal of the Commission's action, including fines, remedies, commitments and settlements, is to instil all the undertakings operating in the EU culture of compliance with competition law. Use of commitments is not appropriate in cases where most of the anticompetitive action took place in the past or where it is most appropriate to order cessation of the anticompetitive behaviour and deter from its repeating by imposition of a fine. The Commission considers structural commitments more effective than the behavioural ones, for they have long term effect on the market. The Commission takes very seriously the question of fulfilment of the commitments by the undertakings which proposed them, and in case of non-fulfilment of the commitments does not hesitate

[6] Remedies, commitments and settlements in antitrust; March 2013, available at: http://europa.eu/rapid/press-release_SPEECH-13-210_en.htm

to impose draconic sanctions. Such was the case of company Microsoft which was imposed a fine of 561 million Euro for non-compliance with its commitment to enable selection of internet browser in operating system Windows.

3.6. Speech by the director general of the Directorate general for competition of the European Commission[7]

The above-mentioned statements by the Commissioner were followed by a complex summary of the Commission's approach to the concept of commitments in the speech by the then director general of DG COMP, Alexander Italianer. The decision by the Commission to adopt commitments is according to Mr. Italianer dependent on their quality, expeditiousness, sufficiency and practicality. The commitments should be proposed at the first opportunity and not in the end of the proceeding. The commitments should efficiently resolve the concerns of the Commission. They should not be over-complicated and difficult to implement and monitor. According to the Director General, the decision on proposing commitments is not necessarily easy for undertakings, as they, in comparison with the sanction proceedings, renounce the chance to convince the Commission to abandon the proceedings or alternatively to challenge the decision on prohibition of the behaviour and on sanction before the Court of the EU, which is seldom in commitments cases. The Commission itself chooses sanction procedure for the sake of punishment, deterrence and setting a precedent and also in cases where the only possible commitment of the undertaking is to refrain from the anticompetitive behaviour. The decisions on commitments have also value for self-assessment of behaviour of undertakings which want to avoid punishment for anticompetitive conduct. An advantage of the undertakings 'commitments dwell in potentially solid and tailor-made solutions using willingness and know-how of the undertakings proposing them and also expeditiousness of commitments implementation thanks to especially absence of court proceedings on appeals, which are more common in case of remedies that the Commission may impose in sanction proceedings. The aforementioned applies especially in case of structural commitments.

As far as optimum speed of the commitments offer is concerned, the undertakings should propose them as soon as possible, optimally before termination of investigation and statement of objections – because the aim of the commitments decision is speedy renewal of competition. On the contrary commitments proposed only as late as in the phase of oral negotiation on the

[7] *To commit or not to commit, that is the question*; December 2013, available at: http://ec.europa.eu/competition/speeches/text/sp2013_11_en.pdf

case may prolong the proceeding. Commitments should also be unconditional, that means propose unambiguous solutions that are possible to be implemented without unnecessary delays and do not require protracted monitoring – in this regard the Commission recommends inspiration by the Commission notice on the merger remedies. In this vein for example structural commitments should not be burdened by problematic possibility of finding a purchaser for the divested assets etc.

3.7. Judgement of the Court of Justice of the EU in Alrosa case[8]

Also the EU Court of Justice took a position on commitments in its first and so far only one of two decisions dedicated to the topic and especially the question of appropriateness of commitments. The court stated that the measure of appropriateness of remedies imposed in sanction proceedings pursuant to Article 7 of the Regulation 1/2003 is not obligatory for decisions on commitments pursuant to Article 9 of the Regulation. In its judgement the Court extensively agreed with the opinion by the advocate general Kokott[9] preceding the judgement. Accordingly, the EU Court of Justice provided for example the following interpretation of the concept of commitments:

> *"This is a new mechanism introduced by Regulation No 1/2003 which is intended to ensure that the competition rules laid down in the EC Treaty are applied effectively, by means of the adoption of decisions making commitments, proposed by the parties and considered appropriate by the Commission, binding in order to provide a more rapid solution to the competition problems identified by the Commission, instead of proceeding by making a formal finding of an infringement. More particularly, Article 9 of the regulation is based on considerations of procedural economy, and enables undertakings to participate fully in the procedure, by putting forward the solutions which appear to them to be the most appropriate and capable of addressing the Commission's concerns.[…] Undertakings which offer commitments on the basis of Article 9 of Regulation No 1/2003 consciously accept that the concessions they make may go beyond what*

[8] C 441/07, paragraphs 35-50, 61 and 90, available at: http://curia.europa.eu/juris/liste.jsf?language=en&num=C-441/07

[9] Opinion of advocate general Julianne Kokott presented on 17 September 2009 in the case C441/07 P – Commission of the European Communities versus Alrosa Company Ltd., paragraphs 42-69, 70-74, 108, 210-220, 245 a 247, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62007CC0441

the Commission could itself impose on them in a decision adopted under Article 7 of the regulation after a thorough examination. On the other hand, the closure of the infringement proceedings brought against those undertakings allows them to avoid a finding of an infringement of competition law and a possible fine."

4. A critical view of the use of commitments by the European Commission

Despite all the above-mentioned positive argumentation of the European Commission representatives, apparent taste of the Commission to use the commitments in practice, and statements of the EU Court of Justice non-disputing the concept of commitments and its use, there are quite frequent sceptical comments by the expert public as to adequacy of commitments use or as to the number of positive aspects attributed to them[10].

Critics of commitments regularly suggest especially the following claims (each of the critical arguments is accompanied by a possible counter-argument in italics, which does not necessarily correspond with the view of this articles' author, but aims to propose a different point of view):

1) The alleged higher speed of the proceedings on commitments in comparison with sanction proceedings is relative, or only minimum, and in cases of alleged abuse of dominant position the sanction proceedings are even slightly faster.
   Counter-argument: The duration of the sanction proceedings should in fact include also the duration of hypothetical appeal procedure. From this point of view the proceedings on commitments are several times shorter.
2) The commitments decisions are not subjected to review by the EU Court of Justice, forasmuch the commitments are proposed by the very undertakings upon which they are subsequently imposed. Commitments prevent development of case law also in developing sectors that are in need of definition of prohibited behaviour. The catalogue of behaviour declared authoritatively by the EU Court of Justice's decisions is not evolving. The undertaking that proposed commitments for themselves do not have the need to challenge the Commission's decisions imposing the commitments, similarly to the

[10] See for example MARINIELLO, Mario. Commitments or prohibitions? The EU antitrust dilemma, *Bruegelpolicybrief,* 2014; COSTESEC, Dominique. Has the Commission kicked its addiction to commitments decisions? *Kluwer Competition Law Blog*, 2016; KEHOE, Killian. Commitments as a tool for energy sector liberalization, *MLex magazine*, 2011

competitors and third parties which used the possibility to market test the draft commitments.

Counter-argument: The court review of commitments decision is in fact still available and took place in at least two cases.[11] *The vigilance over satisfaction of the need for precedents is declared by the Commission representatives (see above). It may be also argued that a speedy action by the Commission by means of a commitments decision is especially useful on developing markets.*

3) Use of commitments allows the Commission to deal with cases of alleged distortion of competition also in situations which would remain untouched in case of need to conduct the whole proceeding to the sanction decision or which would not necessarily be upheld by the EU Court of Justice.

   Counter-argument: Undertakings leading negotiations on commitments may always choose to test the strength of arguments and the will of the Commission to conduct the proceedings to the end of sanction proceedings, while the potential length of sanction proceedings may be among the arguments for which they refuse to do so.

4) The Commission commitments decisions are non-transparent, or scarce in information on the distortion of competition in question and related theory of harm, in comparison with sanction decisions are several times shorter, the analysis of the alleged distortion of competition is not as extensive as in cases leading to sanction decisions by the Commission.

   Counter-argument: Savings of time and capacities of the Commission otherwise spent on conducting sanction proceedings including elaboration of a decision, are one of the main arguments in favour of existence of the concept of commitments. Decisions adopting commitments always contain description of the behaviour raising concerns of the Commission.

5) The commitments decisions enable the undertakings suspected of breach of competition to keep for themselves the potential profit resulting from anticompetitive behaviour, which reduces the deterrent effect of commitments and raises probability of recurrence.

   Counter-argument: Deterrence from future anticompetitive behaviour is not the main goal of imposing commitments (see for example arguments of the Court of Justice of the EU and the Advocate General above) and it can be stated that the very will of the undertakings to negotiate about the commitments shows their respect to the competition proceedings of the European Commission. The possible profit from alleged anticompetitive behaviour is

[11] Besides the above-mentioned judgement in Alrosa case see also case T-76/14 Morningstar, available at:
http://curia.europa.eu/juris/liste.jsf?language=en&num=T-76/14

compensated by the loss resulting from often far reaching behavioural and structural commitments (as may be illustrated by the below-mentioned cases). Any recurrence has not been proven so far (with the exception of imposition of a fine for non-compliance with the commitments to Microsoft).

6) Victims of possible breach of competition law are deprived of the possibility to use the classical sanction decision by the European Commission as evidence in national court disputes on damages caused by breach of competition law.

   Counter-argument: The purpose of the commitments proceedings is not qualification of a breach of competition law (see the judgement mentioned above), therefore it is not possible to presume the choice of the Commission between declaring distortion of competition and acceptance of commitments by undertakings. In other words, the commitments proceeding from its own very nature cannot deprive a party of a decision on distortion of competition. In case of need the Commission may always go back to a sanction proceeding and declare distortion of competition.

7) The prominently ex post regulation by the competition law tools is being used by the Commission (not only) in the energy sector for substituting ex ante regulation by sectoral liberalization law of the EU and for enforcing also other policies than protection of competition. This raises questions as to the competency of the Commission for such a proceeding and appropriateness of the tools used.

   Counter-argument: The Commission itself does not declare such a policy. At the same time one may ask whether such mixed approach can be completely avoided when the basic goals of liberalisation of energy markets and protection of competition are identical, i.e. aim at securing accessibility of markets to competition or at eliminating barriers preventing market entry. It must be born in mind that commitments are in principle proposed by the undertakings themselves and possible pressure by the Commission or selection of cases for the purposes of liberalizing markets by commitments may only be speculated. It is true that the results of potentially long implementation of the liberalisation directives may be at least partially replaced or supplemented by relatively quick opening of the market and elimination of barriers by commitments proposed from the own will of undertakings.

5. A chronological overview of cases of application of commitments by the European Commission in the energy sector

Company	Competition concerns	Main commitments offered
Distrigaz	Long term contracts on gas supply[12]	70 % of yearly gas supplies to large industrial customers will be open to competition; no contract covered by the commitments will be longer than 5 years.
E.ON	Manipulating wholesale market with electricity and market with regulatory electricity[13]	Divestiture of 5000 MW capacity for electricity production by various sources in Germany; divestiture of high voltage transmission network.
RWE	Preventing access to gas transport network[14]	Divestiture of high pressure network for transport of gas in West Germany.
Gaz de France	Preventing access to gas import infrastructure[15]	Quick and substantial limitation of long term capacity reservations for import of gas to France and their further reduction under 50% of the previous volume.
EDF	Long term electricity supply contracts[16]	Around 65% of the volume of electricity supplies contracted with large customers will be freed for market.
Svenska Kraftnät (SvK)	Limitation of export capacity on interconnectors[17]	Splitting the Swedish electricity transmission market to several bidding zones enabling adaptation of electricity trading to actually available transmission capacity.
E.ON	Long term reservation of capacity for gas transportation[18]	Freeing large capacity volumes on access points to the transportation networks; limitation of reservation of own access to transportation networks.

[12] 2007; case COMP/B-1/37966 available together with all other below mentioned case under their respective number at: http://ec.europa.eu/competition/elojade/isef/index.cfm?clear=1&policy_area_id=1

[13] 2008; cases COMP/39.388 a COMP/39.389

[14] 2009; case COMP/39.402

[15] 2009; case COMP/39.316

[16] 2010; case COMP/39.386

[17] 2010; case COMP 39351

[18] 2010; case COMP/39.317

ENI	Refusal of access to gas transportation network[19]	Divestiture of shares in three companies owning, operating and steering transportation capacity on international networks for gas transportation to Italy.
Areva/Siemens	Joint venture – non compete obligation[20]	Limitation of the non-compete obligation and its cancellation in relation to products and services non related to activity of the joint venture.
ČEZ, a.s.	Potentially pre-emptive reservation of transmission network capacity[21]	Divestiture of electricity production capacity of app. 800-1000 MW.
Deutsche Bahn Energie	Margin squeeze by setting prices of traction current[22]	Introduction of new system of prices for traction current applicable to all railway companies non including further discounts.
Bulgarian energy holding (BEH)	Restrictions on resale of electricity[23]	Offering certain volume of electricity on one-day market through new independent power exchange created by BEH and transferred to state, enabling anonymous trade.
GAZPROM	Territorial restrictions in gas supply contracts[24]	Abolishing and further non-application of all (non)direct contractual limitations on gas resale; facilitation of interconnection of Bulgarian gas market with surrounding EU countries; creating opportunities for bigger flow of gas to Baltic states and Bulgaria.

[19] 2010; case COMP/39.315
[20] 2012; case COMP/39736
[21] 2013; case AT/39727
[22] 2013; cases COMP/AT.39678 a COMP/AT.39731
[23] 2015; case AT.39767
[24] 2017; case AT 39.816 – in the phase of a proposal of commitments, the proceeding has not been finished yet.

6. Conclusion on the application of institute of commitments by the European Commission in the energy sector

Commitments enabled by the EU competition law are in the EU energy sector applied most frequently but not exclusively, to action by companies with dominant position on all levels of electricity and gas markets, specifically on their long term and exclusive commercial relationships and also potential refusal or prevention of access to essential facilities. On the other hand, the investigated behaviour includes also lack of action by dominant undertakings in trade and investments to infrastructure. This enumeration however does not nearly exhaust all the possible branches of energy sector and types of abuse of dominant position of prohibited agreements. Especially in the area of abuse of dominant position the European Commission shows capability for innovative approach to the definition of prohibited behaviour. The possible abuses of dominance according to the Commission could have aimed at both exclusion – or not letting in – of competition and exploitation of current customers. The European Commission in its hitherto practice accepted commitments to refrain from potentially prohibited behaviour but also commitments to act for the sake of renewal or even enabling competition on the market. In approximately same proportions commitments consisting in change of behaviour and significant structural changes in the market were accepted. The companies investigated and proposing the commitments came from both the original and new EU member states. The Gazprom case, illustrating, among others, the energy dependency of the EU, demonstrated the dedication of the Commission to deal also with behaviour of companies outside the EU. In the Energy sector, in comparison with the example illustrated above, the Commission has not found it necessary to impose a fine for a breach of a commitment.

Overall, the use of commitments in the energy sector is fully in line with the trend of the European Commission in enforcing the competition law on the markets with key importance for the EU Internal market. B

y the above-mentioned way the potentially very complex and time consuming cases with big impact on competition and consumers in substantial part of the Internal market are dealt with. With respect to the importance of the energy sector for competitiveness of the EU, corresponding need for quick reaction to the detected potential distortions of competition, but also with respect to the ongoing historical changes on the energy markets, the use of commitments in the above-mentioned context seems to be an acceptable compromise for both the European Commission and undertakings under investigation.