Energy sector antitrust risk highlighted – EU fines power exchanges for anti-competitive practices

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Summary

Fines recently imposed on three European spot power exchanges highlight the European Commission’s focus on anti-competitive behaviour in the energy sector. In this article, BLP specialist competition lawyer James Marshall provides a short summary of two of those cases, and indicates what was notable about them.

On 5 March, the European Commission (“Commission”) imposed fines on three European spot power exchanges for breaches of European Union (“EU”) competition law.

The Commission fined the two leading European spot power exchanges, Paris-based EPEX Spot (“EPEX”) and Oslo-based Nord Pool Spot (“NPS”), nearly €6m in total for cartel conduct between 2011 and 2012. OPCOM, the Romanian power exchange, was fined €1.03m for abusing its dominant position between 2008 – 2013. Non-confidential versions of the decisions will be published following agreement between the Commission and the parties. The cases are notable for three reasons:
First, they highlight the Commission's commitment to enforcing competition law in the energy sector as part of its promise to establish a fully integrated European energy market in 2014. The cases also complement the EU's Third Energy Package (which requires structural unbundling of certain vertically integrated energy assets and provides a framework for access to energy infrastructure), as well as the goal of achieving pan-European security of supply (which is a key factor in the politically-charged Gazprom investigation).

Second, they combine the Commission's commitment to energy sector competition, with its current scrutiny of price manipulation in trading platforms and benchmarks (for example the recent LIBOR settlement – which resulted in fines of €1.71 billion – and the ongoing investigation into potential collusion in Platts price reporting).

Third, they could herald follow-on damages actions by parties directly affected by the illegal behaviour. The Commission supports antitrust damages claims and is expected to publish new legislation in 2014 aimed at making such claims easier.

What does this mean and what should I do?

Although the fines themselves are relatively small by EU standards, both the Commission and national authorities, including Ofgem in the UK, are intent on eliminating antitrust violations in wholesale energy markets.

Traders (and rival power exchanges) directly affected by the anti-competitive practices may be able to pursue follow-on damages actions. In many respects this is where the real value may come in.

If you traded on, or competed with, any of NPS and EPEX between 2011 – 2012, and/or OPCOM between 2008 – 2013 (the relevant periods of the illegal behaviour), it may be possible to claim damages from the spot markets involved. In addition, the cases may provide leverage in current and future commercial negotiations with the power exchanges.
To preserve the best position for any future action, you should maintain all relevant records available and review the position before March 2016. If your trading team noted any potentially untoward activity in the relevant period, now may be a good time to record those suspicions in privileged form.

Combined with ongoing energy sector reform in the EU and other Member States – most notably the UK (see our recent post on this) – wholesale energy trading should become more transparent and competitive as a result of these cases.

**Case 1 – spot power exchange cartel**

EPEX and NPS operate in different Member States of the EU and agreed not to compete in each other’s core territories, as well as to share markets into which they planned to expand. (NPS operates in Denmark, Estonia, Finland, Latvia, Lithuania, Norway and UK, and EPEX operates in Austria, France, Germany and Switzerland). Market sharing of this type is a particularly serious breach of EU law.

Joaquin Almunia, the EU Director General of Competition, noted that "power exchanges provide key price information and price signals in wholesale electricity markets". Given the €40 billion-plus value of EU-wide wholesale electricity trades, "anti-competitive practices at the power exchange level can seriously disrupt and distort electricity markets", particularly by sending misleading pricing signals to the market.

The enforcement action complements the EU's current focus on price manipulation in financial benchmarks, including an ongoing investigation into potential collusion in price reporting to the Platts price reporting agency.

**Case 2 - abuse of dominance**

OPCOM held a dominant position in the national market and its behaviour restricted free and fair electricity trading and supply. In particular, the Commission’s press release states that
“OPCOM discriminated against non-Romanian electricity traders by requiring traders registered in other EU Member States to be Romanian VAT registered, even though they were already VAT registered in their home countries”. There was no requirement to be Romanian VAT registered under Romanian law. This reduced liquidity in the Romanian wholesale electricity market by creating illegal barriers to new entrant EU traders.

This decision demonstrates the Commission's scrutiny of energy sector competition enforcement in a number of Member States. In particular, the Commission is currently conducting investigations into suspected abuse of dominance by Bulgarian Energy Holding in the Bulgarian wholesale electricity market. The Commission suspects that certain restrictions on the ability of wholesale traders to make downstream electricity sales distort competition in that market.

Most significantly, the Commission is continuing its investigation into alleged abuse of dominance by Gazprom. Gazprom is suspected of abusing its dominance in the market for upstream gas supply in Eastern Europe in particular by hindering supply. While that investigation remains shrouded in uncertainty, it clearly signals the EU's desire to create a secure and integrated EU-wide energy market in order to tackle security of supply concerns.

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