



Commitment Decisions in the Effects-based Regime

Ombretta Main



ICA - Directorate for Community Affairs



Introductory remarks

- After the GP's issuance, the Commission has adopted most decisions ex art. 9 of Reg. 1/2003
- Has the GP become obsolete?
- Is an effects-based assessment of exclusionary conducts required/opportune in art 9 proceedings?





Summary

- Some statistics on last year's Commission's decisions in the area of abuse of dominance
- Focus on two published decisions ex art 9 of Reg. 1/2003
- Some preliminary conclusions





Post-GP Commission's final decisions (1/09-3/10)

<i>N.</i>	<i>Case</i>	<i>Type of conduct</i>	<i>State of the procedure</i>	<i>Type of decision adopted or likely to be</i>
39388	German electricity wholesale market	Exploitative	Decision adopted	Art. 9
39389	German electricity balancing market - EON	Exclusionary/Exploitative	Decision adopted	Art. 9
39402	Rwe gas foreclosure	Exclusionary (Refusal to supply, margin squeeze)	Decision adopted	Art. 9
37990	Intel	Exclusionary (Conditional rebates)	Decision adopted	Art. 7
39316	GdF foreclosure	Exclusionary (Refusal to supply)	Decision adopted	Art. 9
38636	Rambus	Exploitative	Decision adopted	Art. 9
39530	Microsoft	Exclusionary (Tying)	Decision adopted	Art. 9
39351	Swedish interconnectors	Segmentation of Internal market	Advisory committee	Art. 9
39386	Long Term Elect. Contract – EdF	Exclusionary (Exclusive contracts)	Decision adopted	Art. 9
39315	ENI	Exclusionary (Refusal to deal)	Market test	Art. 9
39317	Eon Gas foreclosure	Exclusionary	Market test	Art. 9

Source: DGCOMP's data



Post-GP Commission's closed cases and envisaged decisions

- **8 out of 11** cases in the area of abuse of dominance are entirely or partly concerned with exclusionary conducts
- **7 out of 8** cases have been or are going to be brought to an end by a decision ex art 9 of Reg. 1/2003



NCAs' closed cases and envisaged decisions in the area of abuse of dominance since 1/09

<i>Country</i>	<i>Infringement</i>	<i>Committments</i>	<i>No infringement</i>	<i>Total</i>
BELGIUM	1			1
DANEMARK	1			1
FRANCE	3	1	2	6
GERMANY	2		3	5
GREECE	1			1
ITALY	3	4		7
NETHERLAND	1			1
PORTUGAL	1	1	1	3
SPAIN	7			7
SWEDEEN		2		2
OTHERS	4			4
<i>Total</i>	<i>24</i>	<i>8</i>	<i>6</i>	<i>38</i>

Source: NCA's data



NCAs' closed cases and envisaged decisions in the area of abuse of dominance since 1/09

- On average, one fifth of NCA's cases has been addressed by commitment decisions
- High variance across Competition Authorities
- The application of art 9 or equivalent national provisions may have a very significant role both at central and at national level





Commitment decisions in gas markets

1. DG/COMP 39316 – GdF - Refusal to supply
2. DG/COMP 39402 – RWE - Refusal to supply, price squeeze





Issue to be investigated

Balance between :

- i. Safeguard of preliminary nature of the assessment and of the non ascertaining nature of the proceeding
- ii. Provision of a well structured, effects-based, competitive analysis.





The assessment of refusal to supply in the GDF and RWE commitment decisions

- Both GDF and RWE are alleged to keep most part of their infrastructure capacity for themselves in the absence of transparent and non-discriminatory procedures
- Access to the infrastructure is objectively necessary for other undertakings to be able to compete in the downstream market/ the refused input is not duplicable
- Competitors' residual and uncertain access to the infrastructure translates into low market shares
- Consumers' harm is not specifically dealt with



... in relation to the GP

- The reasoning developed in the GDF and RWE decisions mirrors the framework employed by the GP's when addressing the refusals to deal conduct
- In particular, according to the GP, consumers' harm depends on whether or not the likely negative effects of the refusal to supply outweigh the possible reduction of the input's owner incentives to invest and innovate.
- A thorough assessment of the above is not necessary if the balancing of incentives has been made by the sector regulator before imposing obligations to supply
- GDF and RWE decisions fall within this category





The assessment of price squeeze in the RWE commitments decision

RWE is alleged to have squeeze competitors' margins by:

- Setting artificially high transmission tariffs
- Applying important elements of the network tariff only to third party users
- Granting high rebates only to RWE's subsidiaries

The decision argues that competitors were put at disadvantage. No test





RWE's commitments

- RWE commitments consist of a divestment of its gas transmission network
- This ensures that RWE has no control over the network and can not engage in anti-competitive practices, of any form – capacity or price related.
- Therefore the commitments are not specifically tailored on concerns about price squeeze.





Conclusions

- Adherence to the GP of the commitments decisions taken into consideration is:
 - higher when consumer's harm is a rather straightforward consequence of the alleged abusive conduct
 - lower when complex conducts, related to the incumbent's price strategy are considered,
- A sound identification of competition problems is essential to facilitate the choice of appropriate remedies





Conclusions

- So far there are no indications by the Commission that decisions ex art 9 are adopted at the expenses of the effects-based approach, depending on the focalization on less complex conducts
- Would this enforcement tool be applied in more complex contexts, a different equilibrium between opposite needs may emerge.

