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Editorial - EU Energy Liberalisation: Coming to a Member State Near You!

*Alan Riley**

Given the support for a watering down of the third energy package recently in the European Parliament, it could be easily concluded that EU energy liberalisation, if it is to happen at all, will only happen excruciatingly slowly. This argument overlooks the crucial point that the third energy liberalisation package is in fact only part of the liberalisation programme, and even then not the most decisive element in that programme.

What is overlooked in discussion over the scope of the liberalisation legislation is the impact of DG Competition's energy sector review launched in June 2005. During the course of that review DG Comp has obtained a significant amount of evidence of illegal behaviour, partly from complaints from energy customers and competitors and partly through 'dawn raids' which took place in May and December 2006. The outline of that evidence is set out in anonymised form in the Gas and Electricity Market reports published by DG Comp and available on its website. The reports underline the grave nature of the evidence found by DG Comp, from illegal price-fixing and market sharing, referred to by Justice Scalia in the US Supreme Court case *Trinko* as 'the supreme evil of antitrust', to gross abuse of dominance by energy incumbents by denying third party access to their networks in contravention of existing legislation and Article 82 of the EC Treaty. The gas and electricity sectors were found in almost all parts of the supply chain to be riddled with anti-competitive behaviour to the detriment of consumers and energy intensive businesses.

To its credit DG Comp has withstood significant political pressure to deploy the evidence obtained from the review to prosecute energy companies. The number of statement of objections initiated by the Commission against energy companies is unclear, but is understood that approximately 15-20 SOs are in the process of being dispatched. The crucial reality of a detailed evidence-based SO, of several hundred pages, setting out illegal behaviour by an energy company is the key to forcing change in the energy sector. Even the most powerful domestic energy incumbents cannot consider with equanimity the prospect of what the Competition Commissioner Ms Kroes has indicated will be 'sky high fines' for significant breaches of the competition rules.

In addition, and in fact probably more damaging than the size of any fine, is the prospect of the Commission publishing a 200 page prohibition decision which identifies in significant detail the ways in which the energy company in question undermined competition and consequently forced consumers and energy intensive

* Professor, City Law School, City University, London.

businesses to pay higher energy prices. Particularly at a time of very high energy prices, the damage to corporate reputation and the subsequent political damage is more than most CEOs of domestic energy incumbents could reasonably be expected to withstand.

A further connected factor, which reinforces the incentive to settle amongst energy incumbents, is the prospect of damages actions in the national civil courts by energy intensive users, such as chemicals and metals companies, and the prospect, in some States, of class actions by consumers. If the Commission publishes a 200 page prohibition decision listing all the details of illegal behaviour of company X, there is a great incentive, given the very high energy prices energy intensive business users are suffering, to seek to recover some of those costs by deploying the Commission's evidence in national court damages actions. There is a potentially a similar incentive for consumers associations.

Damages litigation on the back of Commission competition decisions has already started to appear in some national courts. Aside from the impact of very high energy prices, one particular reason to sue is that the amount of damages involved are likely to be significantly larger than in a non-energy competition case. The reason for this is that a typical cartel price-fixing case will last approximately 5 years, even then the operation of the cartel may have been intermittent. In most Member States interest on damages is from date of damage, so the compound interest on 5 years worth of illegal profits will be significant but not alarming. By contrast, in the energy field, a powerful domestic energy incumbent may have been able to deny third party access to networks or engage in market sharing for decades. The consequence of paying damages for a very long period of time, together with compound interest represents a core threat to the ongoing financial health of many major energy companies.

If the prospect of prosecution by the Commission, followed by fines, damage to reputation and damages actions in an era of high energy prices were not enough reason for energy companies to agree to unbundle their networks, as E.ON has agreed to do in respect of its electricity network, there is the factor of the growing realisation by shareholders in energy incumbents that unbundling is potentially a very good option for them. The experience in the UK has been that the shareholders of the unbundled British ex-incumbent have benefited enormously from unbundling. The evidence from the British experience is that holding the network and supply or generation together suppresses value which is released when the network is broken up. Furthermore, as most incumbents are at least part-privatised there is the danger that private equity groups will seek to buy up the shares of incumbents, in order to force a break-up to release that value.

These three factors, antitrust prosecution by DG Competition, damages actions and the realisation of shareholder value, put immense pressure on energy incumbents to settle with DG Comp and agree to unbundle. Settlement has the advantage from the energy incumbent's perspective as that as no detailed prohibition decision is published, no fine will be paid and reputational damage is limited. In addition, without a prohibition

decision it is more difficult to sue an incumbent, and the shareholders are satisfied because unbundling takes place.

In this context the papers in this issue make compelling reading Professor Cseres in 'What has Competition Done for Consumers in Liberalised Markets?' argues that while liberalisation may set a useful framework; for it to really deliver it will require flanking policies. They should provide consumers the means to surmounting information available and effective consumer protection legislation are also required. Dr Monti in 'Managing the Intersection of Utilities Regulation and EC Competition Law' considers the cases where antitrust solutions should give way to regulatory ones. Finally Mr Willis and Mr Hughes in 'Structural Remedies in Article 82 Energy Cases' provide a detailed and substantial account of the application of the key recent cases in which Article 82 has been deployed to open up national energy markets.