REGULATORY
EU Competition Law

Competition Law and the Energy Sector – EU, UK, and Beyond; Looking Ahead to 2013
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Since it is early in 2013 (according to the Gregorian calendar), this competition law update considers possible competition law developments in the year ahead. Rather than a “Janus” approach of rounding up last year, it focuses on likely future developments in EU, UK, and international competition law of interest to energy companies in the next twelve months and beyond.

EU DEVELOPMENTS

EU Internal Energy Market

The European Commission (“Commission”) will advance initiatives set out in its November 15, 2012 Communication on the EU internal energy market. The Communication sets out various priorities to seek to ensure that the EU internal energy market is complete by 2014. The EU is not yet on track to meet this deadline.

In particular, the Commission has urged the EU member states to take all the necessary measures to implement the Third Energy Package. The Commission maintains that it will continue to bring infringement proceedings against member states who fail to ensure correct and timely implementation of the Package. The Commission also sets out measures to seek to improve the position of energy consumers, including asking member states to remove regulated retail prices. The Commission has also decided to establish an Electricity Coordination Group to facilitate cooperation in security of supply in the electricity sector. The Commission also sets out various supporting measures to encourage investment to modernise infrastructure, achieve sustainability targets, and improve security of supply.

Simplifying EU Merger Control

The Commission is considering possible improvements and simplifications to EU merger control. In particular, it is considering acquisitions of non-controlling minority interests. Vice President Almunia considers that there are two options: (a) a selective system in which the Commission identifies the cases that may raise specific competition problems; or (b) a mandatory notification of the type in operation at present. Mr. Almunia’s preference is for the selective option. Another area of potential reform is the interaction between the EU merger control system and national merger control in the EU. Currently, EU merger control provides for a “one stop shop” for exclusive competition review by the Commission of certain large mergers with cross-border elements. However, there are exceptions whereby mergers that would otherwise be reviewed by the Commission may be reviewed by the member states and transactions which would otherwise be reviewed by the national authorities may be ‘referred up’ to the Commission. The simplification of EU merger control is set to be adopted in 2013 as part of the Commission Work Programme 2013.

Private enforcement of competition law

Initiatives to stimulate private damages actions for antitrust infringements in Europe have enjoyed something
of a ‘stop-start’ history. The Commission did not take forward action in 2012 and work in this area is not formally part of the Commission Work Programme 2013. However, in October 2012, Vice President Almunia signalled that the Commission continues to work on an antitrust damages initiative to clarify the relationship between private and public enforcement across Europe. In December 2012, he confirmed an intention to submit a proposal on antitrust damages actions to the College of Commissioners “in the coming months.”

It is therefore likely that there will be further activity in this area at EU level during 2013. The Commission may issue final guidance on quantification of damages following the publication of draft guidance in June 2011.

**Public procurement**

New EU directives on public procurement are expected in 2013. The main aim of the new procedures is to simplify the existing rules and introduce greater flexibility. The Commission has also published a separate proposed directive on the award of concession contracts. This applies to works and services concessions and also applies in the utilities sector. Under the current rules concession contracts are not subject to the full application of EU procurement rules.

It was originally planned that the directives would be adopted by the end of 2012 with an implementation date of June 30, 2014. The delay in adoption signals a likelihood that the deadline for implementation into national law will be extended. The delayed implementation date will most likely be 24 months following entry into force of the relevant directive. There will be mandatory use of only e-procurement for all procedures 54 months after entry into force.

**European Commission investigation into Gazprom**

On September 4, 2012 the Commission announced that it had opened formal proceedings to investigate whether Gazprom is abusing a dominant position contrary to Article 102 of the Treaty on the Functioning of the EU. Having formally opened proceedings, the Commission will now treat this investigation as a priority. According to public sources, the Commission has not yet issued a Statement of Objections (“SO”). The issue of an SO is a key further stage in a Commission investigation and is the Commission’s ‘charge sheet’ of objections laying out its detailed case. The Commission states that it is investigating three suspected anticompetitive practices by Gazprom in Central and Eastern Europe: dividing gas markets by hindering the free flow of gas across member states; preventing the diversification of the supply of gas; and imposing unfair prices on customers by linking the price of gas to oil prices.

It is quite possible – but by no means certain – that the Commission may adopt an SO by the end of the year or in 2014. In any event, the case will be watched attentively by energy companies operating in Europe. The first two of the Commission’s lines of inquiry echo areas of focus in previous EU antitrust inquiries. The latter line of inquiry relating to the pegging of long-term gas contracts to oil prices is more controversial; how this is decided will have implications beyond the current case.

**UK DEVELOPMENTS**

**Energy Bill**

The Energy Bill 2012-13 (“Energy Bill”) will continue through the legislative process following its introduction to the House of Commons on November 29, 2012. Among other things, the Energy Bill implements the government’s proposals on Electricity Market Reform (“EMR”). EMR is intended to hasten the move to a low-carbon economy, principally through “contracts for difference” (“CfD”), which are long-term contracts aimed to guarantee secure and stable revenues for investors in low-carbon energy.

At the same time as publishing the Energy Bill, the Department of Energy and Climate Change (“DECC”) also issued: (a) the government’s Annual Energy Statement, which sets out an overview on the progress the government has made in implementing policy on energy and climate change over the past 12 months; (b) the Energy Security Strategy, setting out DECC’s assessment of UK energy security; (c) Electricity Market Reform: policy overview; (d) various policy briefs and impact assessments relating to the different aspects of the Energy Bill; (e) the government’s response to the report of the House of Commons Energy and Climate Change Select Committee Report; (f) a call for evidence on the CfD supplier obligation (i.e., a levy on all licensed suppliers in Great Britain and Northern Ireland to collect money owed to generators); (g) a consultation on Electricity Demand Reduction; (h) a consultation on synergies and conflicts of interest arising from the Great Britain System Operator delivering EMR; and (i) the government response to the consultation.
on a proposed new power for Ofgem to compel regulated energy businesses to provide redress to consumers.

Ofgem

UK regulator for the electricity and natural gas sector, Ofgem, has set out its priorities for 2013-14 in a draft forward work programme. These priorities include implementation of its Retail Market Reform proposals, implementation of proposed reforms to enhance liquidity in wholesale electricity markets, electricity distribution price control review, and conclusion of its enforcement review.

In November 2012, Edward Davey, Energy Secretary, made a statement to Parliament on allegations of manipulation of the natural gas market. Ofgem confirmed that concerns have been brought to its attention in this regard and that it is conducting an investigation. Further statements in this area may be made during 2013. Ofgem stated that it will consider carefully any evidence of alleged market abuse, as well as the scope for action under all its relevant powers. Ofgem has the lead responsibility for physical gas markets, with the Financial Services Authority leading on any investigations into any associated financial market.

Reform of UK competition law and transition to Competition and Market Authority

It is expected that the Enterprise and Regulatory Reform Bill will receive Royal assent during the first half of 2013. A key element of the reforms will be the creation of a new Competition and Markets Authority (“CMA”) to which will be transferred the functions of the Competition Commission and the competition functions of the Office of Fair Trading (“OFT”). The CMA is expected to be fully operational by April 2014 and the OFT and Competition Commission will be working towards the transition to the CMA during 2013.

Other reforms relate to the competition rules in the Enterprise Act 2002 (on the merger and markets regime and the criminal cartel offence) and to the Competition Act 1998 (on the antitrust enforcement regime and concurrent application of competition law by the competition and sector regulators).

Reform of UK private actions regime

On 29 January 2013, the UK Government issued its response to the 24 April 2012 consultation on reforming private actions in UK competition law.

The main changes that the Government will implement include:

- making the Competition Appellate Tribunal (“CAT”) the main court for competition actions in the UK, including a fast track regime;
- introducing a new opt out collective actions regime; and
- promoting Alternative Dispute Resolution.

In response to concerns that an opt out system would encourage frivolous claims, a number of checks and balances will be introduced including:

- no rebuttable presumption of loss in cartel cases;
- judicial certification of cases so that unmeritorious claims do not proceed;
- no treble damages;
- no contingency fees for lawyers;
- maintaining the ‘loser pays’ principle;
- claims may not be brought by law firms, third party funders or special purpose vehicles.

The majority of the reforms are subject to changes in primary legislation. They are likely to come into force in Spring 2014, at the same time as the creation of the new CMA.

INTERNATIONAL DEVELOPMENTS

New Competition Law in the United Arab Emirates
In October 2012, the UAE passed Federal Law No. 4/2012 on the regulation of competition (the “UAE Competition Law”) which aims to protect and enhance competition within the UAE. The UAE Competition Law will enter into force on February 23, 2013. It will be fully effective in August 2013 after a six-month transitional period.

As with most competition regimes internationally, the UAE Competition Law regulates market behaviour with a particular emphasis on (a) regulating restrictive agreements and abuse of market power; and (b) merger control.

The UAE Competition Law applies to all entities operating in the UAE and entities whose activities outside the UAE may affect competition in the UAE. These are, however, certain sectors and activities that are specifically excluded, including: (a) the oil and gas sector; (b) activities related to the production, distribution and transportation of electricity and water; and (c) activities on the treatment of sewage, garbage disposal, hygiene, and the like, in addition to supportive environmental services. While these provisions appear to provide a wide exclusion for the energy and certain natural resources and related sectors, those sectors remain to be subject to sector regulation. It also remains to be seen how long the exclusions will last. Also, the new UAE Competition Law will, in principle, cover the activities of suppliers to energy and natural resources sectors, for example suppliers of infrastructure and logistics. Energy and natural resources will therefore want to consider whether the activities of third parties may be restricting their ability to compete in violation of the new law and what means of redress may be open to them.


Amendments to Indian Competition Law

The end of 2012 saw developments towards amendments to Indian competition law. The Lok Sabha (the lower house of the Indian Parliament) passed the Competition (Amendment) Bill, 2012 (the “Competition Amendment Bill”) on December 7, 2012. Before this bill becomes law, it needs to be passed by the Rajya Sabha (the upper house of the Indian Parliament). It must then be notified by the Government. The exact timing of implementation of the Competition Amendment Bill is unclear, although there is momentum to push ahead the sweeping changes to the existing Competition Act, 2002 which is entering its fifth year of implementation.

The Competition Amendment Bill seeks to confer increased autonomy on the Competition Commission of India ("CCI") in enforcing the Competition Act, as well as some fine tuning in the investigatory functions of the CCI. Among the main potential changes of interest to energy companies are the following:

- **Collective dominance:** Applicability of the prohibition on abuse of a dominant position to cover “collective dominance.” Previous decisions of the CCI have concluded that the Indian Competition Act does not apply to collective dominance. This means that the CCI may in the future find a dominant position where no company is individually dominant but where, together, two or more companies hold a dominant position. This should allow the CCI to find more scope for infringement action where it does not have evidence of an anticompetitive agreement or single dominance.

- **Group:** The threshold in order to constitute a “group” when determining the relevant turnover or assets for merger control is increased to 50 percent. The current provision defines a group as two or more enterprises that exercise 26 percent voting rights in each other.

- **Sector-specific merger control thresholds:** A new provision to give the Central Government the power to specify different values of assets and turnover for any class of enterprises for merger control purposes.

- **References from and to statutory authorities:** Mandatory references of issues by statutory authorities (including sector regulators) to the CCI and from the CCI to the statutory authorities. Currently, such references between the CCI and statutory authorities occur on a discretionary basis.

- **Orders:** Wider powers to the CCI to pass “appropriate orders” to close investigations or direct further investigations.

- **Right to be heard:** Provision to require the CCI, after a determination that there has been a contravention of the Competition Act, to give the affected party a right to be heard before passing orders imposing a
penalty.

- Merger control timetable: The waiting period for deemed approval of mergers will be reduced from 210 days to 180 days.

Dawn raids: Empowerment of the Chairperson of the CCI to approve search and seizure (so-called ‘dawn raids’). The scope of the CCI’s powers to conduct dawn raids has been subject to some debate and the changes will place those powers on a firmer footing.

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