Regulatory Competition Law in European Energy Markets

A dissertation submitted by candidate number 14695 to the Department of Government, the London School of Economics and Political Science, in part completion of the requirements for the MSc in Regulation.

August, 2016

Word Count:10.097

Abstract

Recent application of competition law, especially in European Union (EU), has converged to sector-specific regulation since it intervenes the operation of markets more aggressively and aim to re-structure it. This regulatory use of competition law has been widely observed in EU energy markets, providing extensive examples to analyse this concept in depth. The ongoing liberalisation process and the national characteristics of sector-specific regulation while the EU-wide application of Community competition law render analysing this sector more interesting. This dissertation aims to identify how or through which tools competition law has become regulatory in energy markets and which factors can explain this regulatory use of competition law in these markets. Within this context, EU anti-trust cases between 1999-2016 July has been analysed. This case review suggests that competition law has been regulatory from 1999, however became much more structural and aggressive after 2007 by using broad interpretation of basic concepts, sector inquiry, formal and informal commitments. This dissertation argues that this is a regulatory tool change in energy market regulation and liberalisation. Theories of regulatory change can be benefitted from to explain this shift*. The functionalist explanations and interest-based theories may explain the need of a change and its timing, while ideas-based theories are better at explaining the move towards regulatory competition law and the role of policy entrepreneurs. Institutional theories and reputation points the differences in Member States' regulations and the convenient characteristics of EU competition law to institutionally fit the need of a single energy policy.*

Table of Contents

INTRODUCTION

With its initial aim of “ensuring market efficiency”, competition law has been one of the tools of the state to organise markets and the behaviours of market actors. Although both competition law and economic or sector-specific regulation mostly address the same market problems and the distinction in terms of their logic is vague, the methods they that employ differ from each other. Within the scope of its conventional application, competition law is proscriptive and ex-post. It aims to preserve the competition in the market and is bound to some judicial procedures. However, competition law enforcement in recent years has become much more interventionist resulting in highly re-structural consequences in the market operations. This means a shift from its conventional judicial, ex-post, prohibitive features towards an application resembling economic or sector-specific regulation. This type of intrusive, re-structural and administrative use of competition law converging to sector-specific regulation is named regulatory competition law (RCL) and highly discussed in the literature.

The recent enforcement of European Commission (Commission) in energy markets of European Union (EU) is a leading example for RCL. Because energy markets in EU are still on the process of liberalisation, competition problems as a result of vertical integration and the conducts of the incumbents firms are possible to occur. Sector-specific regulation with the support of competition law aim to introduce competition to possible competitive markets like generation, export, wholesale and retail as well as addressing the problems emerging from the conducts of powerful incumbent firms. It should be also noted that sector-specific regulation in energy is applied solely at national level whereas Commission enforces EU Competition Law throughout the whole EU in addition to national competition law application. Therefore, EU energy markets provide extensive and interesting examples to understand and analyse RCL.

In this regard, this dissertation aims to analyse the application of RCL by Commission in EU energy markets. As RCL is mostly associated with EU competition law and EU application provides adequate examples for this dissertation, the national application of competition law is excluded. This dissertation answers the questions how and why competition law has been applied in a regulatory manner in this specific sector. Diverging from the literature about the pros and cons of the RCL and its effect on future competition law enforcement, this dissertation acknowledges competition law as one of the regulatory tools of the states and analyses RCL in the scope of regulatory theories. To achieve this, it first evaluates the Commission's application of competition law from 1999- 2016-July on energy markets and identifies a change towards more intrusive and re-structural use of competition law after 2007, which also can be argued as a regulatory tool change in energy market regulation and liberalisation. Then, this dissertation analyses this change using the theories of regulatory change and seeks to find out which theory can explain the recent shift.

Within this context, the first section is dedicated to understand RCL and its distinctive aspects from the conventional competition law. As the application of competition law is highly related with the liberalisation process, the liberalisation of EU energy markets is briefly explained in Section-II. Then, this section reviews the RCL cases between 1999[1] till 2016-July by using the identified aspects to differentiate RCL from conventional competition. Merger control has always been applied ex-ante and brought remedies, hence they hardly show the shift in the application of competition law. Therefore merger decisions are excluded from the analysis. Case review identifies the most used tools of RCL and a change towards more intrusive use of competition law

[1] The case research available at http://ec.europa.eu/competition/elojade/isef/ does contain the anti-trust cases before 1999. See. http://ec.europa.eu/competition/cases/manual.html (Accessed: 15.08.2016). Additionally, energy markets started to be liberalised in late 1990's.

after Sector Inquiry in 2007. Section-III, first compares the application of competition law before and after 2007, and then puts this change in the context of regulatory tool change. Afterwards it applies the theories of change to explain why RCL became prominent and vigorous in energy markets.

Finally this dissertation argues that competition law in energy markets applied by the Commission has been regulatory during the period of analysis, yet became more interventionist, vigorous and re-structural after the Report of Sector Inquiry in 2007. Most used tools of the RCL in energy markets are informal and formal commitments, broad interpretation of refusal to deal and essential facility doctrines and sector inquiry. Especially the fact that the majority of formal commitment decisions belongs to energy sector is highly remarkable.

This dissertation concludes that the change in the application of RCL in energy markets is a regulatory tool change in regulating the energy markets and their liberalisation process. Rather than being supportive to sector-specific regulation, competition law gained a major role in regulating the markets with this change. Functionalist theories show the need for a change by emphasising the ineffectiveness of sector-specific regulation, the weakness of national regulatory agencies (NRAs), the global characteristic of energy supply and the practical convenience of competition law. Interest-group theories explain the dynamics behind the move towards more effective tools and help to understand the capture of the NRAs. However these theories do not explain why competition law has become the preferred tool. Ideas-based theories focus on ideologies about the policy tool characteristic of competition law, yet cannot state much about the timing of the change. Institutional theories and reputation refer the different levels of liberalisation among Member States and the institutional match of EU competition law in developing EU-wide policies. This findings also show that

none of these theories can explain all aspects of regulatory change. Change can be explained with a mix of these theories.

I. REGULATORY COMPETITION LAW

I.1. Economic Regulation and Competition Law

Governments intervenes the operation of the economy with several motives like the existence of monopolies, information asymmetries, moral hazard, anticompetitive behaviour or ensuring continuity of services (Baldwin et al., 2012: 15-24; Lodge and Wegrich, 2012: 18-25). With its main objective to ensure "market efficiency"[2], competition law is one the regulatory methods to reach the desired market outcomes. Within this context, competition law and economic regulation can be seen as "*components of the State's arsenal of market regulatory tools that facilitate the legal function of market regulation*" (Dunne, 2015: 1).

Especially in the case of monopolies sectors-specific regulation and competition law have overlapping aims and they both address the same problems like third party access, long-term contracts, vertical integration. Therefore, competition law and sector-specific regulation can be argued to share the same objectives and logic in many aspects. From this perspective, the distinction between competition law and sector specific regulation is vague and unclear (Ibanez-Colomo 2010: 63; Dunne, 2015: 3)

Nevertheless, the methods, procedures and tools adopted by competition law and economic regulation may differ in many aspects. Thus, the actual source of the distinction between two is those variations. Acknowledging the differences between them is crucial to differentiate the conventional competition law from regulatory one

[2] There are some discussions about whether competition law may also serve other objectives. This issue is discussed in Section-III in detail.

and identify the instances where competition law converges to sector-specific regulation.

Dunne (2014: 411) identifies five non-incontrovertible but useful standards to differentiate economic regulation and competition law: First, competition law is applied across sectors, whereas economic regulation addresses specific sectors. Second, competition law is mostly ex-post (except merger control), yet economic regulation is ex-ante. Actually the ex-post characteristic of the competition law is presented one of the main distinctions in the literature (Ibanez-Colomo, 2010: 263; Ehlers, 2009: 61; Cave and Crowther, 2005: 481). Third, competition law allows markets to operate unless there is an infringement, while economic regulation intervenes to market mechanisms. In other words, economic regulation decides how markets should be structured. Fourth, competition law in many jurisdictions aim market efficiency, yet economic regulation may also have redistributive or other social aims. Last, competition law with its case-by-case application is more dynamic, while sector-specific regulation remains static.

Ehlers (2009: 60-61) argues that the distinction is that competition authorities has no power in some situations which regulatory authorities can take action. Regulation, in this regard, can impose new duties within its legal mandate because it has wider aims than competition law. Similarly, Cave and Crowther (2005: 485) claims that regulatory remedies are broader than competition law remedies. Ibanez- Colomo (2010: 263), accordingly, summarizes the main difference as that the regulation is more "*intrusive*" trying to shape the conditions of the competition whereas competition law aims to preserve existing market structure.

Given the literature, economic regulation and competition law have overlapping mandates but the mechanisms they use differ in terms of their scope of application,

temporal aspect of enforcement, the goals other than market efficiency, the extent and nature of remedies. In short, economic regulation shapes the operations of the markets and competition law ensures that companies do not distort the given competition level in those markets.

I.2. Regulatory Use of Competition Law

Recent application of competition law is argued to move away from its above-mentioned distinctive mechanisms and resemble the sector-specific regulation. Competition law, in many cases, has not hesitated to intervene the markets and sometimes challenge the sector-specific regulation. This type of use of competition law adopting the mechanisms of sector-specific regulation is named as “regulatory use of competition law” or “regulatory competition law” (RCL).

According to Dunne (2015, 79) RCL is characterized by administrative-technocratic use rather than adopting adversarial- judicial proceedings; ex-ante application, prescriptive obligations, static remedies requiring monitoring and search for best outcomes for the market rather than preventing anti-competitive behaviour.

The conventional use of competition law has some judicial characteristics with some procedural guarantees like defence rights or appeal procedures. Therefore the decision-making procedures under the competition law is adjudicative (Larouche, 2000: 120; Dunne, 2015: 79-81). However, RCL and its tools mostly lack of these procedural guarantees. Hereby, competition authorities act more like a policy maker and competition law becomes administrative.

Besides taking action after an infringement, RCL also discourages firms from engaging in an infringement by ex-ante drawing safe-harbours or pointing out the problematic

conducts. Ex-ante application of anti-trust is one of the main features of RCL (Ibanez-Colomo, 2010: 264-268, G. Monti, 2008: 19-20).

Accordingly, RCL becomes also prescriptive (Ibanez- Colomo, 2010: 268-276) and focusses on remedies (G. Monti, 2007: 484). Analysing application in EU telecommunication and energy, Cave and Crowther (2005: 481) argue that competition law has become regulatory, by "*prescribing detailed patterns of behaviour*". These prescriptive nature of RCL also reveals itself in remedies. The remedies shows how to relieve the competitive concerns, hereby RCL prescribes the desired conducts.

I. 3. Tools of RCL in EU

Competition law in EU addresses two main concerns: cartels/ agreements between competitors distorting competition under Article 101 of Treaty on the Functioning of the European Union (TFEU) and abuse of dominance under Article 102 of TFEU. Competition law has many practical methods and tools to replicate economic regulation and affect the way of market operation. Especially, in EU, the supremacy of EU competition law over national regulations[3] aggravates the effectiveness of RCL. Additionally, Salerno (2008: 3) argues that the ability of Commission to directly access the regulatees and get decisions about them makes competition law akin to a classic regulator.

First, open-texture of competition rules, case by case implementation, discretion given to authorities make competition law a practical and pragmatic tool for economic intervention. Ibanez- Colomo (2010: 265-267) argues that decisions of Commission and EU courts can draw principles or bright-lines, which ex-ante point the acceptable limits of conducts. The written rules additionally may be interpreted in ways leading to

[3] See. G. Monti (2008: 3-10); Lianos and Geradin (2013: 603-605).

consequences shaping markets, as it challenged the very essence of IP law in *Microsoft*[4] or re-structured the markets with divesture remedies in *ENI*[5] and *Gaz de France (GDF)*[6].

Another method to use competition law in a regulatory manner is the soft law instruments like guidelines, notices, communications or sector inquiries. These non-binding tools disseminate Commission's views about the possible infringements. Further, as Cave and Crowther (2005: 488) state, more than being a summary of understanding of case-law, they are ex-ante policy documents. For instance, the requirements for standard-setting organizations stated in the Guidelines of Article 101[7], in a way, regulate the operation of standard-setting organisations by requiring transparency, unrestricted participation and fair, reasonable and non-discriminatory access to standards. Soft law instruments are also administrative as they do not provide firms the usual procedural guarantees of competition law investigations. For example, companies cannot challenge the findings and suggested remedies of a sector inquiry (Ibanez- Colomo, 2010: 287).

Another tool for regulatory competition law is the negotiated settlement or commitment decisions (Ibanez-Clomo, 2010; G. Monti: 2008: 19-25, Dunne, 2014). Instead following fully adversarial proceedings, competition authorities may encourage companies not to contest their findings and offer voluntarily remedies in return of some benefits (Wills, 2008: 337). It should be noted that Commission applied informal commitments prior the Regulation 1/2003[8] (Kostopoulos, 2009: 14; Cave and

[4] Commission decision: Case COMP/C-3/37.792 Microsoft; CIF decision: Case T-201/04, Microsoft v. Commission.
[5] Case COMP/39.315 *ENI*.
[6] Case COMP/39.316 *Gaz de France.*
[7] Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements.
[8] Council Regulation (EC) No 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.

Crowther, 2005), which officially introduced the commitments to EU. Afterwards, commitments have become one of the most used tools of RCL and found a considerable place in case-law. Since its introduction in 2004 till 2016-July, there have been 32 commitment decisions while 79 prohibition cases including 56 cartel[9].

The primary purpose of commitments is to preserve effective competition and to obtain faster changes in the market for the future[10] and they intend to provide more rapid solutions[11]. However, as the commitments are offered by the undertakings themselves, the judicial review is very limited. Remedies are prescriptive and may be re-structural and finally Commission decides the best outcomes for the market. Similarly, Dunne (2014: 401) argues that commitment decisions carry the characteristic of quasi-regulatory anti-trust as "*the consensual, compromise-focused nature of the commitment procedure*" focusses on the future market structure instead of punishing past infringement.

Herein, the importance of the magnitude of fines that Commission can impose after usual investigation procedure should also be noted. Wils (2008: 345) also emphasises the importance of the Commission's reputation in penalties for an effective commitment procedure. The motives of the companies to avoid possible fines lead them to welcome these non-binding or un-orthodox tools. This embracement consequently strengthens the effectiveness of RCL tools.

I.4. When Competition Law Becomes Regulatory

RCL has been applied in several sectors in EU. However, one reason for the application is the lack of regulation in the market. In these circumstances, competition

[9] Commitment procedure is not applicable in cartel cases.
[10] Commission Staff Working Paper (..) on the Functioning of Regulation 1/2003, para. 97.
[11] Case C-441/07 P, Commission v. Alrosa Co. Ltd., para. 35.

law substitutes regulation and plays a gap-filling role until the required regulation is put into effect as it did in air transport and card payments markets (Dunne, 2015: 74-76). Additionally, in circumstances of weak enforcement or weak agencies, competition law again substitutes the sector-specific regulation as in cases *Deutsche Telecom*[12], *Astra-zeneca*[13] and *Rambus*[14].

Additionally, competition law has also challenged the current regulation in technology markets with its decisions *Microsoft*[15], *Lundbeck J.J*[16], *Motorola- Samsung*[17]. Herein competition law implicitly opposes the current application of IP regulation disregarding the specifications of industry, which changes rapidly and dominated by network effects. Commission also second-guessed the validity of IP rights and their use[18].

Ibanez-Colomo (2010) argues that competition law becomes regulatory when markets display a tendency to monopoly and if there is a bottleneck. Especially the application of RCL in technology markets like *Microsoft*[19] and *Google*[20] are related with monopoly tendency. Bottleneck refers mostly access to indispensable infrastructure. Accordingly, the problems emerging in newly liberalised markets due to the powerful incumbents are another reasons for competition law being more interventionist. Competition law in telecommunication sector can be given as one example[21], another is energy sector, which is explained in detail in following sections.

[12] Case C-280/08 P *Deutsche Telekom AG v Commission*.
[13] T-321/05 - AstraZeneca v Commission.
[14] Case COMP/38.63 Rambus.
[15] Supra note 4
[16] Case AT.39226 Lundbeck.
[17] Case AT.39939 Samsung.
[18] For discussion about these cases see. Petrovcic (2013), Rato and English (2015), Banasevic (2015).
[19] Supra note 4.
[20] This case is not finalised. For detailed information see. http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_39740 (Accessed: 19.8.2016).
[21] See. Larouche, 2000.

These examples actually refer the idea that the current regulations in some sectors are static and weak, hereby cannot address the problems of the markets. Competition law, nevertheless, can identify and solve these problems quickly and effectively. I suggest that Commission has adopted this idea and believes that it can correct market failures due to the trust of its sector specific knowledge and experience gained from case-law experience over the years. Moreover, the powers and the broad set of tools employed by Commission reinforce this trust. In addition to this trust, its powers to target any company operating in EU and impose high fines led to an understanding that competition law better fits as a regulation to the changing conditions of the markets.

I.5. Discussions about Regulatory Competition Law

Although it is a practical tool and offers a quick resolution to market problems, RCL is not problem-free. It is not the aim of this dissertation to discuss the normative question whether competition law can undertake the duties of sector-specific regulation. However, just to capture all aspects of the RCL, it should be noted that RCL is criticized in terms of its legitimacy (Hancher and de Hauteclocque, 2010:10, G. Monti, 2007: 498; Larouce, 2000: 122), the possibility to undermine Member States' policy choices (Svetiev, 2014: 468; G. Monti, 2008: 10), its higher risk to err in the suitable remedies (Dunne, 2015: 117; Devlin 2012: 850-852), reducing the "*excepted standards of intervention*" (Ibanez-Colomo: 2010: 277), proportionality of the remedies (Ibanez-Colomo, 2010, Dunne, 2014: 406; G. Monti, 2007: 498) [22] and the risk of politicisation or instrumentalization of competition law (Dunne, 2015: 95-97; Ibanez-Colomo, 2010).

[22] Supra note 11, para. 40-41 states that Commission is not bound to search for a less onerous remedies in commitment cases unlike prohibition cases.

II. REGULATION AND COMPETITION LAW IN ENERGY SECTOR

II.1. Liberalisation and Regulation of Energy Sector

Like other utilities, energy sectors used to operate mostly through state-owned monopolies. Cameron (2002: 5-6) argues that governments involved into energy sector because it is natural monopoly, capital intensive, strategically important for economy and military; and accepted as an essential service. However, due to the increasing dissatisfaction of the state monopolies' performance, technological innovations, budgetary reasons and the ideological shift about the role of the state, the merits of these justifications are questioned in recent decades[23].

Johnston and Block (2012: 10) argued that the importance of energy markets in reconstruction of European economies and the concerns about security/diversity of supply obstructed the adoption of single policy. However, changing political climate, environmental concerns and rising international competition revealed the need of an EU energy policy. Today, as one of the EU competence arenas[24] energy policy involves competitive markets; security of energy supply; promoting energy efficiency, saving, renewable resources and the interconnection of energy networks[25]. However, due to the relation to competition law enforcement, the regulation regarding liberalisation and functioning of the energy markets are explained below in detail.

Nowadays, it is accepted that the generation, export, wholesale and retail markets of energy do not display natural monopoly characteristic and they can be opened to competition whereas transmission and distribution are organised as monopolies. The liberalisation process in EU has been conducted through legislative packages

[23] For detailed explanations about liberalisation as a policy change See. Hood (1994: 37-56)
[24] TFEU Article 4(2)(i).
[25] TFEU Article 194(1).

containing regulations and directives. The directives should be transposed into the national legislation. Hence, regulation of the energy markets and ensuring liberalisation are subject to national regulation. The Sector Inquiry conducted by the Commission showed that the current rules brought with the first[26] and second[27] legislative packages did not achieve their objectives[28]. This finding led to the third energy package[29].

The third package suggests that Independent System Operator (ISO)[30] and Independent Transmission System Operator (TSO)[31] suitable to solve the problems arising from vertical integration whereas Commission proposed that full ownership unbundling is the most effective method[3233]. Additionally, Member States should ensure third party access to transmission networks in a non-discriminatory manner[34]. Third party access is argued by Jonston and Block (2012: 73) to be the "*cornerstone*" and by Kruimer (2014: 42) to be the "*prerequisite*" of liberalisation.

Directives also address the long-term contracts and clearly note that the long-term supply contracts[35] or contracts to use gas transmission systems[36] should comply with competition rules. Last, third package put greater importance on the strength of NRAs

[26] Directive 96/92/EC and Directive 98/30/EC.
[27] Regulation (EC) No 1228/2003, Regulation (EC) No 1775/2005, Directive 2003/54/EC, Directive 2003/55/EC.
[28] For details of the Inquiry see Part-II.2.2.
[29] Regulation (EC) No 713/2009 , Regulation (EC) No 714/2009, Regulation (EC) No 715/2009, Directive 2009/72/EC, Directive 2009/73/EC.
[30] Supply companies may own gas or electricity transmission networks, yet the operation, maintenance, and investment are conducted by an independent company.
[31] Supply companies own gas or electricity networks, yet operate them through a subsidiary.
[32] Communication from the Commission to the European Council and the European Parliament an Energy Policy for Europe.
[33] Despite the Commission's findings, there is not a consensus in the literature about the effectiveness of full ownership unbundling. See: Pollit (2008); Diathesopoulos, (2010); Jonston and Block (2012: 67-70).
[34] Directive 2009/72/EC and Directive 2009/73/EC, Article 32(1).
[35] Directive 2009/72/EC, Article 37(l), Directive 2009/73/EC, Article 41(l).
[36] Directive 2009/73/EC, Article 32(3).

and their independence[37]. Additionally for coordination among NRAs, Agency for the Cooperation of Energy Regulators (ACER) was established[38].

Abovementioned issues are also within the mandate of competition law. The remaining market power of incumbents and their vertically integrated structure (both operating in potentially competitive and monopolistic transmissions networks) cause incentives for incumbents to protect their markets shares (Albers, 2001: 3-4; Johnston and Block, 2012: 38) and engage with abuse of dominance like restriction of third party access, long-term contracts or excessive prices. Thereby, the transition period from state-monopolies towards competitive markets create problems subject to competition law enforcement as well as sector-specific regulation. Therefore it can be argued that competition law is one of the components of the regulatory regime in energy markets, especially related with the liberalisation aspect.

II.2. Competition Law in EU Energy Markets

Between 1999 and 2016-July, Commission took 48 antitrust cases[39]. The anti-trust cases contain several types of decisions ranging from prohibition, commitment, sector inquiry, joint-venture clearance and obstruction of investigation[40]. As the ex-ante application in merger decisions are accepted within the limits of conventional competition law, this section focuses on anti-trust decisions and seeks to find through which type of instruments competition law mimics sector-specific regulation. Despite three prohibition decisions, the supremacy of un-orthodox cases and commitments in energy sector is remarkable[41]. The prominent examples of RCL distinguished from

[37] Directive 2009/72/EC, Article 35(4) and Directive 2009/73/EC, Article 39(4).
[38] Regulation (EC) No 713/2009.
[39] Case search was conducted on 1.8.2016.
[40] See Appendix-1
[41] See Appendix-2

conventional competition law according to the identified characteristics in Section-I are discussed below.

II.2.1. Informal Commitments and Other Methods

Before the official commitments, Commission used informal methods like advocacy, persuasion and settled investigation in return of remedies. Anti-trust cases in the beginning of 2000's were mainly about joint sale agreements, territory restrictions and congestions in electricity interconnectors' network. Within the context of advocacy, Directorate General for Competition wrote a letter to the responsible authorities in the EU Member States in order to assure the individual marketing of Norwegian gas[42]. An agreement were made with the Algerian Ministry to remove the territorial restrictions in marketing Algerian gas[43]. Commission also published a Memo explaining the role of interconnectors network for market integration after liberalisation[44] and following the concerns of Commission, the operators linking the United Kingdom and France markets[45] and the operators of Germany, Norway and Denmark[46] agreed on open up the interconnector infrastructure to access.

In addition, two investigations related joint sales agreements[47], three investigations against territorial restrictions[48], two investigations about third party access and discrimination[49] were settled and closed after commitments. The commitments mainly involve abandonment of anti-competitive behaviour, in other means, they are barely

[42] PO/Access to Gas Networks, IP/01/1170, Brussels, 2.08.2001.
[43] IP/07/1074, Brussels, 11.07.2007.
[44] MEMO/01/76, Bruseels, 12.03.2001.
[45] PO/Interconnector France-UK+3, IP/01/341, Brussels, 12.03.2001.
[46] Statkraft+I/S Elsam+18 IP/01/30, Brussels, 11.01.2001.
[47] GFU, IP/02/1084, Brussels, 17.07.2002; PO/DUC-DONG, IP/03/566, Brussels, 24.04.2003.
[48] Territorial restriction Netherlands, IP/03/1345, Brussels, 06.10.2003, PO/Territorial restrictions – Austria, IP/05/195, Brussels, 17.02.2005; PO / Territorial restrictions Germany (Gasprom), IP/05/710, Brussels, 10.06.2005.
[49] Gas Natural/Endesa, IP/00/297, Brussels, 27.03.2000; Marathon, IP/04/573, Brussels, 30.04.2004.

re-structural. Yet more prescriptive than others, *Marathon*[50] case introduced a detailed system to improve third party access. Consequently, this early application of competition law can be argued administrative rather than judicial and prescriptive rather than proscriptive. However, it is hardly re-structural.

II.2.2. Soft Law

There is not any sector-specific competition guideline in energy markets, sector is subject to general competition rules. Yet Sector Inquiry finalised in 2007 can be claimed a soft law method aiming to re-shape energy markets.

One of the main findings of the Final Report[51] was that wholesale level of market remained highly national and concentrated; and there was little entry into retail markets. It noted that lack of effective access to network for new entrants, behaviours like favouring subsidiaries and investment decisions not based on the interest of network but on the basis of supply interest were observed because of vertical integration. Low level of market integration and the ineffectiveness of cross-border sales in imposing competitive constraint were detected. The lack of transparency were claimed to prevent having a level playing field and the regulated prices below market prices were noted to discourage new entries. Moreover, industrial customers were found to be tied to incumbents in downstream retail markets.

These findings directed Commission's future cases mentioned below as well as leading to a new legislative package. By other means, Commission depicted its future enforcement route according to the findings of the inquiry and sent clear messages to the market about the problematic conducts. Additionally, Final Report involved the

[50] Ibid.
[51] Inquiry pursuant to Article 17 of Regulation (EC) No 1/2003 into the European gas and electricity sectors (Final Report).

possible remedies. Merger control and release programmes or more structural remedies were proposed to address the market concentration and preventing vertical foreclosure. However, Ibanez-Colomo (2010: 297) finds these assessments "*superficial*" as they do not explain broadly how vertical integration could lead to infringement by its nature.

II.2.3. Commitment Decisions

Energy sector comes first in terms of utilising the commitment procedure. After the Regulation 1/2003 came into force in 2014-May, 32 commitment cases were published[52] until 2016 and 12 of them were in energy sector[53].

One of the commitments was under Article 101 and the remedy was removal of the restrictive clauses from the agreements. However, commitments under Article 102 brought remedies changing the market structure and operation. The list of commitment decisions under Article 102 showing their dates, sub-sectors, competitive concerns and remedies can be seen in Appendix-3. In terms of their competition concerns, cases can be analysed under four categories.

II.2.3.1. Long-term Contracts

The first category addresses the long-term and exclusive contracts between customers -especially industrial customers- and the former exclusive right or monopoly position holders. In *Distrigaz*[54]*,* the gas supply contracts in Belgium and in *Long term energy contracts*[55] the electricity supply contracts in France were subject to investigations because of the duration and the explicit/implicit exclusivity clauses in both cases; and

[52] There is one more commitment finalised yet the decision is not published: Case COMP 39767.
[53] For comparison of prohibition and commitment case numbers see. Appendix-1
[54] Case COMP/B-1/37966 *Distrigaz.*
[55] Case COMP/39.386 *Long Term Electricity Contracts France*.

resale restrictions in the latter[56]. Commitments involved reduction in the duration of the contracts, unilateral right to terminate for existing customers and removal of the resale restriction clauses from agreements.

Last energy package leaves the regulation of long-term agreements to competition law by stating that they should be in compliance with competition rules. The duration of the agreements of dominant firms and exclusivity in them have always raised concerns[57]. These cases in usual investigation procedure would have finalised again with the prohibition of long terms agreements and restrictive clauses along with fines. Therefore regarding these commitments, competition law cannot be argued to cross its legal mandate and imposed remedies beyond relieving the competition concerns.

II.2.3.2. Refusal to Access

Refusal to access or refusal to deal (RTD) cases contain the majority of the structural remedies. RTD may happen as actual or "constructive refusal" such as delaying access, degrading the supply, imposition of unreasonable conditions for the supply[58] or "*margin squeeze*"[59], referring that dominant firm charges a price for access which does not allow the efficient competitor to compete in downstream market. In this regard, Commission regarded long-term capacity bookings as a way of RTD.

In *RWE Gas Foreclosure*[60] (*RWE*), *GDF*[61], *E.ON*[62] and *ENI*[63], Commission stated that the vertically integrated companies allocated most of their internal/international gas

[56] A similar case was closed: MEMO/07/313, Brussels, 26.07.2007, Case COMP/39.387 *Long term electricity contracts in Belgium.*
[57] Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings (Hereinafter Guidance of 102), para. 17, 36.
[58] Ibid, para.79
[59] Ibid, para.80.
[60] Case COMP/39.402 *RWE Gas Foreclosure.*
[61] Supra note 6.
[62] Case COMP/39.317 *E.ON Gas*.
[63] Supra note 5.

transmission or import capacities to subsidiaries in the downstream market through long-term contracts. Slightly different, in *CEZ*[64] Commission blamed the dominant electricity generation company for pre-emptive bookings. In *German Electricity Balancing market*[65] (*GEBM*), dominant firm was argued to favour its production plants by increasing costs and limiting energy exports in balancing power market[66].

In *RWE* and *Deutsche Bahn I/II*[67] vertically integrated firms were alleged to margin squeezing. Additionally, in *GDF* and *ENI*, Commission based on the new harm theory "*strategic underinvestment*", by which vertically integrated companies refrain from expanding their transmission/import capacities despite its profitability to grant limited access to third parties in downstream markets and preserve the market position of their subsidiaries. However, strategic underinvestment is highly discussed in the literature. First, it is questioned whether it is a new concept or just an expansion of essential facilities doctrine (Szlagowski, 2010: 204) and criticised in terms of its broad interpretation, risk of lowering the standard of intervention, suitability for different cases (Merlino and Faella, 2013) and the competence of competition authority to assess the feasibility of the investment (Gauer and Kjøbye, 2014:1628).

Commitments included divesture of transmission capacity (*RWE, GEBM, ENI*) or release of available capacity, introduction of a new pricing system and submission of relevant data each year to Commission to assess for margin squeeze.

Remedies including divestment definitely changed the structure of the markets. Talus (2013: 124) argues that these cases reveal the tendency of the Commission to "*stretch*"

[64] Case AT/39727 *CEZ*.
[65] Case COMP/39.389 *German Electricity Balancing Market*.
[66] The inability to store electricity requires balancing of production and demand with certain amount of generation capacity allocated as reserve. Balancing markets can be named as "*last resort*" for energy transactions (Vandezande et al., 2010: 3147).
[67] Case COMP/AT.39678 Deutsche Bahn I; Case COMP/AT.39731 Deutsche Bahn II.

RTD or essential facility doctrine beyond their scopes[68] and to engineer market structure. Commission, as Jonston and Block (2012: 37) and Dunne (2015:113-115) argue, reached its aim of full ownership unbundling through competition law enforcement, while it was not able to convince Member States in third energy directive discussions. This might mean undermining the choices and legislative powers of Member States. In *CEZ*, the dominant company divested some of its generation capacity to allow new entrants. It seems that Commission preferred to create a competitive market with divesture instead of waiting that entrepreneurs to build new generation plants. In short, divesture is used as a tool to build the markets (Hancher and de Hauteclocque, 2010: 8-9).

Duty to grant access has been part of conventional competition law. Nevertheless, competition law usually defines the "*outer limits of admissible methods*" (Albers, 2001: 10). However, the release obligations decided the adequate or efficient available capacity in transmission network for third parties. Thereby, Commission prescribes the efficient market structure and the suitable ways to reach it rather than pointing the prohibited conducts.

Another concern about these cases is that they carry the risk to reduce the intervention threshold (Ibanez- Colomo, 2010). Commission can impose highly structural remedies in cases which actually cannot meet the legal criteria established in case-law and judicial practices. Actually, competition rules oblige dominant firms to deal with their competitors in exceptional circumstances. According to the criteria set up in *Magill*[69], then re-evaluated in *Microsoft*[70] and in Guidance of 102, objective necessity of input, elimination of effective competition, consumer harm and no objective justification

[68] For similar view see. Sholz and Purps (2011:62).
[69] Joined Cases C-241/91 P and C-242/91 P, RTE and ITP v Commission [1995] ECR I-743.
[70] Case T-201/04, Microsoft v. Commission.

should be established in RTD cases. Commitments, however, as result of their nature do not involve detailed explanations about each criteria, yet conclude with structural remedies including divesture.

II.2.3.3. Exploitative Abuses

In *German Electricity Wholesale Market*[71], Commission claimed that one of the collectively dominant firms withdrew its capacity in order to raise electricity wholesale prices. The firm committed to divest 5 000 MW of its generation capacity. Commission noted that divestiture removes the ability and the incentive to withdraw generation capacity profitably and enable competitors to get access to new plants. Again, Commission preferred to take a structural action against dominant firm by weakening its position in the market, instead fining and prohibiting an infringement. The risk of reducing the intervention standard is also prominent in this case: Excessive pricing has been a rare type of abuse over the years (G. Monti, 2007: 218-219; Jones and Sufrin, 2014: 576) and after usual competition law investigation this case might have ended up with closure. Yet, thanks to commitments, the company divested its generation capacity.

III.2.3.4. Segmentation of Markets

Swedish Interconnectors[72] addressed the capacity curtailing practice of the transmission network operator in the case of internal congestion contributing segmentation of markets. The company proposed to subdivide the transmission system in to biffing zones and manage congestion without limiting trading capacity on interconnectors. In one of its latest decisions, in *BEH*[73], Commission accepted the

[71] Case COMP/39.388 *German Electricity Wholesale Market*.
[72] Case 39351 *Swedish Interconnectors*.
[73] Supra note 52. Decision has not published yet. IP/15/6289, Brussels, 10.12.2015.

commitment to build a power exchange and transfer it to the Ministry to ensure independency and offer certain volumes of electricity for exchange. Another ongoing case, Gazprom[74], also evaluates the territorial restrictions.

II.3. Summary of the Regulatory Characteristic of Competition Law in Energy Markets

The application of competition law in energy markets seem to be ex-ante, prescriptive and administrative while comparing just 3 prohibition in 48 antitrust cases. RCL in the beginning of 2000's seems to address the conventional competition concerns and the remedies were barely re-structural. Sector Inquiry showed the failure of creating efficient markets in many aspects and the subsequent commitment decisions handled the concerns identified in the Inquiry. Except the long-term agreements, the commitments decisions after the Inquiry, contain highly structural remedies and aim to design efficient competitive and integrated markets, which national regulations remained slow to achieve. However, this application of competition law raised lots of concerns about the proportionality and legitimacy. Additionally, the same type of concerns were not resolved with the same remedies. Some of long-term bookings and strategic underinvestment cases ended with release obligations, yet some with divesture. These differences could originate from the specifics of the relevant market as well as could be a result of complicated negotiation procedures.

[74] IP/15/4828, Brussels, 22.4.2015.

III. ANALYSING REGULATORY COMPETITION LAW IN ENERGY SECTOR

The previous part identifies a move towards more structural remedies in the application of RCL in energy markets. This move can be explained under the theories of regulatory change.

III.1. Regulatory Change in EU Energy Markets

As a part of public policy, regulatory change is a part of policy change. Regulatory change may occur in many forms and ways, varying from paradigm shifts to organizational changes or to minor instrument replacements. Hall (1993: 278-9) identifies three orders of policy change. The first degree change refers to change in the levels or settings of basic instruments, second order change is change in regulatory tools, techniques and organizations while third order changes include changes in the overall goals or understanding of policy. As Kuhn (1962) states, it refers to a paradigm shift in the cognitive or normative framework.

Regarding regulation of monopolies, Commission has a key role in EU to decide the tools addressing the obstacles to competitive markets, such as proposing new sector-specific regulation or applying the general competition law (Talus, 2013: 292-3).The discussions about the application of ex-post competition law in ex-ante regulated industries have been found a considerable place in the literature[75]. In EU, *Deutsche Telekom*[76] and *Telekomunikacja Polska*[77] decisions clearly stated that the existence of ex-ante regulation addressing the same concerns does not exclude the ex-post competition law application.

[75] See. Geradin and O'Donoghue (2005), Hellwig (2008), Shelanski (2011), G. Monti (2008), Dunne (2015:187-262).
[76] Case C-280/08 P *Deutsche Telekom AG v Commission*.
[77] Case COMP/39.525 — *Telekomunikacja Polska*.

The concurrent application of competition law and sector specific regulation is based on the argument that regulation may not absolutely prevent anticompetitive conducts especially in newly liberalised markets (Dunne, 2015: 157,195; G. Monti, 2007: 442; Kruimer, 2014:63). Therefore, competition law in newly liberalised sectors plays a complementary role to sector-specific regulation to achieve efficient markets. Accordingly, the former Commissioner M. Monti (2003) noted that Commission's focus in the transition period from monopolised to competitive energy markets should aim improvement of the market structure rather than formal procedures of imposing fines and emphasised the complementary and not competing nature of regulatory powers and competition law. This complementary and supportive role of competition law is also stressed by many scholars (Cameron, 2005: 311, Ehlers, 2009: 60, Albers, 2001: 4; Shelanski, 2012: 506).

Nevertheless, recent application of competition law in energy markets seems to have a further role than just complementing sector-specific regulation. In the previous section a move towards more structural use of RCL in energy sector after the Sector Inquiry is identified. This use of competition law has been mostly preferred to accelerate the liberalisation process.

In other words, competition law's complementary role in liberalisation has turned into being one of the main actor. For instance, Jonston and Block (2012: 71) argues that more progress was ironically achieved by competition law rather than ex-ante tools in terms of unbundling. Talus (2013: 174) identified the recent change in competition law as a move from almost non-application, first to a "*supportive*" enforcement and then "*increasingly intrusive*" one.

Both competition law and sector-specific regulation are the tools for policy makers to achieve the desired ends in the market structure. Within this context, it can be argued

that after 2007, competition law has gained more weight as a policy tool in liberalisation process. This change can also be read as change of the policy tools in liberalisation. The sector-specific regulation has not been completely removed, yet competition law is evolved to a more regulatory manner and has been applied to change the structure of the energy markets in EU. According to the Hall's typology (Hall, 1993) this can be argued a change in policy techniques and tools, thus a second order change. In the next parts, the reasons of this change are analysed under the theories of regulatory change.

III.2. Theories of Regulatory Change

III.2.1. Functionalist Theories

According to this theory, regulatory change is driven by functional necessities. Changes in technology and social structure or external shocks may lead to change in regulation. Technological changes may affect market operations as it did in telecommunication, social structure changes like increasing women workforce may force for new regulations, external shocks like crises or catastrophes can distort the functions of existing regulation.

Although all of those explanations help to understand the need for change, they do not explain why the regime ends up with a particular type of regulation or regulatory tool.

III.2.2. Interest-Based Theories

The interest-based theories suggest that regulatory developments are driven not by the pursuit of public interest but by the concerns of interest groups and interplay between them. Most prominent among them is the capture theory. According capture theory, regulation serve the benefits and interests of the industry. Stigler (1977) suggests that regulation is captured by its point of origin. This argument is based on

the assumption that politicians seek to get re-elected and industry interests are concentrated and consumer interests are diffused. Similarly, Peltzman (1989) argues that regulatory process mostly represents the regulated interests. However, Bernstein (1956) proposes a life-cycle theory for capture and claims that regulation gets captured after the public and political interests start decreasing in the maturity period of regulation.

However, capture theories hardly can fit the examples of social, consumer and environmental regulations against the industry interests (Lodge and Wegrich, 2012: 31). Wilson (1980, 366-372) in his interest-group constellation theory handles the assumption of diffused costs and concentrated benefits, and identifies four potential constellation of interest groups, each of which lead to different policy outcomes. Capture can occur when the costs are diffused, while benefits are concentrated. Yet, in other constellations, regulation may benefit other interests such as *interest group politics* (concentrated costs and benefits), *majoritarian politics* (diffused cost and benefits) and *entrepreneurial politics* (diffused benefits, concentrated costs).

These economic based approaches, however, are criticized as they disregard ideologies, emotions and moral values as motives of behaviours of policy makers (Baldwin et al, 2012: 46) and assume that all motives are pecuniary (Carpenter, 2010: 42).

III.2.3. Ideas-Based Theories

By emphasising their power, (Keynes, 1936) refers the importance of ideas in shaping policies. Accordingly, ideas-based theories argue that regulation changes because the ideological settings and climate have changed. Dethrick and Quirk (1985) claim that policies are shaped by "*the politics of ideas*". By analysing several sectors, Quirk

(1988) repeatedly argues that change towards "*pro-competitive deregulation*" can be better explained by the politics of ideas rather than interests.

However, ideas need to be turned into policy in order to change the regulation. Therefore, they need a carrier to transmit the logic of them. This is named in the literature as "*policy entrepreneurs*" (Kingdon, 1995), "*the world of the individual*" (Black, 2005) or "*epistemic communities*" (Haas, 1992). Majone (1989: 36-41) also emphasises the crucial role of advocacy and persuasion in order that the ideas lead to a change in policy.

Nonetheless, interests can exploit ideas to promote desired regulations and vice-versa ideas can use powerful interests to gain prestige. By referring the argument of Mc Closkey (1985:31) that persuasiveness of the policy does not based on experiments; Hood (1994: 6) claims that once the effect of ideas are based on rhetorical skills rather than logic, the distinction between ideas and interest would blur. Therefore, policy change can be the result of collaboration of interests and ideas. For instance, Dunleavy (1986) argues that "privatization boom" has arisen from the cooperation of ideas and interest.

III.2.4. Institutional Theories

"Institutionalism has become such a broad church that it is hard to find anyone who would not claim to be an institutionalist" (Baldwin et al., 2012: 53). Their common argument is that "institutions matter" since institutions define the structure where the individual or social action takes place (Black, 1997: 54). They mainly argue that institutions have significant effects on decision-making, hereby regulations. Institutions can be defined as "*humanly devised constraints that shape human interaction*" (North 1990: 3) or "*the formal rules, compliance procedures, and standard operating practices*" (Hall 1986: 19).

Varying approaches emphasise different aspects of the institutions: For instance, rational choice institutionalism mostly focuses the role of formal rules in individual behaviour and their stabilizing effects by reducing uncertainties while historical institutionalism highlights the differences of institutions and path dependency; whereas sociological institutionalism focusses not just formal rules but also cognitive factors like culture and values (see. Hall and Taylor, 1996). Intuitionalist theories explain the change with the impact of the institutions on behaviours and decision-making. Moreover, they explain the reasons of different responses to the same problem because change happens if the new regulatory instruments fit the existing institutional environment (Black, 2005: 32-33).

Nevertheless, Black (1997: 58) argues that the varying definitions in this broad school lead to ambiguity. Additionally, Levi (1987: 687) claims that institutionalism is not successful in explaining institutional change.

III.2.5. Reputation as a Driver of Change

Carpenter (2010:33) defines reputation as a composition of "*symbolic beliefs about an organization- its capacities, intentions, history, mission- and these images are embedded in a network of multiple audiences*". Associated with expertise, reputation enables agencies to determine the basic concepts of the thought and different audiences can empower or weaken the regulator in distinct ways; for example legislature can grant it more authority, regulatees can enhance its power by obeying its rules, scientific community can facilitate the conceptual power by accepting the definitions and the terms of the agency (Carpenter, 2010).

Accordingly, regulator's behaviour can be triggered from the concerns to protect and enhance its reputation. Reputation can also explain why an agency gains the authority to regulate a specific issue. Carpenter (2010: 53) claims that the emergence of a

regulation does fit the textbook examples; instead voters and citizens acknowledge a problem and possible solutions. Existing agencies have the advantage of familiarity and simplicity, hereby reputation may lead to the result that new problems are addressed by the existing agencies Carpenter (2010: 53).

This theory is able to explain the changes in an existing regulatory regime, changing or enhancing the duties of a regulator, however it is not satisfactory to explain the paradigm changes (third order changes).

III.3. Applying Regulatory Change Theories into EU Energy Markets

III. 3.1. Functionalist Theories

The shift towards using RCL more aggressively to facilitate liberalisation can be first explained by the disappointment or failure of sectors-specific regulation. It has been highly obvious that liberalisation in energy markets has not warmly welcomed in all Member States. The adaptation of the Directives into the national legislation remained slow and reluctant. Commission was not satisfied with the efforts of Member States on unbundling and liberalisation (Johnston and Block, 2012: 37). After the second energy package, Commission sent several warning letters to Member States pointing the failure to transpose the directives into national law[78] and brought some of them in front of the European Court of Justice (CJEU)[79].

Besides slowly adopting the directives, the enforcement of national sector-specific regulation has remained inefficient. Liberalisation efforts has slowly progressed (Sadowska, 2011: 450) and failed to change the market structure despite some improvements (Talus, 2013. 292). Sector-specific regulation enforced weakly (Hancher

[78] IP/06/430, Brussels, 4.4.2006; IP/05/319, Brussels, 16.3.2005;
[79] IP/05/853, Brussels, 6.7.2005

and de Hauteclocque, 2010: 8) and the NRAs' independence remained questionable (G. Monti, 2008: 9-10). This unpleasant status of liberalisation was unfold by the Sector Inquiry. Afterwards, the need of "*intensive care*" for energy liberalisation was acknowledged (Salerno, 2008:14).

Many scholars see the increasingly use of RCL as a respond to the shortcomings of sector-specific rules and dissatisfaction with the existing policies (Hancher and de Hauteclocque, 2010: 9, Sadowska, 2011: 450; G. Monti, 2007: 495-496, Talus, 2013: 294). Additionally, lack of political support to liberalisation policies is likely one of the reasons of this failure. The political reluctance manifested itself in the discussions of the third energy package legislations, too. Several Member States especially Germany and France, which have powerful energy incumbents, opposed the suggestions of full ownership unbundling. Since Commission could not gain the desired regulations through legislative process, it has applied competition law to achieve more competitive markets. Therefore the lack of political support to liberalisation policies in the national scope is also mentioned as a reason for the change of Commission application (G. Monti, 2007: 495-496; Sadowska, 2011: 450, Talus, 2013: 292).

RCL can also be explained by the force of the globalisation of energy markets. The global characteristics of energy markets and the fact that EU's dependence on non-EU countries in energy supply require an energy policy above Member States. The dependence in energy supply to powerful firms like Gazprom weakens the bargaining power of the Member States. However, with its supranational character, EU has more power in negotiations and the possible fines in competition enforcement can threaten even the powerful energy companies. Lastly, interconnection networks do not belong to one jurisdictions and the related contradictions should be addressed with collaboration of the Member States or by an international organisation. ACER, in this

regard, was introduced to enhance cooperation and dialogue between NRAs and tackle the cross-border issues. However, Talus (2013: 136) argues that although it may reduce protectionism and anticompetitive conducts of incumbents, it cannot completely solve these problems.

All these explanations explain the need for a change in energy market regulation. Moreover, they also illustrate the timing of the change. The dissatisfaction with the existing regulatory structure was revealed with the Sector Inquiry and as stated RCL became more vigorous after the Inquiry. However, these theories barely explain why competition law was preferred among other alternatives. For instance, they do not answer the question why a supranational energy agency was not established or why ACER was not given more power.

III. 3.2. Interest Based Theories

Liberalisation policies naturally does not benefit the incumbent firms as they face to lose their monopoly profits after the markets are competitive. Accelerating this process with RCL is not in the least interest of incumbent firms. Therefore, this policy change cannot be explained by the capture theories. However, change actually benefit new entrants and finally the consumers as they will reach more choices and competitive prices. Therefore, the costs of the change in regulatory tools are shared among the incumbents and costs are concentrated. On the contrary, more liberalised markets will benefit the diffused interests: consumers. Hence, it can be argued that this policy change is a result of entrepreneurial politics according to the interest-group constellation theory of Wilson (1980).

Nevertheless, capture theories have also explanatory power at national level. One of the reasons behind the slow progress in liberalisation is that the NRAs are captured. Before the introduction of liberalisation, energy policies were totally national. Energy

companies were seen as "*national champions*", further they were sponsored and supported by national governments (Talus, 2013: 212). Additionally, governments in many instances have considerable shares in incumbents (Hellwig, 2008: 28). After markets were opened to competition, incumbents still remained to be powerful and to have the support of governments. In these circumstances, NRAs have difficulties in immunizing themselves from being seized by the industry interests. Experiences also showed that sector-specific regulation is more prone to capture (Hellwig, 2008: 16) and in the lack of EU-wide regulator, NRAs are "*institutionally, politically and culturally responsive*" to the interests of incumbents. (Talus, 2013: 136).

Capture, accordingly, explain the need for a new policy tool referring the disappointment with the existing regime and pointing again the explanations under the functionalist theories. However it does not explain why this tool is RCL. Additionally, interest-group constellation theory has the explanatory power of the move to liberalisation and more vigorous tools in liberalisation policy. Nevertheless, it still does not answer the question why particularly RCL is preferred.

III. 3.4. Ideas-Based Theories

The discussed change can be explained under the ideologies about the aims of competition law. The aim of competition law is a long-lasting discussion and a definitive answer have still not been reached.

The discussion about the aim of competition law throughout the years has been influenced by different schools of thought. Scholars from Chicago School like Posner (1979) and Bork (1978) argue that the sole aim of competition is market efficiency. However, some scholars (Elzinga, 1977, Hovenkampf, 1982) claim that competition law may serve other aims, too.

The effect of this ideological environment on the evolution of the competition law is incontestable. For instance, EU competition law originally interested in economic freedom and market integration (ordoliberal vision), yet today it is focussed on consumer welfare and efficiency (G. Monti, 2007: 503). Bellamy and Child (2008: 43) note that EU competition law has two aims: protection of competition and single market. Hereby, the question is whether liberalisation of the markets appeared as a new aim of competition law directing the current application. However, it is also disputable whether the aim of liberalisation attached to competition law is a brand-new approach. I suggest that the aim of liberalisation of the markets can be analysed under the market efficiency and market efficiency is the aim of competition law, which is mostly agreed on among all schools of thought. Moreover, as discussed above, competition law has been accepted one of the methods to introduce competition into the old state-monopolies besides or with sector-specific regulation. Therefore, using competition law in liberalisation policies is hardly a new ideology or has hardly become dominant recently.

However, as discussed in the first section, using competition law as a policy tool and in a more interventionist manner can be argued to have gained popularity recently. Although the possibility to serve for other aims than efficiency has been discussed for long, serving the efficiency and other aims with a more administrative, re-structural, ex-ante manner is relatively new idea. Though his new use of competition law has generated concerns and criticism in some aspects like legitimacy, proportionality and politicization[80], they seem to be adopted by the Commissioners and Directors for competition. M. Monti (2003) emphasises the role of improving market structure in newly liberalised markets; Kroes (2006 and 2007) suggests highly structural remedies

[80] See. Section-I.

to support the ownership unbundling as the most efficient method to deal with the problems emerging in liberalised energy markets, Italianer (2010) argues to focus key sectors for the development of single market to meet the objectives of European growth strategies and Almunia (2013) mentions the fulfilling role of the competition law in IP markets. These statements clearly presents that the Commission adopted the idea using competition law like a regulation.

The discussed regulatory change may hardly be argued as a result of a change in ideologies about the aims of competition law. Yet it can definitely be argued as a result of ideologies weighting more importance on the policy tool function of competition law in structuring the markets. This approach is mostly embraced by the enforcers who can be argued to play the role of *policy entrepreneur*. However, ideas-based theories cannot explain why competition law as a policy tool gained more role after two liberalisation package and not in the beginning of the liberalisation process.

III. 3.4. Institutional Theories and Reputation

Although institutionalism has varying fragments under it, the main argument that institutions matter in policy-making helps to understand some aspects of the current regulation. First, institutional differences in each country like the traditional understanding of the role of state, constitutional and cultural expectations can explain the different degrees of liberalisation among Member States[81]. However, elaboration of these institutional differences is beyond the scope of this dissertation except identifying this as a factor for the need of change to achieve a standard level of liberalisation among Member States, referring again the functionalist theories.

[81] For different country experiences see. Joskow (2008).

Energy with its close relation and dependence to other industries and national growth has critical importance for each country. The TFEU also accept the rights of the Member States to decide how to exploit their energy resources and the structure of their energy supply[82]. This complicates the establishment of one single authority in EU-wide regarding energy in general and liberalisation in particular. The lack of single regulatory agency for energy liberalisation policies exacerbate the negative impacts of the political reluctance towards liberalisation as governments can still have to some extent the discretion while transposing the EU directives into national law. ACER is meant to address this problem, yet its powers are mostly limited to cooperation and consultancy. The absence of EU-wide enforcement is in a way fulfilled with EU competition law.

In the choice of using RCL, the reputation of Commission's competition law enforcement may have played a role. Given the need of EU-wide liberalisation policy, yet obstacles to establish one single authority drew attention to existing structures and legislations as Carpenter (2010) suggests. According to the DG Competition Stakeholder Survey results[83], competition law decisions are praised by stakeholders as they are well-reasoned, comprehensive, based on high quality economic analysis. Commission was found effective in detecting the infringements and competition enforcement was considered to have a positive effect on economic growth. This positive image about the effectiveness of the competition enforcement helped the assignment of more tasks to the competition enforcement by the Commission.

[82] TFEU 194(2).
[83] http://ec.europa.eu/competition/publications/reports/surveys_en.html (Accessed: 18.8.2016).

CONCLUSION

A move towards adopting more sector-specific regulatory techniques is observed in recent application of competition law. The differences between competition law and sector specific law in their mechanisms are helpful to differentiate RCL from conventional competition law, because RCL resembles sector specific regulation. The distinctive characteristics of RCL is administrative, ex-ante, prescriptive and re-structural application of competition law. Its main tools are broad interpretation of competition law concepts, informal commitments-methods, soft law instruments and especially official commitment decisions under Regulation 1/2003.

One of the leading sectors subject to regulatory type of competition law is EU energy markets and this application is highly discussed among competition and energy law scholars. According the distinctive characteristics of RCL, competition law application of Commission in energy markets has been regulatory during the period of analysis between 1999-2016-July, yet became more interventionist, vigorous and re-structural after the report of Sector Inquiry in 2007. Most used tools of the RCL in energy markets are informal and formal commitments, broad interpretation of refusal to deal and essential facility doctrines and Sector Inquiry. Especially the fact that the majority of formal commitment decisions belongs to energy sector is highly remarkable and shows the close interest of Commission to re-structure energy markets. In fact, the main motive of these decisions is accelerate the liberalisation and ensure market integration, because Commission is not satisfied with the performance of national regulation.

As energy sectors can be regulated and opened to competition either competition law or sector-specific regulation or both, competition law is one of the regulatory tools to intervene energy markets. Thus, the move towards applying RCL more vigorously recently in energy markets can be seen as a regulatory tool change in energy

regulation and liberalisation policy and constitute a second order change according to Hall's (1993) typology.

Theories of regulatory change can explain the reasons of this change. Functionalist theories emphasise the failure of sector-specific regulation, the weakness and dependency of NRAs, the global characteristic of energy supply and the practical convenience of competition law as it is applied across Member States. These explanations point the need of the change and explain the timing of it. According to interest-based theories, the change in EU level fits to *entrepreneurial politics* (Wilson, 1980) as change benefits consumers given that costs are concentrated and benefits are diffused. This justifies the direction of the change towards more effective tools in liberalisation. Capture theory, at national level, explains the ineffectiveness of the NRAs in ensuring liberalised markets. However neither functionalist nor interest-group theories explain why particularly RCL has become the preferred tool.

Ideas-based theories point the ideological discussions about the role of competition law as a policy tool and the role of Commissioners to carry these ideas. Yet they cannot explain the timing of the change. Institutional theories focus the institutional limitations of the Member States in adopting liberalisation policies and differences among them. Institutional theories with reputation refer that the powers of EU competition law fit to develop an EU-wide liberalisation policy.

These findings state that none of the theories can solely explain all aspects of change. Additionally some aspects of the theories intertwine as explanations of capture and intuitionalist theories can elaborate some of the factors analysed under functionalist theories. Therefore, this study also shows that the change in EU energy market regulation towards giving a major role to RCL can be understood with a combination of different regulatory change theories. All theories explain one part of the story.

BIBLIOGRAPHY
Books and Articles

Albers, M. (2001), "Competition Law Issues Arising from the Liberalisation Process", in Geradin, D (ed), *The liberalization of electricity and natural gas in the European Union,* The Hauge: Kluwer Law International:1-16.

Baldwin, R., Cave, M. and Lodge, M. (2012) *Understanding Regulation Theory, Strategy, and Practice*, (2th ed), Oxford: Oxford University Press.

Banasevic, N. (2015), "The Implications of the Court of Justice's Huawei/ZTE Judgment", *Journal of European Competition Law & Practice*, 6(7): 463-464.

Bellamy, C and Child, G.D. (2008), *Bellamy and Child: European Community law of competition* (6th ed.), Roth, P. and Rose, V. (eds.), Oxford : Oxford University Press.

Bernstein, M. H. (1955), *Regulating Business by Independent Commission*. Princeton, New Jersey: Princeton University Press.

Black, J. (1997), "New Institutionalism and Naturalism in Socio-Legal Analysis: Institutionalist Approaches to Regulatory Decision Making", *Law & Policy*, 19(1): 51-93.

Black, J. (2005), "Tomorrow's worlds: frameworks for understanding regulatory innovation", in Black, J., Lodge, M. and Thatcher, M. (eds), *Regulatory Innovation: a Comparative Analysis*, North Hampton, MA: Edward Elgar.

Bork, R. (1978), *The Antitrust Paradox: A Policy at War with itself* (2nd ed.), New York: Basic Books, Inc.

Cameron, P.D. (2002), *Competition in energy markets: law and regulation in the European Union*, Oxford: Oxford University Press.

Carpenter, D. P. (2010), *Reputation and power: organizational image and pharmaceutical regulation at the FDA*, Princeton, N.J.: Princeton University Press.

Cave, M and Crowther, P. (2005), "Pre-emptive competition policy meets regulatory anti-trust", *European Competition Law Review*, 26(9): 481-490.

Derthick, M. and Quirk, P.J. (1985), *The politics of deregulation*, Washington, D.C.: Brookings Institution.

Devlin, A. (2012), "Antitrust as Regulation", *The San Diego Law Review, Summer, 49(3):* 823-878.

Diathesopoulos, M. D. (2010), "Ownership Unbundling in EU & Legal Problems", *SSRN Electronic Journal, December 29, 2010*, Avaliable at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1732212 (Accessed: 20.08.2016).

Dunleavy, P. (1989), "Explaining the Privatization Boom: Public Choice versus Radical Approaches", *Public Administration*, 64(1):13–34.

Dunne, N. (2014),"Commitment Decisions in EU Competition Law", *Journal of Competition Law & Economics*, 10(2): 399-444.

Dunne, N. (2015), *Competition Law and Economic Regulation Making and Managing Markets,* Cambridge*:* Cambridge University Press.

Ehlers, E. M. (2009), *Electricity and gas supply network unbundling in Germany, Great Britain and The Netherlands and the law of the European Union: A comparison,* Antwerp - Oxford - Portland: Intersentia.

Elzinga, K. (1977), "The Goals of Antitrust Other Than Competition and Efficiency, What Else Counts?", *University of Pennsylvania Law Review*, 125(6): 1191-1213.

Gauer, C. and Kjøbye, L. (2014), "Part III Special Sectors, 12 Energy", in Faull, J.; Nikpay, A.; Taylor, D. (eds), *Faull & Nikpay - The EU Law of Competition* (3rd ed.): 1623-1634.

Geradin, D. and O'Donoghue R. (2005), "The Concurrent Application of Competition Law and Regulation: The Case of Margin Squeeze Abuses in the Telecommunications Sector", *The Global Competition Law Centre Working Papers Series 04/05*, College of Europe, Brugges.

Haas, P.M. (1992), "Epistemic Communities and International Policy Coordination", *International Organization*, 46(1): 1-35.

Hall, P. A**.** (1986), *Governing the Economy: The Politics of State Intervention in Britain and France.* Cambridge: Polity Press.

Hall, P. A. (1993), "Policy Paradigms, Social Learning and the State: the Case of Economic Policy-making in Britain," *Comparative Politics*, 25(3): 275-296.

Hall, P. and Taylor, R. (1996), "Political Science and the Three New Institutionalism", *Political Studies*, 44(5): 936-957.

Hancher, L. and De Hauteclocque, A. (2010), "Manufacturing the EU Energy Markets: The Current Dynamics of Regulatory Practice", *EUI Working Paper RSCAS 2010/01*. Avaliable at: http://cadmus.eui.eu/bitstream/handle/1814/13077/RSCAS_2010_01.pdf?sequence=1&isAllowed=y (Accessed: 22.08.2016).

Hellwig, M. (2008) "Competition Policy and Sector-Specific Regulation for Network Industries," *Preprints of the Max Planck Institute for Collective Goods Bonn 2008/29*. Avaliable at https://www.coll.mpg.de/pdf_dat/2008_29online.pdf (Accessed: 17.08.2016).

Hood, C. (1994), *Explaining Economic Policy Reversals*, Buckingham: Open University Press.

Hovenkamp, H. (1982), "Distributive Justice and the Antitrust Laws", *George Washington Law Review*, 51(1): 1, 1-31.

Ibanez Colomo, Pablo (2010), "On the application of competition law as regulation: elements for a theory", *Yearbook of European Law 2010*, 29(1): 261-306.

Johnston A. C. and Block G. (2012), *EU Energy Law*, Croydon: CPI Group.

Jones, A. and Sufrin, B. (2014), *EC Competition Law (5th ed.),* Glasgow*:* Oxford University Press.

Joskow, P. (2008), “Lessons Learned from Electricity Market Liberalisation”, *Energy Journal*, Special Issue: 9-43.

Keynes, J.M. (1936), *The General Theory of Employment Interest and Money*, London: Macmillan and Co.

Kingdon, J. (1995), *Agendas, Alternatives and Public Policies*, (2nd ed.), New York: HarperCollins College Publishers.

Kostopoulos, K. (2009), “Commitment Decisions: The New Kind of Settlement in European Competition Law: Application in Air Transport”, *Air and Space Law*, (1): 13-19.

Kruimer, H. (2014), *The non-discrimination obligation of energy network operators: European rules and regulatory practice*, Cambridge: Intersentia.

Kuhn, T. S. (1962), *The Structure of Scientific Revolutions*, Chicago: University of Chicago Press.

Larouche, P. (2000), *Competition law and regulation in European telecommunications*, Oxford: Hart Pub.

Levi, M. (1987), “Theories of Historical and Institutional Change”, *PS*, 20(3): 684-688

Lianos, I. and Geradin, D. (2013), *Handbook of European competition law. Substantive aspects*, Edward Elgar: Cheltenham.

Lodge, M. and Wegrich, K. (2012), *Managing Regulation Regulatory Analysis, Politics and Policy*, Basingstoke: Palgrave Macmillan.

Majone, G. (1989), *Evidence, argument and persuasion in the policy process*, New Haven, Conn.; London: Yale University Press.

Mc. Closkey, D.N. (1985), *The Rethorick of Economics*, Madison, WI: Wisconsin University Press.

Merlino, P. and Faella, G. (2013) “Strategic Underinvestment as an Abuse of Dominance under EU Competition Rules”, *World Competition* 36(4): 513–540.

Monti, G (2007), *EC Competition Law*, Cambridge University Press, Cambridge.

Monti, G. (2008), “Managing the Intersection of Utilities Regulation and EC Competition Law”, *LSE Law, Society and Economy Working Papers,* 8/2008, available at http://eprints.lse.ac.uk/24605/1/WPS2008-08_Monti.pdf (Accessed: 18.08.2016).

North, C.D: (1990), *Institutions, institutional change, and economic performance*, Cambridge: Cambridge University Press.

Peltzman, S. (1976), “Toward a More General Theory of Regulation”, *The Journal of Law and Economics*, 19(2): 211-240.

Petrovcic, U. (2013), “Patent Hold-up and the Limits of Competition Law: A Trans-Atlantic Perspective”, *Common Market Law Review,* 50(5): 1363–1386.

Pollit, M. (2008), “The arguments for and against ownership unbundling of energy transmission networks”, *Energy Policy,* 36(2): 704–713

Posner, R. A. (1979), "The Chicago School of Antitrust Analysis", *University of Pennsylvania Law Review*, 127(4): 925-948.

Quirk, P. J. (1988), "In Defense of the Politics of Ideas", *The Journal of Politics*, 50(1): 31-41.

Rato, M and English, M. (2015), "An Assessment of Injunctions, Patents, an Standards Following the Court of Justice's Huawei/ZTE Ruling", Journal of European Competition Law & Practice: 1-10.

Sadowska, M. (2011), *"*Energy Liberalization in Antitrust Straitjacket: A Plant Too Far?*", World Competition,* 34(3):449–476.

Salerno, F. M. (2008), "The Competition Law-ization of Enforcement: The Way Forward for Making the Energy Market Work?", *EUI RSCAS Working Paper 2008/7*, Avaliable at: http://cadmus.eui.eu/bitstream/handle/1814/8108/RSCAS_2008_07.pdf?sequence=1&isAllowed=y (Accesed: 22.08.2016).

Scholz, U. and Purps, S. (2011), "The Application of EU Competition Law in the Energy Sector", *Journal of European Competition Law & Practice*, 2(1): 62-77.

Shelanski, H. A. (2011), "*The Case for Rebalancing Antitrust and Regulation",* Michigan Law Review, 109(5): 683-732.

Shelanski, H. A. (2012) "Justice Breyer, Professor Kahn and Antitrust Enforcement in Regulated Industries'", *California Law Review*, 100(2): 487-517.

Stigler, G. (1971), "The Theory of Economic Regulation", *The Bell Journal of Economics and Management Science*, 2(1): 3-21.

Svetiev, Y. (2014), "Settling or Learning: Commitment Decisions as a Competition Enforcement Paradigm", *Yearbook of European Law*, 33(1): 466–500.

Szlagowski, P. (2010), "The Abuse of Dominant Position Through Strategic Underinvestment of Energy Transmission Network Interconnectors", *International Energy Law and Taxation Review*, 6: 201-205.

Talus, K. (2013), *EU energy law and policy: a critical account*, Oxford: Oxford University Press.

Vandezande,L.; Meeus,L.; Belmans,R.; Saguan, M.; Glachant, J. M. (2010), "Well-functioning balancing markets: A prerequisite for wind power integration", *Energy Policy*, 38 (7): 3146–3154.

Wils, W. P. J. (2008), *"*The Use of Settlements in Public Antitrust Enforcement: Objectives and Principles*", World Competition,* 31(3): 335-352.

Wilson, J. Q. (1980), *The Politics of regulation***,** New York: Basic Books.

Speeches

Almunia, J. (2013), "Intellectual property and competition policy", *Speech at IP Summit 2013 (Paris)*, 9.12.2013.

Italianer, A. (2010), "Priorities for Competition Policy", *Speech at St Gallen International Competition Law Forum*, 20.5.2010.

Kroes, N. (2006), “A New Energy Policy for a New Era”, *Speech at Conference on European Energy Strategy - The Geopolitical Challenges*, Lisbon, 30.10.2006.

Kroes, N. (2007), “A New European Energy Policy; Reaping the Benefits of Open and Competitive Markets”, *Speech at Energy Conference: E-World Energy & Water,* Essen, 5.2.2007.

Monti, M (2003), “Applying EU Competition Law to the newly liberalised energy markets”, *Speech at World Forum on Energy Regulation*, Rome, 6.10.2003.

Commission Regulations and Directives

Directive 2003/54/EC concerning common rules for the internal market in electricity and repealing Directive 96/92/EC, OJ L176/37, 15.7.2003.

Directive 2003/55/EC concerning common rules for the internal market in natural gas and repealing Directive 98/30/EC, OJ L176/57, 15.7.2003.

Directive 2009/72/EC concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC, OJ L211/55, 14.8.2009.

Directive 2009/73/EC concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC, OJ L211/94, 14.8.2009.

Directive 96/92/EC of the European Parliament and of the Council of 19 December 1996 concerning common rules for the internal market in electricity, OJ L027/20, 30.1.1997

Directive 98/30/EC of the European Parliament and of the Council of 22 June 1998 concerning common rules for the internal market in natural gas, OJ L204/1, 21.7.1998

Regulation (EC) No 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L1/1, 4.1.2003.

Regulation (EC) No 1228/2003 of The European Parliament and of the Council of 26 June 2003 on conditions for access to the network for cross-border exchanges in electricity, OJ L176/1, 15.7.2003.

Regulation (EC) No 1775/2005 on conditions for access to the natural gas transmission network OJ L289/1, 3.11.2005.

Regulation (EC) No 713/2009 establishing an Agency for the Cooperation of Energy Regulators [2009] OJ L211/1, 14.8.2009.

Regulation (EC) No 714/2009 on conditions for access to the network for cross-border exchanges in electricity and repealing Regulation (EC) No 1228/2003 [2009] OJ L211/15, 14.8.2009.

Regulation (EC) No 715/2009 on conditions for access to the natural gas transmission networks and repealing Regulation (EC) No 1775/2005 [2009] OJ L211/36, 14.8.2009.

Commission Guidelines and Other Documents

Commission Staff Working Paper accompanying the Communication from The Commission to the European Parliament and Council Report on the Functioning of Regulation 1/2003 {COM(2009)206 final} Brussels, 29.4.2009 SEC(2009) 574 final.

Communication from the Commission to the European Council and the European Parliament an Energy Policy for Europe {SEC(2007) 12}, COM(2007), 10.1.2007.

Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, OJ C 45/7, 24.2.2009.

Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, OJ C 11/1, 14.1.2011.

Inquiry pursuant to Article 17 of Regulation (EC) No 1/2003 into the European gas and electricity sectors (Final Report) {SEC(2006) 1724}, Brussels, 10.1.2007 COM(2006) 851 final.

Case List
EU Commission

Case COMP/B-1/37966 *Distrigaz,* 11.10.2007.

Case COMP/39.386 *Long Term Electricity Contracts France*, 17.3.2010.

Case COMP/39.387 *Long term electricity contracts in Belgium.*

Case COMP/39.525 — Telekomunikacja Polska, OJ C 324/7, 9.11.2011.

Case AT/39727 *CEZ*, 10.4.2013

Case COMP/39.402 *RWE Gas Foreclosure,* 18.3.2009.

Case COMP/39.316 *Gaz de France,* 3.12.2009

Case COMP/39.317 *E.ON Gas*, 4.5.2010.

Case COMP/39.315 *ENI*, 29.9.2010.

Case COMP/39.389 *German Electricity Balancing Market*, 26.11.2008.

Case COMP/AT.39678 Deutsche Bahn I; Case COMP/AT.39731 Deutsche Bahn II, 18.12.2013.

Case COMP/C-3/37.792 — Microsoft OJ C 166/20, 18. 7.2009.

Case COMP/39.388 *German Electricity Wholesale Market*, 26.11.2008.

Case 39351 *Swedish Interconnectors*, 14.4.2010

Case COMP 39767. The decision has not published at the date of this study- IP/15/6289, Brussels, 10.12.2015.

PO/Access to Gas Networks, IP/01/1170, Brussels, 2.08.2001.

PO/Interconnector France-UK+3, IP/01/341, Brussels, 12.03.2001.

Statkraft+I/S Elsam+18 IP/01/30, Brussels, 11.01.2001.

GFU, IP/02/1084, Brussels, 17.07.2002.

PO/DUC-DONG, IP/03/566, Brussels, 24.04.2003.

Territorial restriction Netherlands, IP/03/1345, Brussels, 06.10.2003.

PO/Territorial restrictions – Austria, IP/05/195, Brussels, 17.02.2005.

PO / Territorial restrictions Germany (Gasprom), IP/05/710, Brussels, 10.06.2005.

Gas Natural/Endesa, IP/00/297, Brussels, 27.03.2000.

Marathon, IP/04/573, Brussels, 30.04.2004.

Case COMP/38.636 Rambus, OJ C 30/17, 6.2.2010.

Case AT.39226 Lundbeck, OJ C 80/13, 7.3.2015.

Case AT.39939 Samsung, OJ C 350/8, 4.10.2014.

Court of First Instance

Case T-201/04, Microsoft v. Commission, ECLI:EU:T:2007:289.

Court of Justice

Case C-280/08 P *Deutsche Telekom AG v Commission*, EU:C:2010:603

Case C-441/07 P, Commission v. Alrosa Co. Ltd., ECLI:EU:C:2010:377

Case C-280/08 P *Deutsche Telekom AG v Commission*, EU:C:2010:603.

Joined Cases C-241/91 P and C-242/91 P, RTE and ITP v Commission ECLI:EU:C:1995:98.

T-321/05 - AstraZeneca v Commission, ECLI:EU:T:2010:266.

Press Release and Memos

MEMO/01/76, Brussels, 12.03.2001.

MEMO/07/313, Brussels, 26.07.2007.

IP/05/319, Brussels, 16.3.2005;

IP/05/853, Brussels, 6.7.2005

IP/06/430, Brussels, 4.4.2006

IP/07/1074, Brussels, 11.07.2007.

IP/15/4828, Brussels, 22.4.2015.

DG Competition Stakeholder Survey (2014), available at: http://ec.europa.eu/competition/publications/reports/surveys_en.html (Accessed: 18.8.2016).

APPENDICES

Appendix 1:

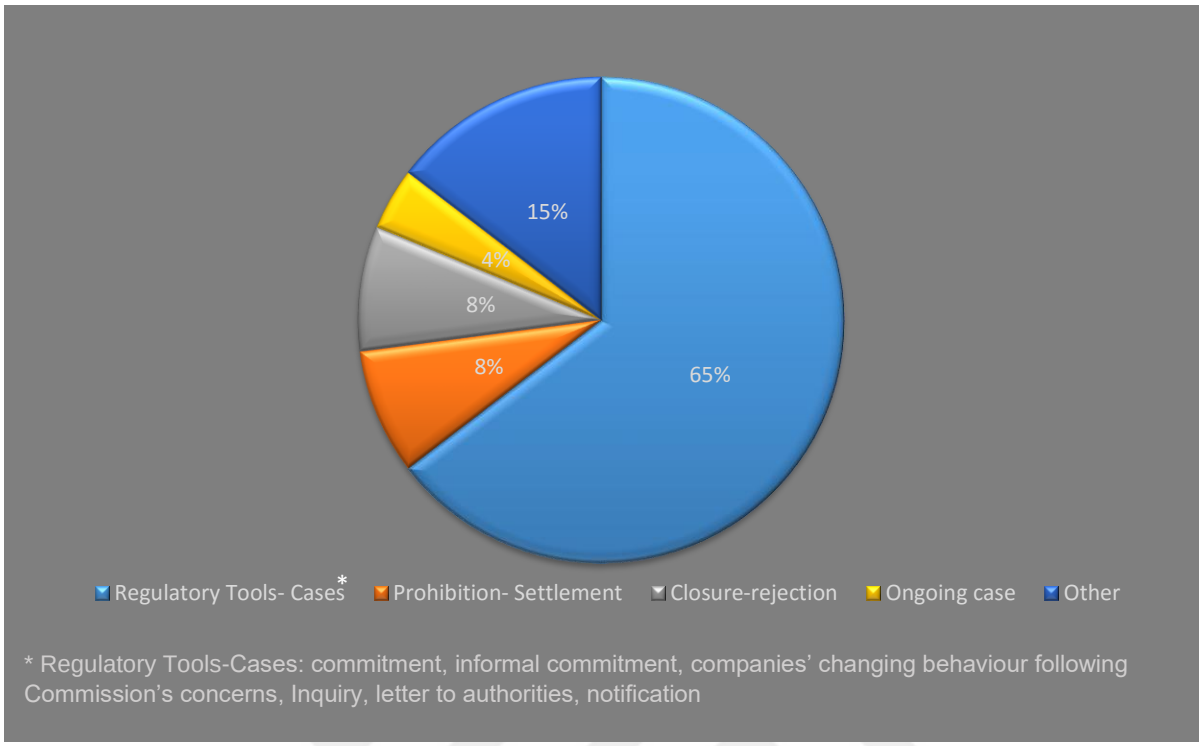
The Distribution of Anti-trust Cases in EU Energy Markets (1999-2016-July)

Type of Decision	Number of Cases
Announcement of Inspections	**3**
Change of Behaviour following Commission's concerns	**2**
Closure	**3**
No evidence	1
Proceedings closed	2
Commitment	**13**
Article102	11
Article101	1
Article102- no final decision	1
Incompliance of the State to competition rules	**3**
Informal Commitment	**8**
Negotiations with Ministry of Algeria	1
Settled Cases	7
Inquiry*	**2**
Electricity	1
Gas	1
Letter to Authorities	**1**
Notification	**5**
Agreements- Clearance with amendments	1
Joint Venture	2
Joint Venture- clearance	1
Joint Sale Agreements- Withdrawn	1
Ongoing case	**2**
against Bulgarian Energy Holding-abuse of dominance	1
against Gazprom- territorial restrictions	1
Procedural Fines	**1**
Prohibition	**3**
Cartel	1
Anti-trust	2
Rejection	**1**
Settlement	**1**
Cartel	1
SUM	**48**

*Although there seems to be two different sector inquiries there is one final report regarding both.

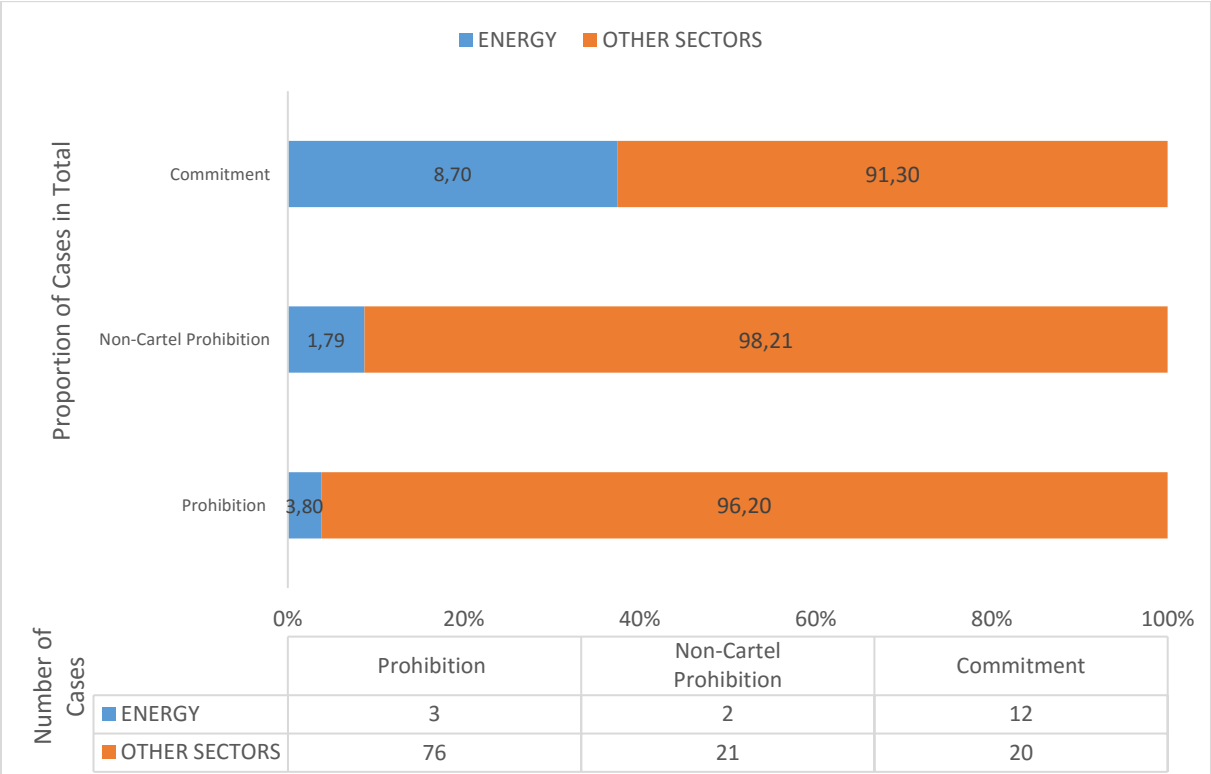
Source: EC Case Search Database- http://ec.europa.eu/competition/elojade/isef/

Distribution of RCL tools in Competition Law Enforcement in Energy Markets (1999-2016-July)



Source: EC Case Search Database- http://ec.europa.eu/competition/elojade/isef/

Appendix-2: Comparison of Prohibition and Commitment Cases in Energy and Other Sectors (2004 May-2016 July)



Number of Cases

	Prohibition	Non-Cartel Prohibition	Commitment
ENERGY	3	2	12
OTHER SECTORS	76	21	20

Source: EC Case Search Database- http://ec.europa.eu/competition/elojade/isef/

Appendix-3: Commitments regarding Article 102 of TFEU

	İnitiate Proceedings	**Decision**	**Subject**	**Commitment**	**sector**
Distrigaz	26.2.2004	11.10.2007	Long term Contracts with customer	-5 years limit for future agreements -Unilateral termination clause for existing contracts	Gas
German Wholesale Market	7.5.2008	26.11.2008	Capacity withdrawing	Divesture of generation for wholesale market	Electricity
German Balancing Market	7.5.2008	26.11.2008	Favouring affiliates	Divesture of transmission network for balancing market	Electricity
RWE Gas Foreclosure	20.4.2007	18.3.2009	Refusal to deal Essential facility • long term capacity booking • Margin Squeeze	Divesture of transmission network	Gas
Gaz de France	16.5.2008	3.12.2009	Refusal to deal Essential input • long term capacity booking • strategic underinvestment	-Release reservation capacity immediately -Reduction in its reservation below %50 till 2014	Gas
Long term energy contracts	18.7.2007	17.3.2010	• Long term Contracts with customers • Resale restrictions	-5 years limit for future agreements -Removal of restriction of resale	Electricity
Swedish Interconnectors	1.4.2009	14.4.2010	• Segmentation of the market • Discrimination price differences	-Subdivision of the transmission system -Not responding internal congestion curtailing international transmission	Electricity
E.ON	22.12.2009	4.5.2010	Refusal to Deal Essential facility • long term capacity booking	-Release reservation capacity immediately -Reduction in its reservation capacity below %50 for H-Gas-65 for L gags by October 2015	Gas
ENI	20.4.2007	29.9.2010	Refusal to deal • capacity degradation • capacity boarding • strategic underinvestment	Divesture of transmission capacity	Gas
CEZ	11.7.2011	10.4.2013	Long term pre emptive capacity booking in transmission system	Divesture of one the assets in generation capacity	Electricity
Deutsche Bahn I/II	13.6.2012	18.12.2013	Refusal to Deal • Margin squeeze	-Grant access to network -New pricing strategy	Electricity
BEH	21.11.2012	10.12.2015 (Date of Press release)	• Segmentation of the market • Territorial restriction	Setting up independently operated power exchange	Electricity