Commission Tools

- Competition rules
- Liberalization Directives
EU Competition Rules

• Level playing field for all participants through the application of:
  – Anti-trust rules (arts. 81, 82 and 86)
  – Merger regulation rules
  – State Aid rules (art. 87)
EU Regulatory Models: Electricity

- Sector specific rules addressed in a Directive
- Harmonisation attempts to establish common rules for all players
- Creation of an Internal Market in electricity
EU Competition Rules

- The Commission:
  - Will encourage the decentralised application of competition rules
  - Will normally not intervene in areas where:
    - sector specific regulation provides more detailed rules or,
    - goes beyond the requirements of EC Competition law
• The Commission:
  – Will intervene where:
    • There are cases having a particular political, economic and legal significance for the Community, i.e. affecting competition in several MS
    • To ensure a minimum level of harmonization of rules covering market conduct
Article 81 EC

- Prohibits agreements with the
  - object or effect of
  - distorting competition
  - which may affect trade between Member States

- Those agreements are automatically null and void

- Some exemption possible if conditions fulfilled
Article 81 EC

• Exemptions when an agreement:
  – Contributes to improve production or distribution of goods
  – Promotes technical or economic progress
  – Allows consumers a fair share of the benefit
  – Does not contain restrictions which are not indispensable
  – Does not eliminate competition
Article 82 EC

• Prohibits undertakings from
  – abusing
  – a dominant position
  – that affects trade between Member States

• Must be *dominance* + *abuse*

• Can include joint dominance
Article 82 EC

• Prohibition to impose unfair (i.e. predatory or excessive) selling prices or other unfair trade conditions

• A price is unfairly high if it is excessive in relation to the economic value of the service provided
Concept of Dominant Position

ECJ Continental Can judgement

“…the power to behave independently, which puts them in a position to act without taking into account their competitors, purchasers or suppliers.”
Types of behaviour caught by Articles 81 and 82

• Activities between undertakings
  – Market sharing or customer allocation
  – Collective bidding and boycotts
  – Exclusive agreements for:
    • Supply
    • Purchase
    • Conditions for dealing with third parties
  – Joint ventures where competition between joint venturers is effectively eliminated
Types of behaviour caught by Articles 81 and 82

• Activities by dominant undertakings
  – Exclusionary activities
    • Refusal to supply key products
    • Sale only on long-term basis
    • Denial of access to essential facilities
    • Excessively high or low prices
    • Certain discounts
    • Bundling/tying
Article 86 EC

- Application of competition rules to:
  - Public undertakings and undertakings to which Member States grant special or exclusive rights
  - Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly
Conditions for application

- Neutrality with respect to public or private ownership of companies

- Freedom to define what constitutes services of GEI subject to control for manifest error

- Proportionality so that restrictions on competition do not create unnecessary distortions of trade
Types of behaviour caught by Article 86 EC (Electricity)

- Network security reliability
- Security of supply
- Right to be connected to the grid
- Special consumer protection
- Service standards
Article 86 EC

• Examples of application: recovery of stranded costs
  – **Austria**: Annual payments (up to Euro 132 million) to a lignite fired plant as a compensation for a service in the GEI as regards security of supply
  – **Spain**: Premiums (up to Euro 1774 million) for the generation of electricity out of indigenous coal as a compensation for a service in the GEI as regards security of supply
Article 87 EC

• Incompatible Aid
  – Any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods
Article 87 EC

• Compatible Aid:
  – Aid having a social character granted to individual consumers on a non-discriminatory basis
  – Aid to make good the damage caused by natural disasters or exceptional circumstances
  – Aid granted to certain areas of the FRG
Article 87 EC

• May be compatible Aid:
  – Aid to promote economic development in areas with abnormally low standard of living or with serious underemployment
  – Aid to promote the execution of an important project of common European interest
  – Aid to facilitate the development of certain economic activities or economic areas
• Relevant criteria for the determination of aid as State Aid:
  – It brings an advantage to the beneficiary
    • Positive benefits such as subsidies, cross-subsidies, cash facilities
    • Relief from charges, such as tax credits, social charges and other payments
  – It is financed through State resources
  – It is selective, benefiting only some companies
Article 87 EC

• Examples of application: recovery of stranded costs
  – Austria: Annual payments (up to EURO 456 million) to hydropower projects, financed by contributions of the regional network operators and other customers
  – Longest possible duration of the compensation system: 31 December, 2009
• Examples of application: recovery of stranded costs
  – **Spain**: Compensation (linked to the evolution of the market price) for investments in electricity production assets by electricity companies formerly covered by the State tariff fixing mechanism
  – EURO 8664 million will be paid until 31 December, 2010, financed through a levy on electricity consumption
Competition Policy
Considerations

• Free competition on supply side suppliers. DG Com will investigate:

• Companies acting on the same product and geographical market that do not enter into competition with each other (Cartel or jv arrangement)

• Companies acting in different geographical markets - restrictions to import or export a product into or from other national markets
Competition Policy Considerations

- Free competition on demand side customers

- Customers shall have the possibility to change/choose freely between suppliers

- Locked in customers - customers that have entered into long-term exclusive supply contract with the dominant operators
EC Merger Control

Transactions subject to review

- Notification is compulsory
- Concentration with a Community dimension
  - Community dimension: turnover threshold
  - Concentrations: change of control or decisive influence
  - Joint-ventures: full functionality
EC Merger Control

Transactions subject to review

• Community dimension:
  – Thresholds:
    • combined turnover is 5 billion worldwide and
    • individual turnover of at least two parties is €250 million EU-wide
    • unless each party achieves 2/3 turnover in same MS
  
  NB: secondary thresholds

  – Exclusive jurisdiction (NB: exceptions)
Regulation of Infrastructure at EU level: Commission involvement

- Creation of electricity/gas regulatory for a integrated by EC officials, national representatives and industry associations
  - Evaluate progress in the implementation of the Directives
  - Provide assistance in their interpretation
  - Propose solutions to some implementation problems
Regulation of Infrastructure at EU level: Commission involvement

- Proposed New Package on Energy Infrastructure
  - List of priority projects (12)
  - Action Plan (13 measures)

- Possibility to use a Commission’s Directive (EC Art. 86.3) to speed up the liberalization process
Conclusions

• Liberalization creates a series of competition problems that need to be addressed to ensure the success of market opening

• In liberalizing industries EC competition law intervenes against restrictions on competition which either:
  – impede the creation of a level playing field
  – have the effect to preserve historic monopoly supply areas
Conclusions

• Enforcement activities of the Commission are mainly focus on restrictive practices with a structural impact
• e.x. network issues and cross border trade problems in the electricity sector
Liberalization & Competition in the EU Energy Markets

Dr. Roberto Rios-Herran
World Trade Institute
Prague June 7, 2003