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Long-term Energy Supply Contracts in European Competition Policy: Fuzzy not Crazy

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Long-term supply contracts (LTC) remain a pervasive feature of most European energy markets despite the progress of liberalization. To get out of the monopoly era, the current refining and harmonization of European market designs may be pointless if incumbents continue to use these contracts as devices to control market. However, there is growing acceptance that their positive impact on investment makes them desirable as long as spot market competition remains unsatisfactory. Welfare-enhancing aspects must thus be weighted against possible side effects on the current process of market opening.

LTC have become a priority for review under the EC antitrust rules since the Energy Sector Inquiry. A series of cases has already come out and new ones are regularly opened, for instance lately against EDF and Electrabel. A widespread view, both in academia and in the industry, is that the European Commission is taking a dogmatic view on LTC and would simply consider them unacceptable when implemented by dominant companies.

The objective of this paper is first to depict the pros and cons of LTC in energy from a general antitrust point of view and then to analyze the actual behaviour of the European Commission vis-à-vis these contracts.

The paper first shows that the antitrust dilemma with LTC in energy is far from entirely solved by economic theory. LTC effects on welfare depend on a quantity of variables and economics does not provide any integrated model to weigh anti-competitive effects with potential efficiency gains over several periods of time. It however clearly shows the different elements to be taken into account in the course of a competition

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analysis. The paper then finds that the European Commission is much less dogmatic than is usually thought and that a new methodology is being implemented to analyze foreclosure effects in the new market context. The analysis of the European Commission displays real efforts to both include recent insights of the competition analysis of foreclosure and limit regulatory costs through a step-based approach. For instance, the first step is a screening test using market share thresholds and black-listed contract clauses which help the enforcer focus on the potentially most significant infringements. The recent cases show that even dominant incumbents are granted the right to sign LTC and the remedies imposed here and there have been innovative. However, the European Commission still takes a 'legalistic' approach in so far as its practice closely complies with what could be acceptable before the European Courts of Justice in case of appeal. In particular, the maximum duration imposed seem directly inspired by what has become the current practice in other sectors and there is no reason to believe that the thresholds successfully used for e.g. beer and ice-cream are inevitably smart for energy. The action of the European Commission under its antitrust powers thus appear to remain constrained by the procedural aspects of the legal process and the evolution of legal doctrine.

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