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# European Union: Energy

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The energy sector has witnessed important developments in the area of EU competition law in the course of the past year.<sup>1</sup> These developments demonstrate the importance of EU competition rules in attaining the objectives contained in article 194 of the Treaty on the Functioning of the European Union (TFEU). During the past few months, the Commission has adopted several high-profile decisions to enforce competition law under articles 101 and/or 102 TFEU, some of which have had far-reaching consequences for the structure of the energy markets involved. In addition, the Commission has concluded important state aid procedures and issued new rules on state aid affecting energy markets. The present chapter will review the main cases regarding oil and gas, coal, nuclear and renewable energy sources, but also electricity and other energy infrastructures, as well as energy-related services such as power exchanges.

Moving forward, with the new European Commission taking office in November 2014 and the Energy Union being one of the EU's top 10 priorities, a strict enforcement of EU competition law will remain essential to prevent companies from distorting the internal energy market.<sup>2</sup> This will in turn ensure that energy can flow freely by addressing issues such as territorial restrictions in supply contracts as well as upstream or downstream and network foreclosure issues (including interconnectors). The Commission will also assess – through competition law enforcement – the evolution and formation of energy prices.<sup>3</sup>

## Cartels and abuse of dominance

### Power exchanges

The Commission dealt with two antitrust cases concerning power exchanges during 2014. Power exchanges provide, among other things, trading services for the delivery of 'spot' electricity products (ie, electricity that is delivered in 24 hours or less after the trading transaction). The trading services offered by power exchanges include the collection of buy and sell orders, the matching of those orders to determine the most efficient transactions, the financial and physical execution of the trades, the management of the implicit allocation of cross-border interconnection capacities through market coupling, and services to third parties for the development and operation of spot electricity trading.<sup>4</sup> According to the Commission, power exchanges play a crucial role in providing 'price information and price signals in wholesale electricity markets' and are thus central to the efficient functioning of electricity markets.<sup>5</sup>

The first case concerned a hard-core cartel between Epex Spot and Nord Pool Spot (NPS).<sup>6</sup> The two companies had mutually agreed not to compete with one another, in particular by allocating territories between themselves during at least seven months in 2011–2012. The aim was to protect their respective national strongholds and share the countries where they planned to expand, in order to maintain the power balance between them. Countries north of Poland (including Poland) were reserved to NPS. Conversely, countries south of Poland were reserved to Epex Spot.<sup>7</sup> Moreover, the companies discussed how to operate collusively on markets where they were both present

and how to allocate commercial opportunities arising in new markets.<sup>8</sup> The European Commission considered these conducts to be a restriction of competition by object under article 101(1) TFEU in the European Economic Area (EEA). The companies settled the case but were fined a total of almost €6 million.

The second case concerned an abuse of dominant position under article 102 TFEU perpetrated by OPCOM, the Romanian power exchange company, between 2008 and 2013.<sup>9</sup> In this case, the Commission found that OPCOM had discriminated against electricity traders established in EU countries other than Romania by requiring them to obtain a Romanian VAT registration even though they already had a VAT registration in their home country. Such requirement, which was not imposed by Romanian tax law, had the effect of impeding other EU wholesale electricity traders from participating on OPCOM. Traders who wanted to enter the Romanian wholesale electricity market had to first set up an establishment in Romania and then required a VAT registration, thereby incurring additional costs and organisational disadvantages.<sup>10</sup> On the basis of its findings, the Commission fined OPCOM and its parent company Transelectrica a sum of approximately €1 million.

This case is a good illustration of how EU competition law can help to build and sustain the single energy market in line with the objectives laid down in article 194 TFEU.<sup>11</sup> It also shows how complex it is to rebut the parent liability presumption even in the case of highly regulated industries. OPCOM was 100 per cent owned by Transelectrica, the Romanian transmission system operator, which was controlled in turn by the Romanian state. Transelectrica argued that since OPCOM was a regulated entity, it was not possible to exercise decisive influence. In particular, in Transelectrica's view, no decisive influence could have been deemed to exist since OPCOM's fees were predetermined by a government agency. However, the Commission held that '[t]he fact that OPCOM's activity is regulated by ANRE does not change the fact that it is controlled by Transelectrica. [...] [E]ven if the level of OPCOM's fees is regulated by ANRE and therefore not subject to control of Transelectrica (see recital (271)). Transelectrica exercises its influence over OPCOM in other areas except fees.<sup>12</sup> These areas of influence included management overlaps,<sup>13</sup> as well as other examples of decisive influence over OPCOM's commercial policy.<sup>14</sup>

### High-voltage power cables

In April 2014, the Commission fined 11 producers of underground and submarine high-voltage power cables for a total of almost €302 million for having operated a 10-year global cartel. The companies shared markets and allocated customers between themselves on an almost worldwide scale.<sup>15</sup> Among others, they allocated important high-voltage power cable projects in the EEA, including large infrastructure and renewable energy projects such as offshore wind farms. Most of the world's largest high-voltage power cable producers participated in these agreements and were fined. ABB received full immunity under the 2006 Leniency Notice.<sup>16</sup>

This Commission Decision is noteworthy because a private equity firm was held jointly and severally liable for cartel infringements under the parental liability doctrine. In fact, the Commission fined the private equity branch of the investment bank Goldman Sachs for having exercised ‘decisive influence’ over one of the members of the cartel. Goldman Sachs has, however, appealed the decision before the EU General Court (GC) arguing that it was a ‘purely financial investor’.<sup>17</sup> The EU judiciary will now have the opportunity to develop further the current case law on parental liability with particular regard to private equity firms.<sup>18</sup>

#### Gas-insulated switch gear

In April 2014, the ECJ ruled in case C-231/11 P *Siemens AG Österreich*.<sup>19</sup> In this case, the ECJ provides its interpretation on the fining powers of the Commission with respect to joint and several liability for cartel infringement.<sup>20</sup>

In 2011, Siemens AG Österreich and another four companies had appealed a Commission decision holding the companies jointly and severally liable for a cartel relating to the sale of gas-insulated switch gear, a component commonly used to control energy flow in electricity grids. The applicants argued, among other things, that the Commission had committed an error in the calculation of the fines. In the first instance, the GC ruled in favour of the applicant and amended the amounts of the fines imposed on them.<sup>21</sup>

However, the ECJ reversed the GC’s findings and ruled that article 23(2) of Regulation No. 1/2003 does not allow to conclude, neither on the basis of the wording of that provision nor the objective of the joint and several liability mechanism, that the power to impose penalties extends, beyond the determination of joint and several liability from an external perspective, to the power to determine the shares to be paid by those held jointly and severally liable from the perspective of their internal relationship.<sup>22</sup> The ECJ ruled that ‘the objective of joint and several liability resides in the fact that it constitutes an additional legal device available to the Commission to strengthen the effectiveness of the action taken by it for the recovery of fines imposed for infringement of the competition rules, since that mechanism reduces for the Commission, as creditor of the debt represented by such fines, the risk of insolvency, which is part of the objective of deterrence pursued generally by competition law [...]’. In turn, the determination of the shares each of them is required to pay does not pursue that dual objective. According to the court, this is a contentious issue, to be resolved at a later stage, and, in principle, where the fine has been paid in full by one or more of those held liable, the Commission should no longer have any interest in the matter.

#### Merger control

During the course of last year, the Commission cleared a significant number of concentrations in the field of energy.<sup>23</sup> Most of these cases involved largely unproblematic transactions that were approved under the simplified merger procedure.<sup>24</sup> Only a relatively small number of transactions were assessed under the normal merger procedure, with most of these transactions affecting markets that had been previously defined by the Commission,<sup>25</sup> and were cleared without major issues.

#### BP/Statoil Fuel and retail aviation

An interesting case concerned the acquisition by BP of the jet fuel business of the Norwegian energy company Statoil.<sup>26</sup> The parties’ activities were found to overlap in the provision of fuel to airplanes at the airports of Stockholm, Gothenburg, Malmö and Copenhagen.

The notified transaction would have reduced the number of jet fuel suppliers from three to two at the airports of Stockholm, Gothenburg and Malmö, and from four to three suppliers in Copenhagen.

The Commission’s investigation found that the proposed transaction would have removed an important competitive constraint and could have resulted in higher prices for the into-plane supply of fuel to airlines. Moreover, the Commission considered customers’ buyer power to be insufficient to discipline the merged entity and the entrance of potential competitors unlikely owing to high barriers. The transaction was cleared in Phase I after BP offered to divest Statoil’s activities in the airports concerned.

#### Nynas/Shell/Harburg Refinery case

In October 2014, the European Commission published the non-confidential version of its decision in M.6360 – *Nynas/Shell/Harburg Refinery*.<sup>27</sup> This case concerned the divestment by Shell of certain assets of its German subsidiary active in the production of naphthenic base and process oils and transformers oil to Nynas of Sweden. After the transaction, Nynas would have remained the only producer of naphthenic base and process oils in the EEA and the largest producer of transformers oil in the EEA. The transaction was, however, cleared in Phase II after the parties had successfully invoked the ‘failing division defence’.

The failing division defence allows otherwise problematic mergers to be cleared where the target is a failing division that is expected to leave the market even if the merger does not take place. The basic concept behind the defence is that competition would deteriorate at least as much without the merger as it would if the merger were to take place. The failing division defence is thus a special application of the counterfactual analysis.<sup>28</sup> This defence is subject to three cumulative conditions, all of which were met in the present case:

- if not acquired, the failing division would, in the near future, be forced out of the market;
- there is no less anti-competitive alternative transaction; and
- the assets of the failing division would inevitably exit the market absent the merger.

Shell demonstrated that, failing a divestiture, it would have permanently closed the Harburg refinery assets, in line with its business strategy to exit the naphthenic oil sector.<sup>29</sup> As for the second condition, the closure of the Harburg refinery would have reduced ‘the naphthenic base and process oil production capacity in the EEA to below EEA demand. Demand for these products in the EEA would then have to be met by imports and consequently higher prices for consumers due to import costs.’<sup>30</sup> The third condition was also considered to be met since there was no other credible buyer other than Nynas. In particular, the Commission analysed the situation of Ergon, the other potential acquirer of the refinery’s assets, and concluded that it would not have made economic sense for it to carry out the acquisition.<sup>31</sup> In addition, the Commission’s investigation showed that Nynas would have achieved ‘significant reductions of variable costs for its additional supplies, which were likely to be passed on to consumers to some extent.’<sup>32</sup>

After the *Nynas/Shell/Harburg Refinery* case the Commission might be more open in the future to accept arguments based on the failing division defence than it was in the past.<sup>33</sup> In particular, the defence might have more chances of success when – as in the case of *Nynas* – there are significant efficiencies arising from the notified transaction.

## State aid

In the course of the past several months, new rules were adopted in the framework of the state aid modernisation process, which are of particular importance to energy markets, such as the new guidelines on state aid for environmental protection and energy. In terms of enforcement, we focus on two decisions adopted by the Commission with regard to renewable energy law in Germany and on capacity mechanisms in the United Kingdom, in view of their significant legal and policy implications, and a GC case confirming the Commission analysis with regard to a public service compensation scheme for the sake of the security of energy supply in Spain.

### Guidelines on state aid for environmental protection and energy 2014–2020

In April 2014, the Commission adopted the new guidelines for the assessment of state aid for environmental protection and energy, applicable for the period 2014–2020 (the EEAG Guidelines).<sup>34</sup> The EEAG Guidelines draw from previous guidance issued by the Commission<sup>35</sup> and constitute an indispensable tool for EU member states to assess the compatibility with state aid rules of planned measures in the energy sector.

The most relevant changes introduced by the EEAG Guidelines include:

- a new framework for the assessment of aids to energy infrastructures, in recognition of the fact that state intervention might be needed to overcome market failures and to ensure that the EU's considerable infrastructure needs are met;<sup>36</sup>
- new rules for the granting of aid for ensuring generation capacity in EU member states ('capacity mechanisms');<sup>37</sup>
- simplified rules for aid for energy efficiency and for cogeneration of heat and power; and<sup>38</sup>
- new rules on aids to energy produced from renewable resources,<sup>39</sup> in order 'to better integrate renewables into the internal electricity market in a gradual way' and by ensuring that public support to renewables will be allocated through competitive bidding processes.<sup>40</sup>

### General Block Exemption Regulation

In May 2014, the Commission adopted a revised General Block Exemption Regulation (GBER) for state aid.<sup>41</sup> Under the GBER, certain categories of aid can be exempted from the requirement of prior notification to the Commission under article 108(3) TFEU, provided they comply with a set of conditions.

The new GBER reflects the principles of the EEAG Guidelines and contains provisions to help member states meet 2020 climate targets, to gradually move to market-based support for renewable energy and to provide companies with incentives to take early steps to meet the EU targets. New categories include a provision allowing operating aid for the production of renewable electricity and operating aid for small scale renewable energy installations. The GBER also exempts investment aid for energy efficiency measures, for energy efficiency projects in buildings and for high-efficiency cogeneration.<sup>42</sup>

### Renewable energy – Germany

In November 2014, the Commission approved the new German Renewable Energy Act (EEG 2014) under EU state aid rules.<sup>43</sup> The Commission concluded that, overall, the EEG 2014 promotes EU environmental and energy objectives without unduly distorting competition in the Single Market. With this decision, Germany was able to maintain its support for the production of electricity from

renewable energy sources, while reducing the financial burden on energy-intensive users and certain auto-generators by way of a reduced payment of the EEG-surcharge.

After an in-depth state aid investigation into the EEG 2014 on the basis of article 108(2) TFEU, the Commission confirmed the existence of state aid, but declared the aid to be compatible with the internal market on the basis of the criteria laid down in section 3.7.2 of the EEAG Guidelines.<sup>44</sup> However, it also considered that some elements were not compatible. First, the surcharge established by the EEG 2014 also covered energy from mine gas, which was not among the list of renewable energies in the EEAG Guidelines; hence the condition of paragraph 184 was not met.<sup>45</sup> In addition, the surcharges only partially fulfilled the proportionality criteria laid down in paragraphs 188 and 189 of the EEAG Guidelines.<sup>46</sup> On the basis of these two elements, the Commission ordered the recovery of the reductions exceeding what was permitted under the EEAG Guidelines. The recovery decision has been appealed before the GC by Germany and by several energy-intensive producers.<sup>47</sup>

The EEG case demonstrates the Commission's commitment to ensuring that the support of renewable energies does not have the effect of distorting competition on the internal market. In commenting on the decision Commissioner for Competition Vestager said: 'I want to strike a balance between several needs: to promote renewable energy and ensure its stable financing. At the same time we need to make sure that contribution by SMEs and consumers is fair, and that we protect the competitiveness of European industry.'<sup>48</sup>

### Capacity market electricity scheme – United Kingdom

In July 2014, the Commission approved the capacity market electricity generation scheme proposed by the UK.<sup>49</sup> This was the first time that the Commission had assessed a capacity market under the new provisions on capacity markets under the EEAG Guidelines. The Commission found that the capacity mechanism designed by the United Kingdom to ensure the security of supply in peak times were fully in line with section 3.9 of the EEAG Guidelines and thus compatible with the internal market. As such, it represents an important benchmark for other EU member states to design their capacity market schemes in a way that is compliant with EU state aid rules.

Under the proposed scheme, the UK system operator is required to organise annual centrally managed auctions to procure the level of capacity necessary to ensure the security of energy supply. Auctions are organised in a non-discriminatory way and are in principle open to existing and new generators, demand-side response operators and storage operators.<sup>50</sup> If successful at the auction, capacity providers are awarded a capacity agreement. In exchange for a sum for the duration of the capacity agreement,<sup>51</sup> capacity providers need to provide capacity at times of stress or face financial penalties. The aid granted is paid out as a function of the amount of capacity set out in each provider's capacity agreement and is financed through a levy on electricity suppliers.<sup>52</sup>

According to the Commission, the UK demonstrated that the measure contributed to a well-defined objective, as required by section 3.9.1 of the EEAG Guidelines. Moreover, the measure was necessary to adequately address the market failure that prevents the market from delivering the required capacity and was enacted only following an analysis of potential alternatives;<sup>53</sup> the aid granted was appropriate within the meaning of section 3.9.2 of the EEAG Guidelines;<sup>54</sup> the aid granted was proportional to the attainment of the objectives pursued, as required by section 3.9.5 of the EEAG

Guidelines;<sup>55</sup> and thus the aid did not have any undue or negative effect on competition and trade within the meaning of section 3.9.6 of the EEAG Guidelines.<sup>56</sup>

#### Electricity-generating power plants – Spain

In December 2014, the GC dismissed an appeal by Castelnou Energía against the Commission and upheld the Commission decision approving a Spanish measure by which 10 electricity-generating power plants were required to obtain indigenous coal and produce certain volumes of electricity from that coal, while at the same time benefitting from a preferential dispatch mechanism.<sup>57</sup> The GC confirmed the Commission's assessment that the requirements imposed by the Spanish measure were compatible aid under article 106(2) TFEU because this qualified as a service of general economic interest (SGEI) necessary to secure the electricity supply in Spain.

Aside from the SGEI aspects, this case is of particular relevance as it deals with the interaction between state aid and other EU policies. The GC confirmed that where the Commission assesses an aid measure that does not pursue an environmental objective, it is not required to take account of EU rules on protection of the environment in its examination of the aid and of the forms of that aid which are inextricably linked to it. The judicial review is limited to the verification of compliance with the rules, other than those relating to state aid, to those rules capable of having a negative impact on the internal market, defined as an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured.

#### The way ahead

The Energy Union Communication describes the Energy Union as 'an integrated continent-wide energy system where energy flows freely across borders, based on competition and the best possible use of resources, and with effective regulation of energy markets at EU level where necessary'.<sup>58</sup> In this context, it is clear that competition law and policy will continue to play a key role. In fact, the Communication specifically mentions that 'strict enforcement of the Treaty's competition rules will help to prevent companies from distorting the internal energy market. Antitrust enforcement will ensure that energy can flow freely by addressing territorial restrictions in supply contracts as well as upstream/downstream and network foreclosure issues (including interconnectors). The Commission will also assess – through competition law enforcement – the evolution and formation of energy prices'.<sup>59</sup>

In the light of the foregoing, the Commission sent a statement of objections to Russian gas giant Gazprom alleging the violation of article 102 TFEU in the Central and Eastern European gas market.<sup>60</sup> In particular, the Commission accuses Gazprom of abusing its dominant position by imposing territorial restrictions in its supply agreements with gas wholesalers. These territorial restrictions include export ban clauses, destination clauses and other measures preventing the cross-border flow of gas. Moreover, according to the Commission preliminary findings, Gazprom has pursued an unfair pricing policy in five eastern EU member states 'by charging prices to wholesalers that are significantly higher compared to Gazprom's costs or to benchmark prices'.<sup>61</sup>

In the area of merger control, the Commission has opened several Phase II investigations in cases regarding energy markets. This was the case of the proposed acquisition of the only Greek gas transmission system operator DEFSA by SOCAR, the State Oil Company of the Azerbaijan Republic.<sup>62</sup> The Commission stopped the

clock in Phase II in late January 2015 and the transaction has been pending approval since then. In February 2015, the Commission opened an in-depth investigation into General Electric's proposed acquisition of the thermal power, renewable power and grid businesses of Alstom.

Finally, with respect to state aid enforcement, the Commission aims at ensuring 'that capacity mechanisms and support for renewable electricity are fully in line with existing rules and do not distort the internal energy market' and that renewables production is supported 'through market-based schemes that address market failures, ensure cost effectiveness and avoid overcompensation or distortion'.<sup>63</sup> To this end, the Commission has recently launched a sector inquiry into the capacity mechanisms of 11 EU member states (Belgium, Croatia, Denmark, France, Germany, Ireland, Italy, Poland, Portugal, Spain and Sweden).<sup>64</sup>

#### Notes

- 1 The present chapter takes into account developments during 2014 and part of 2015 (until May).
- 2 The Juncker Commission took office on 1 November 2014. See Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, the Committee of the regions and the European Investment Bank. A Framework Strategy for a Resilient Energy Union with a Forward-Looking Climate Change Policy (COM/2015/080 final), 25 February 2015 (also referred to as the 'Energy Union Communication').
- 3 *Ibidem*, p. 9.
- 4 See Commission Decision of 5 March 2014 in Case AT.39952 *Power Exchanges*, paras. 5–6.
- 5 See Statement by Vice-President Joaquín Almunia on antitrust decisions on power exchanges, 5 March 2014.
- 6 See Commission Decision in Case AT.39952 *Power Exchanges*, above No. 4.
- 7 *Ibidem*, paras. 28–31.
- 8 *Ibidem*, paras. 32–34.
- 9 See Commission Decision of 5 March 2014 in Case AT.39984 *Romanian Power Exchange/OPCOM*.
- 10 *Ibidem*, para. 230.
- 11 See Statement by Vice-President Joaquín Almunia on antitrust decisions on power exchanges, above No. 5.
- 12 See Commission Decision in Case AT.39984 *Romanian Power Exchange/OPCOM*, above No. 9, para. 271.
- 13 *Ibidem*, paras. 277–281.
- 14 *Ibidem*, paras. 288–293.
- 15 See Summary of Commission Decision of 2 April 2014 in Case AT.39610 *Power Cables*.
- 16 ABB, Nexans, Prysmian (previously Pirelli), J-Power Systems (previously Sumitomo Electric and Hitachi Metals), VISCAS (previously Furukawa Electric and Fujikura), EXSYM (previously SWCC Showa and Mitsubishi Cable), Brugg, NKT, Silec (previously Safran), LS Cable and Taihan.
- 17 See Case T-419/14 – *The Goldman Sachs Group v Commission*. Under current case law, the 'purely financial investor' is only an investor who holds shares in a company in order to make a profit, but who refrains from any involvement in its management and in its control, as established in Case T-392/09 – 1 *garantovaná as v Commission*, not yet published, para. 52.
- 18 The 'purely financial investor defence' has allowed companies to successfully avoid liability for the illegal conduct of their subsidiaries in some cases (see Case COMP/38.238 – *Raw Tobacco Spain*, para. 383), but not always (see Case COMP/39.396 – *Calcium carbide and*

- magnesium based reagents for the steel and gas industries*, paras. 257–262).
- 19 See Joined Cases C-231/11 P and C-233/11 P – *Commission v Siemens Österreich*, not yet published.
- 20 Other noteworthy cases ruled by the GC or the ECJ in 2014 are C-553/12 P – *Commission v DEI*, not yet published; Joined Cases C-247/11 P and C-253/11 P – *Areva and Others v Commission*, not yet published; T-272/12 – *Energetický a průmyslový and EP Investment Advisors v Commission*, not yet published; T-272/12 – *Energetický a průmyslový and EP Investment Advisors v Commission*, not yet published.
- 21 See T-122/07 – *Siemens Österreich and VA Tech Transmission & Distribution v Commission*, ECR 2011 II-00793.
- 22 See Joined Cases C-231/11 P and C-233/11 P – *Commission v Siemens Österreich*, above No. 19, para. 58 to 60.
- 23 Authors estimate around 51 transactions based on the data publicly available on the European Commission's Merger Database (available at [http://ec.europa.eu/competition/elojade/isef/index.cfm?clear=1&policy\\_area\\_id=2](http://ec.europa.eu/competition/elojade/isef/index.cfm?clear=1&policy_area_id=2), as of 26 May 2015).
- 24 See Commission Decision of 13 June 2014 in Case M.7228 – *Central/Bord Gais Energy*; Commission Decision of 10 September 2014 in Case M.7316 – *DET NORSKEOLJESELSKAP/MARAHON OIL NORGE*; Commission Decision of 3 September 2014 in Case M.7318 – *Rosneft/Morgan Stanley Global Oil Merchanting Unit*; Commission Decision of 27 January 2015 in Case M.7456 – *Imerys/S&B Minerals*.
- 25 M.7456 – *Imerys/S&B Minerals*, above No. 24, represented the first time the Commission assessed a market for the mineral perlite.
- 26 Commission Decision of 15 December 2014 in Case M.7387 – *BP/Statoil Fuel and Retail Aviation*.
- 27 Commission Decision of 2 September 2013 in Case M.6360 – *Nynas/Shell/Harburg Refinery*.
- 28 The failing division defence is a special application of the failing firm defense. See Guidelines on the assessment of horizontal mergers under Council Regulation on the control of concentrations between undertakings, OJ C 31, 2004, p. 5, paras. 89 to 91.
- 29 Commission Decision in M.6360 – *Nynas/Shell/Harburg Refinery*, paras. 312–327.
- 30 See European Commission press release, 'Mergers: Commission approves acquisition of Shell's Harburg refinery assets by Nynas AB of Sweden', 02.09.2013 (available at [http://europa.eu/rapid/press-release\\_IP-13-804\\_en.htm](http://europa.eu/rapid/press-release_IP-13-804_en.htm)). Commission Decision in M.6360 – *Nynas/Shell/Harburg Refinery*, paras. 422–442.
- 31 Commission Decision in M.6360 – *Nynas/Shell/Harburg Refinery*, paras. 328–361.
- 32 See European Commission Press Release, 'Mergers: Commission approves acquisition of Shell's Harburg refinery assets by Nynas AB of Sweden', above No. 30. Commission Decision in M.6360 – *Nynas/Shell/Harburg Refinery*, paras. 443–473.
- 33 For cases where the failing division defence was rejected by the Commission, see M.933 – *Bertelsman, Kirch/Premiere*; M.1221 – *Rewe Meini*; M.2876 – *NewsCorp/Telepiù*.
- 34 Guidelines on State aid for environmental protection and energy 2014–2020, OJ C 200, 2014, p. 1.
- 35 Guidelines on State aid for environmental protection, C 82, 2008, p. 1.
- 36 See EEAG Guidelines, above No. 34, section 3.8.
- 37 *Ibidem*, section 3.9.
- 38 *Ibidem*, section 3.4.
- 39 *Ibidem*, section 3.3 and 3.7.
- 40 See European Commission, 'Energy and Environmental State Aid Guidelines – Frequently asked questions', 9 April 2014 (available at [http://europa.eu/rapid/press-release\\_MEMO-14-276\\_en.htm](http://europa.eu/rapid/press-release_MEMO-14-276_en.htm)).
- 41 Commission Regulation (EU) No. 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of articles 107 and 108 of the Treaty, OJ L 187, 2014, p. 1.
- 42 *Ibidem*, articles 38–44.
- 43 Commission Decision of 25 November 2014 in Case SA.33995 Support of renewable electricity and reduced EEG surcharge for energy-intensive users.
- 44 *Ibidem*, paras. 166–216.
- 45 *Ibidem*, paras. 190–191.
- 46 *Ibidem*, paras. 204–207.
- 47 See, ex pluribus, T-134/14 – *Germany v Commission* and T-230/14 – *Deutsche Edelstahlwerke v Commission*.
- 48 See European Commission Press Release, 'State aid: Commission approves German aid scheme for renewable energy (EEG 2012); orders partial recovery', 25 November 2014 (available at [http://europa.eu/rapid/press-release\\_IP-14-2122\\_en.htm](http://europa.eu/rapid/press-release_IP-14-2122_en.htm)).
- 49 Commission Decision of 23 July 2014 in Case SA.35980 *UK capacity mechanism*.
- 50 *Ibidem*, paras. 28–55.
- 51 *Ibidem*, paras. 56–59.
- 52 See European Commission Press Release, 'State aid: Commission authorises UK Capacity Market electricity generation scheme', 23.07.2014 (available at [http://europa.eu/rapid/press-release\\_IP-14-865\\_en.htm](http://europa.eu/rapid/press-release_IP-14-865_en.htm)).
- 53 Commission Decision in Case SA.35980, above No. 49, paras. 118–129.
- 54 *Ibidem*, paras. 130–140.
- 55 *Ibidem*, paras. 144–147.
- 56 *Ibidem*, paras. 148–155.
- 57 See T-57/11 – *Castelnou Energia v Commission*, not yet published and Commission Decision of 29 September 2010 in Case SA N178/2010.
- 58 See Commission Communication 'A Framework Strategy for a Resilient Energy Union With a Forward-Looking Climate Change Policy', above No. 2, p. 2.
- 59 *Ibidem*, p. 9.
- 60 Case AT.39816 – *Upstream gas supplies in Central and Eastern Europe*. April 2015.
- 61 For more information on the *Gazprom* case see European Commission – Fact Sheet, 'Antitrust: Commission sends Statement of Objections to Gazprom – Factsheet', 22 April 2015 (available at [http://europa.eu/rapid/press-release\\_MEMO-15-4829\\_en.htm](http://europa.eu/rapid/press-release_MEMO-15-4829_en.htm)) and European Commission – Press Release, 'Antitrust: Commission sends Statement of Objections to Gazprom for alleged abuse of dominance on Central and Eastern European gas supply markets', 22 April 2015 (available at [http://europa.eu/rapid/press-release\\_IP-15-4828\\_en.htm](http://europa.eu/rapid/press-release_IP-15-4828_en.htm)).
- 62 Case M.7095 – *SOCAR/DESFA*. According to the Commission, there is preliminary evidence that the proposed merged entity 'may have the ability and the incentive to hinder competing upstream gas suppliers from accessing the Greek transmission system, in order to reduce competition on the upstream wholesale gas market in Greece. [...] This could reduce the number of current and potential suppliers and the amount of natural gas in Greece and lead to higher gas prices for clients'.
- 63 Commission Communication 'A Framework Strategy for a Resilient Energy Union With a Forward-Looking Climate Change Policy', above No. 2, pp. 10 and 15.
- 64 For more information see European Commission – Press Release, 'State Aid: Commission launches sector inquiry into mechanisms to ensure electricity supplies', 29 April 2015 (available at [http://europa.eu/rapid/press-release\\_IP-15-4891\\_en.htm](http://europa.eu/rapid/press-release_IP-15-4891_en.htm)) and European Commission – Fact Sheet, 'State Aid: sector inquiry into capacity mechanisms – frequently asked questions', 29 April 2015.



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Dr Salomé Ciscal de Ugarte is a partner based in the Brussels office of Crowell & Moring, admitted to practise in Spain and Belgium. Salomé advises on all aspects of EU competition law, including merger control, investigations (cartels, state aid, dominance and other behavioural issues) and litigation before the EU courts.

Prior to joining Crowell & Moring, Salomé worked for Freshfields Bruckhaus Deringer and Mayer Brown, and as director for European and regulatory affairs at Whirlpool Europe.

In 2013, she received the International Law Office's (ILO) 'EU Competition Lawyer of the Year' Client Choice Award, which recognises those lawyers and law firms around the world that stand apart for the excellent client care they provide and the quality of their service. Clients described her as providing 'brilliant and spot-on advice on the legal issues, as well as on the required strategy to get the best results', as well as her 'extensive experience with both competition law and consumer protection law [which] sets her apart from most practitioners'.

Salomé is the president and a member of the board of the Harvard Club of Belgium and currently also serves as a vice-chair and member of the board of directors of the American Chamber of Commerce to the EU. She is associate professor on EU competition law at ESADE and IE Law Schools and is also a fellow of the Centre for European Studies/IE in Madrid. She frequently writes and speaks on issues of competition and trade.

Salomé graduated summa cum laude in law and economics from the University of Deusto (Premio Extraordinario de Licenciatura) and holds a master of laws from Harvard Law School, where she was an associate fellow of the Real Colegio Complutense at Harvard. She obtained a PhD in law from the European University Institute in Florence and has been a Fulbright Scholar.

Please see her online profile for further information:  
[www.crowell.com/Professionals/salome-ciscal-de-ugarte](http://www.crowell.com/Professionals/salome-ciscal-de-ugarte).



**Lorenzo Di Masi**  
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Lorenzo Di Masi is a trainee lawyer in the EU Competition and International Trade Practice Groups at the Brussels office of Crowell & Moring LLP. Lorenzo's practice covers the broad spectrum of EU competition law, including merger control, behavioral issues, private antitrust enforcement and state aid.

Prior to joining Crowell & Moring, Lorenzo worked in the Brussels office of another leading international firm and as a civil servant at the Directorate for Legislative Acts of the European Parliament.

He holds a law degree from the University of Milan and a LL.M. in European Law from University College London, where he also worked as research assistant at the Centre for Law, Economics and Society. He is author of several publications in the area of EU and World Trade Organization law.



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Year after year, Crowell & Moring is recognised as a top competition law litigation practice by legal and industry journals. They were named to the 'Highly Recommended' list in *Global Competition Review's* 'GCR 100: The World's Leading Competition Practices' and in GCR's report on 'New York's Finest' antitrust firms. Washington, DC, and Brussels-based groups have been listed among the leading practices in both *Chambers USA* and *Chambers Global*, where clients describe the lawyers as 'highly impressive' and possessing 'an exceptional ability to communicate complex, technical issues to the layman'. In addition, they were most recently selected to Law360's Competition Practice Groups of the Year' listing, which characterises the team as 'uniquely well-rounded'.

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