

# Bird & Bird

## Newsflash

## Belgian competition authority prosecutor accuses Electrabel of abuse of dominance

On 7 February, the prosecution division of the Belgian competition authority submitted a report to the Council of the authority, alleging an abuse of a dominant position in Belgian electricity markets by Electrabel. It accused Electrabel of withholding generation capacity from the Belgian generation, wholesale and trading market and of submitting purchase orders at very high prices on Belpex, the Belgian power exchange, between 2007 and 2010, and of fictitious sales and "double use" of tertiary reserve services supplied to the grid operator in order to allow it to balance the system, in 2006 and 2007. The 600-page report is not in the public domain, and details of the alleged infringements, and in particular what is meant by "fictitious sales" and "double use", are not clear.

The investigation originated from a study by the Belgian energy regulator, the CREG, finalised in May 2009. The CREG found numerous instances of abnormally high prices (as high as €2,500/MWh, compared with average prices in the region of €50/MWh) on Belpex in 2007 and the first half of 2007. The CREG considered that these high prices resulted from capacity withholding and the submission of bids at artificially high prices by Electrabel. The CREG submitted its study to the competition authority, and then worked closely with the authority's case team during the investigation.

The case now goes before the Council of the competition authority, where Electrabel will have an opportunity to make written and oral representations before the Council makes a final decision. The case is interesting for a number of reasons. It is something of an exaggeration to claim, as the CREG does in its press release welcoming the report, that this detailed investigation of a wholesale electricity market is a first in Europe. The Bundeskartellamt conducted a detailed investigation into suspected capacity withholding in 2009-2011, concluding that there was no evidence of such practices. In the UK in 2007-2008, Ofgem investigated allegations that Scottish generators had made uneconomic decisions to dispatch or withhold plant, and had then charged excessive prices in the balancing mechanism. It concluded that although it had concerns about the generators' conduct, it did not believe that it could sustain a finding of infringement of the competition rules. The Danish, Czech and Italian competition authorities have also all investigated alleged competition law abuses in wholesale electricity markets in recent years. As the CREG notes, the

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European Commission's investigation into suspected capacity withholding by E.ON in Germany resulted in a decision to accept commitments from E.ON to divest part of its generation portfolio. It is clear that the use of competition law to tackle the type of conduct that is alleged here presents a number of difficulties, and any definitive finding by the Belgian authority would therefore be studied with considerable interest around Europe.

The investigation is also of interest because it illustrates the continuing trend for national competition authorities to conduct highly complex and technical investigations in the energy sector, with the European Commission appearing to focus more on large structural cases. Although the exact nature of the allegations in relation to tertiary reserves is not clear, the investigation also illustrates how specialist ancillary services increasingly feature in competition investigations. In the past 18 months, the French competition authority has also investigated the provision of tertiary reserves and the Italian competition authority has investigated the provision of voltage support in the Naples region. National competition authorities are increasingly seeking to define relevant product markets in the energy sector narrowly, and it is clear that a thorough understanding of the application of competition law principles to very technical ancillary services is vital in this area. In this case, tertiary reserves are the generation reserves that the grid operator can call upon at short notice (within 15 minutes) to resolve system imbalances.

Finally, the CREG rightly sees this investigation as a precursor to the more systematic monitoring of energy markets resulting from the adoption and entry into force of the EU Regulation on Wholesale Energy Market Integrity and Transparency. Enforcement action under REMIT is not dependent on establishing a competition law infringement or a dominant position. Capacity withholding is one of the types of manipulation that REMIT was specifically designed to tackle, so competition law tools are less likely to be used for this purpose in future.

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