



Competition Enforcement and Remit: Substantive Overlaps and Institutional Cooperation

Dr Johannes LÜBKING

Head of Unit - Antitrust Energy & Environment
DG Competition

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EU competition rules and REMIT (1/2)

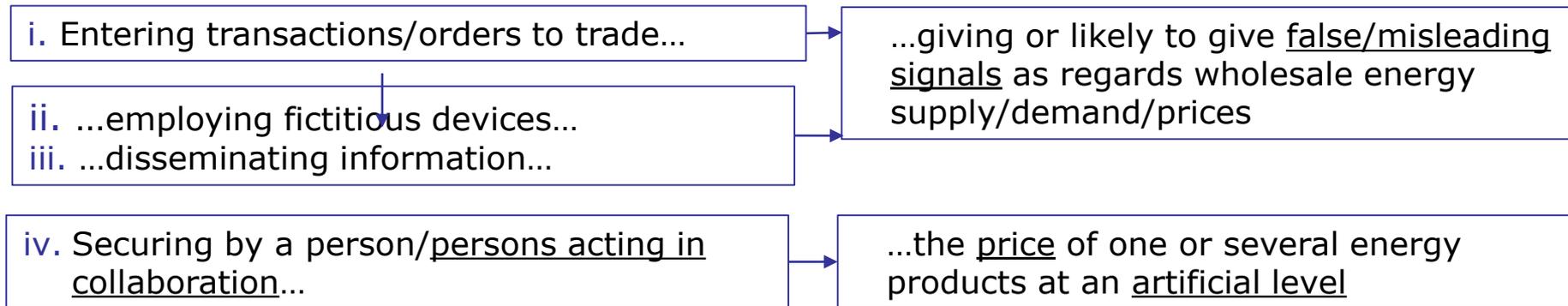
Some differences in objectives:

- EU Competition rules protect competition on the market and ensure that consumers benefit from the opening of electricity and gas markets to competition.
- REMIT establishes rules promoting integrity and transparency of trading in wholesale energy products and prohibits abusive practices affecting wholesale energy markets such as insider trading, market manipulation and attempted market manipulation.

... but **shared overall goals** and **overlaps** between EU competition rules and REMIT, while application of REMIT is **without prejudice to the application of EU competition rules**

EU Competition Rules and REMIT (2/2)

Complementarities and overlaps exist between infringements of EU competition rules and (attempted) market manipulation practices under Article 2 of REMIT Regulation:

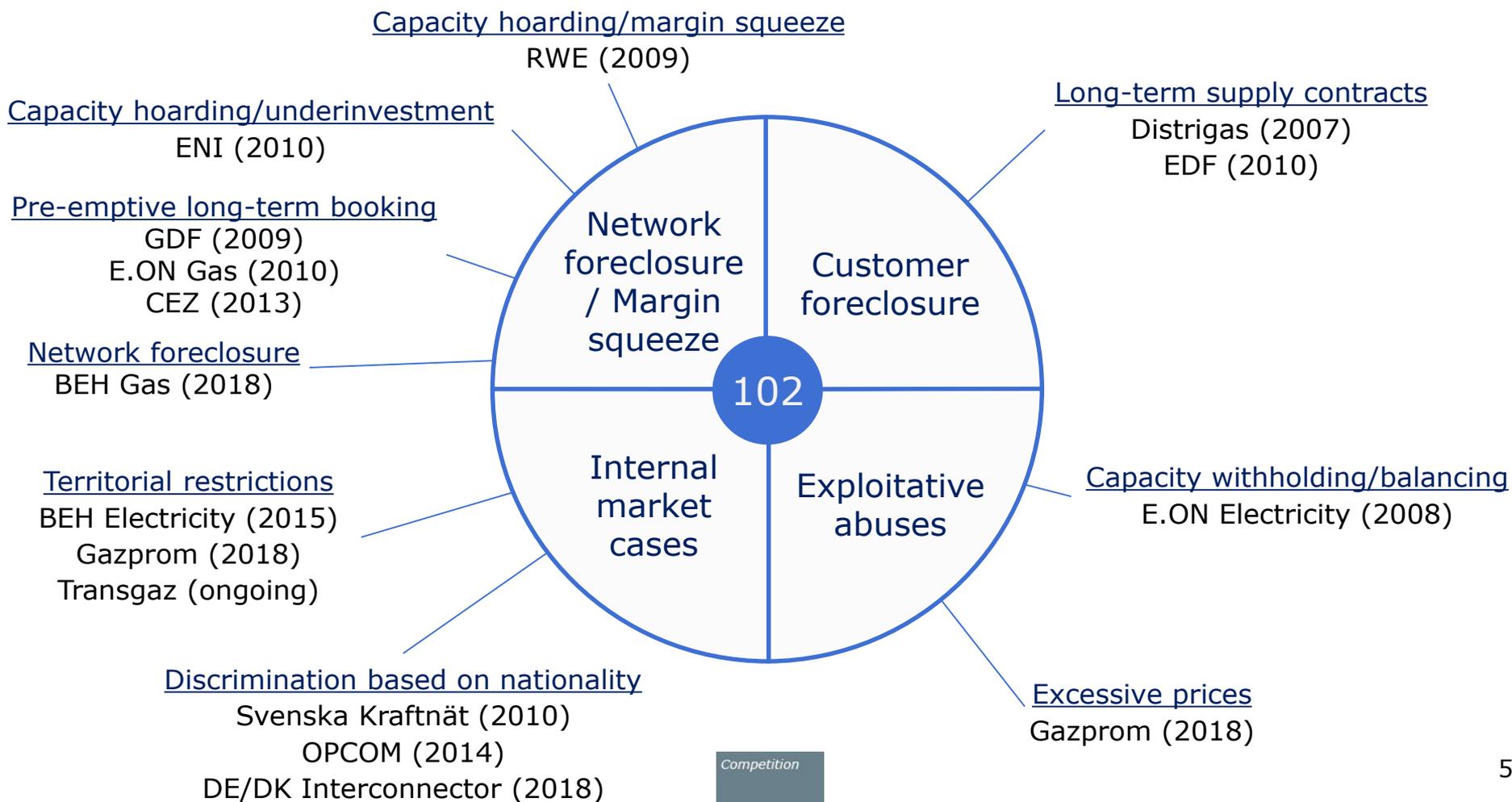


- In comparison to EU Competition rules, related to both
 - Notion of **abuse** in Article 102 TFEU;
 - Notion of **agreement/concerted practice** in Article 101 TFEU

Differences and overlaps with Market Manipulation

	Article 102	Article 101
Different Conditions	<ul style="list-style-type: none"> • Dominant position of undertaking on defined product and geographic market • Conduct to constitute abuse • Potential detrimental effect on competition/consumers 	<ul style="list-style-type: none"> • Agreement/concerted practice between undertakings • With object or effect to restrict competition in the Internal Market
Different Granularity	<ul style="list-style-type: none"> • Trade between MS affected • Presupposes effect on the market (also in duration) 	<ul style="list-style-type: none"> • Trade between MS affected • May require showing of effect to restrict competition
Examples of Overlaps	<ul style="list-style-type: none"> • Capacity withholding • Capacity hoarding • Abusive' strategic bidding & scarcity pricing 	<ul style="list-style-type: none"> • Manipulations involving fictitious transactions between undertakings • Cartels involving manipulation of price benchmarks

Universe of Article 102 cases in the Energy Sector





Competition Practices akin to Market Manipulation (Article 102)

E.ON Electricity Case (2008): suspected abuse by E.ON of a collective dominant position (with RWE and Vattenfall) in German electricity wholesale market

- **Exploitative abuse:** Strategy to (physically) withdraw available and profitable generation capacity aimed at increasing spot and forward prices
- **Exclusionary abuse:** Aimed at foreclosure of competitors : Strategy to deter investments in generation capacity by third parties

Far-reaching **structural remedies:**

- Divestment of 5 GW of generation capacity (around 20% of EON's portfolio)
- Technologies across the merit curve (hydro, lignite/coal, nuclear, gas)
- Reduces ability/incentive to withhold capacity and enables third parties to access generation capacity



Competition Practices akin to Market Manipulation (Article 102 and Mergers)

GdF/International Power (2011): Merger would allow group to:

- Access privileged information of competitors, enabling GdF to bid less aggressively and increase wholesale prices
- Affect position of competitor by reducing maximum available capacity and deteriorating its trading position

Strategic bidding in wholesale market by a vertically integrated company to foreclose competitors and benefit own retail operations

However, "**scarcity pricing**" not as such abusive under Article 102, but generally accepted in Commission State aid decisions on capacity mechanisms. Very high prices can be indication of excessive prices if persistently above costs.



Competition Practices akin to Market Manipulation (Article 101)

Overlaps between collusion under Article 101 and market manipulation, e.g. when it concerns transactions involving fictitious counterparts (i.e. *wash trades*)

Overlaps also exist with Market Abuse rules in financial sector for cartels involving financial benchmarks/related financial instruments:

- Euro and Yen Interest Rates Derivatives (2013) – Fines: EUR 1.5bn
- Swiss Franc Libor and Interest Rates Derivatives (2014) – Fines: EUR 100m
- Euro Interest Rates Derivatives (2016) – Fines: EUR 500m

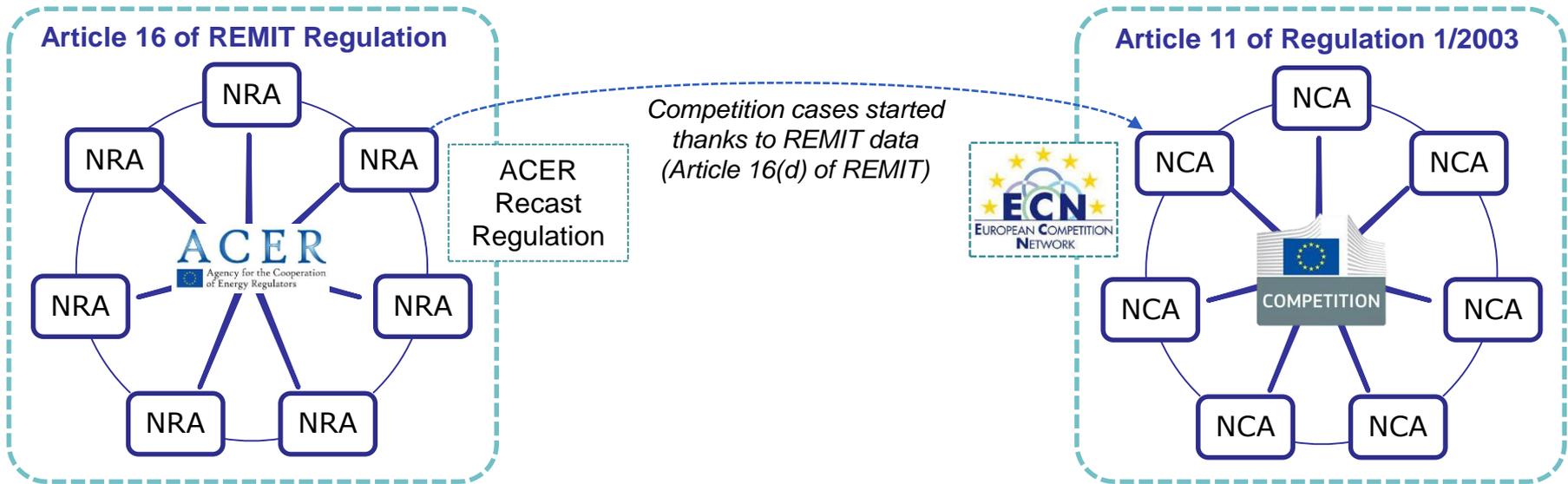
In the energy markets: Ethanol Benchmarks case (on-going):

- Investigation whether ethanol producers manipulated ethanol benchmarks published by price reporting agency



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Institutional Setting: Consistent application of rules and increased cooperation among and between Energy Regulators and Competition Authorities





Consistent application of EU competition rules and of REMIT

Oversight and cooperation for EU competition rules:

- **Art. 11 of Reg. 1/2003** (Art. 11(4) and 11(6)) frames Commission's oversight of NCAs' activity
- The Commission and NCAs cooperate through **European Competition Network (ECN)** (e.g. ECN Working Groups)
- **ECN+ Directive** empowers NCAs to be more effective enforcers and ensures more consistency. Key examples: fines and leniency.
- **Case law developed by the EU Courts**

Consistent application of REMIT:

- **Article 16 of REMIT Regulation** frames Cooperation at Union and national level related to REMIT enforcement
- **ACER Recast Regulation** increases scope for ACER for coordination, cooperation, assistance and oversight
- In the future, further clarification of REMIT by EU Courts may be expected



Scope for increased cooperation between Energy Regulators and Competition Authorities on Data

Cooperation between ACER and NRAs, NCAs, with regard to data already exists pursuant to Art. 16 of REMIT Regulation

Fast and direct access to data collected under REMIT (Article 8 REMIT Regulation) and alerts developed by ACER can be a powerful tool for Commission and Competition Authorities to fulfil their tasks and identify infringements of competition rules in energy markets

Data protected by competition authorities: Competition authorities bound by professional secrecy and confidentiality obligations in fulfilling their tasks (Article 28 Regulation 1/2003). This complies with conditions under REMIT to protect data against abuse.



Three Pleas for Cooperation

- 1. Cooperation on principles:** For cases falling under both EU Competition Rules and REMIT, useful to discuss consistent principles for assessment of essential elements
- 2. Cooperation on individual cases:** Useful for competition authorities and ACER/National Regulators to cooperate if cases are pursued under both set of rules
- 3. Cooperation on data:** Useful for competition authorities and ACER to cooperate on data
 - Excellent collection and organisation of data by ACER from market participants
 - Timely access to data important for Commission and NCAs - for competition cases, access to data may need to be broader in scope and for longer periods