

Antitrust Inspections in The Energy Exchange Market

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On 7 February, the European Commission (EC) and the European Free Trade Association (EFTA) Surveillance Authority conducted unannounced inspections in the energy exchange market. Representatives of Nord Pool Spot (Lysaker, Norway) and EPEX Spot (Paris, France and Leipzig, Germany) announced that the companies were subject to inspections. It is not known whether other companies were also raided. The inspections show that the EC's enforcement policy extends beyond the retail level of the energy sector.

Allegations

The EC has stated that it suspects that the inspected companies, which are active in the electricity trading sector at the wholesale level, have acted in breach of EU antitrust rules on horizontal agreements (Articles 101 of the Treaty on the Functioning of the European Union and Article 53 of the Agreement on the European Economic Area).

In its official statement about the inspections, the EC did not refer expressly to Nord Pool Spot and EPEX Spot as such, but instead referred to "companies active in managing power exchanges in several Member States". It could therefore be implied that additional companies active in this area are being targeted by the EC's antitrust officials. Nord Pool Spot stated that the inspections related to the "possible anticompetitive effects" of the intended joint venture between it and EPEX Spot, as announced on 28 September 2011. This has not been confirmed by the EC.

Inspections by the EC represent a preliminary step in the investigative process where it seeks to gather evidence in order to build a credible cartel case. In this respect, all incriminating documents except those subject to legal professional privilege (*i.e.*, internal correspondence with in-house counsel) may be collected.

Comment

Three years have passed since the EC specifically targeted anti-competitive practices in the energy sector, in line with the single market imperative to further integrate the EU internal energy market. It is now clear that the EC's enforcement policy extends beyond the retail level of the energy sector.

The current case remains at a very early stage. The fact that the EC has carried out inspections does not mean that the companies are guilty of illicit behaviour, nor does it prejudice the outcome of the investigation itself. In the event that the EC does not uncover incriminating evidence that the companies are guilty of anti-competitive practices, it

may decide to end the investigation with no further action being taken. There is no deadline for the EC to issue a Statement of Objections, or to terminate its investigation.

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