

Client Alert

Business Litigation & Antitrust Practice Group

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For more information, contact:

Suzanne Rab

+44 20 7551 7581
srab@kslaw.com

Jeffrey S. Spigel

+1 202 626 2626
jspigel@kslaw.com

Kevin R. Sullivan

+1 202 626 2624
krsullivan@kslaw.com

Charles J. Engel

+1 202 661 7800
tengel@kslaw.com

Kenneth S. Culotta

+1 713 276 7374
kculotta@kslaw.com

Nilufar Anwar

+44 20 7551 7576
nanwar@kslaw.com

**King & Spalding
London**

125 Old Broad Street
London EC2N 1AR
Tel: +44 20 7551 7500

Washington, D.C.

1700 Pennsylvania Avenue, NW
Washington, D.C. 20006-4707
Tel: +1 202 737 0500

Houston

1100 Louisiana Street, Suite 4000
Houston, TX 77002-5213
Tel: +1 713 751 3200

www.kslaw.com

European Commission Conducts ‘Dawn Raids’ at Europe’s Largest Electricity Exchanges

On February 7, 2012, the European Commission announced that its officials had conducted unannounced inspections (so-called ‘dawn raids’) at the premises of companies active in managing power exchanges in several EU member states ([Commission MEMO/12/78](#)).

Oslo-based Nord Pool and Epex, which are jointly owned by French exchange Powernext and German exchange EEX, confirmed the raids took place and said they are cooperating with the Commission.

The Commission states that it is investigating whether the companies concerned may have infringed the EU rules on restrictive agreements contained in Article 101 of the Treaty on the Functioning of the EU (TFEU). The inspections are a preliminary step in the Commission’s investigation.

Background

Nord Pool is the largest European electricity exchange, providing services that facilitate electricity trading at wholesale level, with 350 affiliates from 20 countries trading on the market. The company operates in Norway, Denmark, Sweden, Finland and Estonia.

Epex is based in Paris and manages energy trading in France, Austria, Switzerland and Germany.

In its press statement confirming the raids, Nord Pool stated that it understands that the purpose of the inspection is to investigate possible anticompetitive effects in connection with a planned joint venture with Epex, announced in September 2011.

It appears that the Commission’s inspection is pre-emptive since the companies’ current focal operations are in different geographical locations thus with limited prospects of direct competition between them.

The companies formed a joint venture in September 2010 to expand activity in Europe by operating a joint trading platform anchored in London, for the purposes of harmonising their systems, whilst working as two distinct electricity exchanges.

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As operators in the sector will be aware, the Commission's current goal in the electricity market is to work towards encouraging a unified and competitive European electricity market and away from the current near-monopoly enjoyed by many European electricity exchanges in their operational regions. The Commission states on its electricity market observatory¹:

"A well functioning and competitive market is needed to satisfy the needs and expectations of the European citizens. It will in addition contribute to the policy response required to fight climate change and to secure our energy future."

To this end, it appears that the Commission's recent raids are likely to be a pre-emptive exercise to address any concern that the Nord Pool-Epex agreements might have a damaging effect on the aim of a competitive and unified European electricity market. The Commission may well be concerned that such a joint venture potentially involving information exchange could encourage price coordination between the companies and potential geographic overlap.

The Commission's Powers of Investigation

The EU rules prohibiting restrictive agreements and abuse of dominance are set out in Articles 101 and 102 of the TFEU. The Commission has a wide range of investigatory powers to perform its role of enforcing Articles 101 and 102, which include unannounced inspection visits (or dawn raids) and information requests. The Commission's powers of inspection are broad and allow for deep probing. For example, it can:

- enter company premises (including vehicles) and non-business premises, if these are used by the company or there is a reasonable suspicion that books and other business records are kept there;
- examine the company's books and business records (hard copy and electronic), and take copies of such;
- seal premises during the period of an investigation (normally for no more than 72 hours);
- ask any representative of the company on-the-spot about facts and documents (except where the inspection is on non-business premises); and
- interview any person for the purpose of collecting information (where the individual consents).

In this case, the Commission, accompanied by its counterparts from the relevant national competition authorities, conducted the unannounced inspections at the offices of companies active in managing the power exchanges. The Commission officials also participated in unannounced inspections conducted by the European Free Trade Association Surveillance Authority which is responsible for enforcement of the European Economic Area competition rules in Iceland, Liechtenstein and Norway.

Prior Raids by the Commission in the Energy Sector

The electricity exchange raids are not the first example of the Commission's use of unannounced inspections in the energy sector. The Commission has been active in its enforcement of the EU competition rules in the energy sector in recent years. For example, on September 27, 2011, the Commission announced that it had conducted unannounced inspections at the premises of companies active in the supply, transmission and storage of natural gas in ten EU member states, and across 20 or so sites, mainly in Central and Eastern Europe. Companies that have confirmed searches

¹ http://ec.europa.eu/energy/observatory/electricity/electricity_en.htm

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according to public sources include: Gazprom at its German (Gazprom Germania) and Czech (Vemex) offices; RWE at its German and Czech offices; Germany's E.ON Rurgas; Poland's PGNiG; Austrian group OMV; and Bulgaria's Overgas.

In 2005, the Commission had concerns over rising energy prices in the EU and launched an antitrust probe in the electric power and natural gas sectors, which led to dawn raids the following year involving energy companies in Austria, Belgium, France, Germany and Italy. Consequently, commitments were offered by energy companies to rein in their alleged anticompetitive practices. For example, on November 26, 2008, the Commission revealed that it had decided to accept binding commitments under Article 9(1) of Regulation 1/2003 from E.ON to address the Commission's concerns that it may have abused its dominant position in the German electricity wholesale market and the German electricity balancing market. Under the commitments, E.ON agreed to divest about 5,000 MW of generation capacity from different types of technologies as well as its transmission system business consisting of an Extra-High-Voltage line network and system operations.

Final Thoughts

These recent raids add colour to the Commission's strategy for enforcement of competition law in the EU energy market. The Commission remains fully committed to fostering a unified, competitive and well-functioning European energy market and so is keeping a spotlight on energy exchanges. This is a developed strategy engaged in by the Commission, which initially focused on restrictions of competition as a result of network access, and then broadened its inquiry into alleged abuse of market power on the part of infrastructure owners and operators. The Commission has now deepened its probe into the energy exchange sector. The heavy-handed approach of a dawn raid, typically but not exclusively reserved for investigation of 'hardcore' cartel practices, is a red flag that the Commission is placing importance, and aligning its focus, on the effectiveness of the energy market and the importance of the role of power exchanges in encouraging market integration. Depending on the complexity of the case, and the cooperation of the companies involved (including whether commitments are offered), the investigation could take a number of years to complete.

These raids are of course of immediate interest to power generators and traders. Companies active in related markets, whether gas producers, transporters or traders, will also want to keep a watchful eye on these developments given the interdependencies between gas and power industries.

The following materials discuss in more detail dawn raids in competition investigations in Europe.

Click here to view a [presentation](#) delivered by Suzanne Rab at a seminar in the firm's London's office on managing competition investigations in the EU.

Click here to view a recent [article](#) by Suzanne Rab discussing dawn raids in the EU and challenges being brought against the EC's investigatory powers.

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