Data leveraging in energy markets in the aftermath of EDF and ENEL: taking stock, looking ahead

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I. Introduction

The enforcement of competition laws has always been instrumental to the creation of a competitive, decentralized and pan-European energy market. Since the Sector Inquiry of 2007, the European Commission and national competition authorities (NCAs) have rolled out ambitious enforcement plans complementing the action of energy regulatory authorities and, more often than not, remedying the shortcomings of sector-specific regimes. Over the last fifteen years, enforcement has become more complex and decentralized, NCAs gradually taking over what was originally an effort essentially shouldered by the Commission. In the first period, enforcement priorities concerned e.g. market-partitioning tactics and contractual restraints, such as (very) long-term supply contracts. Cases then became more complex and addressed, in particular, discriminatory access to networks by means of so-called “constructive” refusals to deals or via the manipulation of organized wholesale markets. In recent years, while enforcement at EU level slowed down – but also became more political (see, e.g., the Gazprom saga) –, NCAs have had to grapple with the new issues raised by the energy transition.

This chapter aims to reflect on a series of decisions and judgments issued in 2022, at EU and Member States levels, which all raised the issue of the potentially “abusive” use by incumbents of their own consumer data, both under Article 102 TFEU and equivalent national provisions. As end-users increasingly require more flexibility in energy supply as well as more tailor-made energy services, consumers’ data and consumption profiles become strategic assets to strive in retail competition. Incumbents might thus exploit their legacy dataset(s) to protect their position or leverage their dominance to closely related markets through a wide array of practices (refusal to provide access to consumer data, providing misleading information to existing consumers, etc.). More generally, energy data will be critical in several ways going forward, due to the combined trends of the digitalization of energy supply chains, the massive influx of decentralized renewable

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energy generation, electro-mobility and the emergence of new business models such as energy aggregators.\textsuperscript{8}

As is often the case in deregulated network industries, the fact that the practices are implemented in the specific context of the liberalization process matters. New entrants and consumers face asymmetries of information. Consumer trust in the process and awareness of new (sometimes foreign) providers is often limited. True, wholesale segments of the industry have become more contestable thanks to wide-scale innovation and the acceleration of investment in renewable technologies. However, achieving effective competition in the retail segment, in particular as far as households and small businesses are concerned, remains – for the time being – a challenge across the EU. Incumbents often benefit from a strong brand image in what remain, essentially, relatively small and stable geographic markets. In this context, access to commercial datasets and related commercial infrastructures may make it easier for new entrants to get a foothold as a basis for future expansion at the retail level.

Cases involving access to incumbents’ data are a source of challenges for competition authorities. These investigations are at the crossroads of the “twin” digital and energy transitions. If some of the issues raised are not necessarily as new as they seem at first sight; others – such as the question of whether a sector-specific regime governing access to energy data is needed, or the interplay of data protection and competition rules – are most topical,\textsuperscript{9} and deserve closer scholarly attention. Competition enforcement indeed takes place in a pre-existing regulatory context concerning data and the interaction among different sets of laws must be understood and fine-tuned. The recent enactment of the Digital Markets Act\textsuperscript{10} shows that the frontier between \textit{ex ante} regulation and \textit{ex post} enforcement of competition law is a moving one.

The chapter will first reflect on two recent competition decisions concerning incumbent energy companies in France (\textquote{"EDF"}) and Italy (ENEL). The Italian case was litigated up to the ECJ (hereinafter, also referred to as the “Court”).\textsuperscript{11} The second part of the chapter will go in more depth in some of the issues raised and discuss avenues for further research.

II. The EDF and ENEL decisions

In the recent abuse cases against EDF before the French competition authority (“ADLC”)\textsuperscript{12} and against ENEL before the Italian competition authority (“AGCM”), a significant part of the investigation focused on the internal data management system developed and implemented by the energy incumbents. Therefore, a prerequisite to analyse the practices and their implications is to understand how exactly data was observed, collected and processed by the undertakings.

Data is originally the plural of datum, a latin word that means “that which is given”. Datum refers to the simplest level of information, that serves as reference point, evidence or raw material for further analysis and reasoning. The OECD Glossary of Statistical terms defines data as “[c]haracteristics or information, usually numerical, that are collected through observation”. It then immediately


\textsuperscript{9} See, e.g. on the former, Case C-252/21, \textit{Meta Platforms e.a.}, ECLI:EU:C:2023:537.


\textsuperscript{11} Case C-377/20, \textit{Servizio Elettrico Nazionale e.a.}, ECLI:EU:C:2022:379, hereinafter, the “ENEL judgment”.

\textsuperscript{12} Autorité de la concurrence Decision n° 22-D-06 of 22 February 2022, hereinafter “EDF Decision”.

Electronic copy available at: https://ssrn.com/abstract=4732445
adds that “[d]ata is the physical representation of information in a manner suitable for communication, interpretation, or processing by human beings or by automatic means”\(^ {13}\). As mentioned by the International Competition Network (ICN) Scoping Paper on the impact of digitalization on cartel enforcement, \(^ {14}\) “[i]n a narrower sense the term is often used for the results of scientific experiments or measurements. But in a wider sense the term is used to refer to any information, or representation of such information”.

Data therefore shows a dual nature, in that it is both a piece of information and the representation of this information. Data does not exist in a vacuum, but is the result of observation, collection and storage of information. Furthermore, data is not the random collection of any possible feature of reality but is the result of a deliberate choice to focus on one specific aspect of it.

For example, debates on privacy can give rise to the misleading idea that personal data exist regardless of actual observation by public authorities or commercial providers. Data concerning purchasing behaviour, health status, political opinions or family situation exist only insofar as it is observed and recorded by an external observer.

Data is thus the result of a production process, just like any other product or services. It entails planning, organisation and creation. Many models of data processing have been proposed over time,\(^ {15}\) usually following a series of “stages” of production. However, while these models can be relevant as reference points, their level of generality prevents them from catching the specificities linked to particular sectors, organisation and data types.

A. The data cycle in the EDF case

1. Collection of data

In EDF, the following stages could be distinguished: collection and update, storage, preparation and cleaning, data processing and output. A specific stage – data dissemination or sharing – was relevant in the case of ENEL. Italian law imposed an obligation on incumbents to share client information with new entrants. This regulatory difference are reflected in the strategies pursued by each of the incumbents. We now review each stage of the cycle in turn, focusing on the EDF case, except for the data dissemination stage (see Section C below).

“Collection of data” refers to the recording of raw information (specific items or characteristics of it). This process presupposes the definition of which elements to observe and how to record them. Data is then created through observation and recording of said observation. The collection of data may also include obtaining already existing information, collected for other purposes and reused in the new context.

EDF collected data mainly through two channels: the use of historical data from regulated contracts,\(^ {16}\) and the observation and recording of information by hotline salesforce during

\(^{13}\) https://stats.oecd.org/glossary/detail.asp?ID=532


\(^ {16}\) Para. 121 to 136 of the EDF Decision – Until 2010, there existed in France three types of regulated tariffs: “Green” for large business customers, “Yellow” for medium business customers and “Blue” for small businesses and households. In 2010, French authorities decided to phase out the Green and Yellow tariffs. A transition period started in 2013 and these two tariff effectively expired in January 2016.
customer contacts. Sale forces, in these instances, were specifically instructed to obtain information on a series of structured data points: address, name of contract manager for the company/household, types of use for electric and/or gas, planned projects, need for certain energy services, etc.

2. Data storage

“Data storage” encompasses not only the way data is stored immediately when observed or collected, but also the storage policy of the company. Storage policies can be impacted by the strategic needs of the entity (availability, transfer to various services or activities, use of external provider or internal servers, etc.) and by various regulatory constraints (privacy, data sovereignty, etc.).

A change of storage policy occurred after the liberalization of the energy sector, in order to facilitate the import of collected data into the new commercial applications that were being developed internally. Since 2004, EDF’s commercial unit had carried out a series of changes to its IT infrastructure, including the replacement of old servers and databases by new and more powerful data warehouses designed to host indistinctly historical and new data constantly collected both on regulated and non-regulated contracts. At this stage, the absence of separation between regulated-tariff data and commercial data was noticeable, since all data were merged into global databases, without distinction regarding origin or intended use.

3. Data preparation/cleaning

In order to be used for commercial purposes, data must be cleaned and structured, so as to be used seamlessly by automated software. This includes checking whether categories, spelling and levels of accuracy are homogeneous and contain the same categories of data. This also entails cleaning the database of all non-relevant and duplicated information that may come from crossing and merging different datasets. As data preparation implies updating currently available information, it may require (re)collection activities. There can therefore be feedback loops between the collection and the preparation stages. In particular the design of clear categories and norms for the collection can positively impact the preparation stage. Conversely, difficulties at the preparation stage may create the need to recollect data.

In 2013-2016 (that is to say, the period when the “Yellow and Green” regulated tariffs ended), EDF enhanced its processes of data collection and preparation significantly. In particular, EDF used every contact with customers in order to update its client database and enhance its comprehensiveness and quality with additional items. It did so through contacts with clients via phone (mostly incoming calls and also some outgoing calls) but also by means of mandated letters sent to customers to inform them of the termination of the tariffs.

A comparison was made by the ADLC between the client files shared with competitors by the incumbent on the hand, and client data as used internally for commercial purposes, on the other.

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17 Para. 137 to 140 of the EDF Decision.
18 Para. 89 to 90 and para. 121 to 136 of the EDF Decision.
19 Para. 84 to 85 of the EDF Decision.
20 See supra note 16.
21 Para. 187 to 227 of the EDF Decision.
22 Para. 254 to 287 of the EDF Decision. In order to avoid being forced by public authorities to grant access to data of Green and Yellow customers, EDF voluntarily shared an ad hoc clients’ file with its competitors during the transition period.
23 Para. 212 to 252 of the EDF Decision.
This analysis showed how crucial preparation and cleaning stages can be. Indeed, the client file transmitted to competitors contained non-hierarchical, unstructured information, and included a majority of outdated entries. It was therefore difficult to use it as such, in particular as it was impossible to rely on it as an input for automated digital management purposes. By contrast, and thanks to its unique relationship with clients already subscribed to the regulated tariff, EDF was able to implement a large campaign of data collection and update. EDF was then in a position to use its clients’ data in innovative ways, such as automatically generated contract proposals.

4. Data processing/output

In general, data does not constitute an end product in itself, but is fed into dedicated software, which is then processed in order to obtain a meaningful output, such as client rating, tailored commercial proposals, or category management tools. This output can be provided directly to a human user, or to a machine, which then uses it as input for other calculations or processes.

In this context, the final output is not the data itself, but the new commercial tools using data available to salesforces. Data has therefore no value as a static product, but rather as a constant stream of information flowing through the commercial applications, much like electrons are not themselves transported to users connected to the grid, but simply support the energy exchanges all around the grid at all times.

In EDF, the whole data strategy was designed to adapt the processing of EDF’s customer files from a strictly public service and regulated tariff-related logic to a commercial logic, based on the value and size of the customer. The aim of these changes was to be able, on the basis of the regulated tariff customer base, to build a comprehensive new commercial policy in the liberalized context. In order to do so, the incumbent used the updated and structured client data set not as such, but as an input to a series of digital applications that were used in support of the group’s commercial policy.

The processing of data was used for big data purposes (scoring, category management, targeting, etc.), enabling EDF to organize a massive use of consumption data to structure the client base into categories and design a commercial policy based on competitive offers for each of these categories. Then, data was also used through for the implementation of the commercial policy directly to individual clients, with the possibility to target their specific needs, and to offer to each of them a tailored offer according to their profile.

Processed data could then be made available to the salesforce, through e.g. customer relationship management software, in which all relevant information about each and every client were highlighted to facilitate client engagement. On this basis, salesforces were able to manage contracts more efficiently and monitor clients’ needs so as to detect opportunities to sell them new types of commercial products (such as gas) and services (such as energy services, renovation, etc.) in addition to regulated electricity contracts.

Data was also used within applications proposed directly to customers, allowing them to manage their consumption, compare themselves with similar users and subscribe new services.

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24 Former chief data scientist of the United States Office of Science and Technology Policy, DJ Patil, defined a data product in his 2012 book *Data Jujitsu: The Art of Turning Data into Product* (O’Reilley Media, 2012) as “a product that facilitates an end goal through the use of data.”

25 Para. 91 to 101 of the EDF Decision.

26 Para. 150 to 180 of the EDF Decision.

27 Para. 60 to 64 of the EDF Decision.
Overall, data collection and management constitutes one continuous production process. Even if a number of stages can be distinguished, the circular nature of this activity and the presence of multiple feedback loops between the various stages make it impossible to consider one specific stage without the others.

5. Why EDF’s data strategy amounts to an abuse of a dominant position

As any other undertaking, a former monopoly is entitled to take part in the new competitive environment arising from liberalisation. Indeed, competition law enforcement does not aim at sanctioning an incumbent for trying to remain in a favourable competitive position on its historical market once it opens up to competition. In that respect, the ADLC decision did not sanction EDF for the creation of an efficient and upgraded commercial infrastructure (including data management systems), since it appears to be a necessary and legitimate exercise for every undertaking, even dominant, in order to compete on the energy retail market.

However, an incumbent must resort to means it has acquired on its own merits and not thanks to advantages stemming from exclusive rights and public order tasks entrusted to him. To be abusive, the strategy must be based on a tangible advantage (either material or immaterial), which stems, yet is different, from merely being the incumbent operator. However, being an incumbent may sometimes be a prerequisite for a company to acquire certain advantages that are not accessible, nor replicable by its rivals. In this case, the abuse lies in the actual use of those advantages, and not just from the fact that the undertaking is an incumbent.

The EDF’s internal data cycle, as described above, was based on a comprehensive set of data covering millions of regulated tariff customers, IT tools and means of communication, all financed by the regulated tariffs on which EDF held a monopoly. The data set and related IT infrastructure was not replicable by competitors. EDF’s abusive practice was therefore defined by the ADLC as the use of a non-replicable competitive advantage to maintain a dominant position and leverage its position on other markets. It would be wrong to assume that said competitive advantage was just the data itself. That competitive advantage was in fact composed of the raw data that only EDF possessed, its ability to constantly update it, and its use through IT tools, data storage, and data analysis software useable across the French territory to understand needs and consumption patterns.

In its settlement decision, the French competition authority made it clear that its decision pertained to the commercial infrastructure, which allowed the undertaking concerned to make use of historical data for purposes other than those originally intended. This was also reflected in one of the commitments that EDF agreed on as part of the settlement procedure and which consisted in granting competitors access to contact and consumption data of all its domestic clients having a regulated tariff contract. Data can be very valuable at a given point in time but may soon become outdated. As described above, EDF’s advantage was not only the fact of owning some historical data but lied in the access to a comprehensive and constantly updated set of data that was feeding its tools and commercial applications. Therefore, in order to restore a level playing field with competitors, the commitments provided that competitors could have access to a set of data which was regularly updated (i.e. on a trimester basis) and could be used in their own commercial tools. EDF also committed to use the exact same set of data it was providing to its competitors.

B. The ENEL case from a comparative perspective

1. The AGCM decision
In December 2018, the AGCM adopted its decision in the ENEL case.\(^{28}\) It concluded that ENEL and two of its subsidiaries (Servizio Elettrico Nazionale and Enel Energia) had infringed their dominant position and imposed on them a fine exceeding EUR 93 million. The strategy was implemented during the sensitive period leading to the deregulation of retail electricity prices. Because it was put into effect at such a critical juncture, the alleged abuse had the potential to distort the competitive process and strengthen the incumbent’s position.

ENEL sought to exploit its competitive advantages as a former monopoly to keep an edge over new entrants. Its unique status resulted from a regulatory regime aimed at protecting vulnerable customers. In order to smooth the transition to the fully liberalized market, regulation provided for the operation of an “enhanced protection” service (servizio di maggior tutela) for such customers. This service, operated by Servizio Elettrico Nazionale (“SEN”) would run alongside the free market.

When the contentious conduct was implemented, it was foreseen that safeguards for customers relying on the servizio di maggior tutela would be progressively removed. In that context, the Italian authority found that ENEL had put in place a strategy aimed at transferring SEN’s customer base to its other subsidiary in the free market, Enel Energia (“EE”).

According to the AGCM, ENEL and its subsidiaries abused their dominant position when seeking consent from customers for the transfer of their data to, respectively, its subsidiaries and to third parties. In practice, ENEL collected consent from clients separately for EE and rival suppliers. The AGCM concluded that this course of conduct exploited a behavioural bias that resulted in customers giving their consent more willingly to the transfer of data to EE than to third parties. This argument was supported by the fact that 70% of customers consented to receive commercial offers from the ENEL group (including EE), while just 30% of them agreed to do so from third parties.

In many ways, EDF and ENEL are similar. An obvious commonality between the two cases relates to the use of data. Both French and Italian incumbents sought to exploit the data they held as former monopolies. This said, the differences in the regulatory framework mean that these similarities must not be exaggerated. As indicated by the ECJ in its ruling in ENEL,\(^{29}\) the legislation liberalizing the Italian energy market provided for the legal separation between, respectively, the “enhanced protection” supplier (servizio di maggior tutela) and the supplier in the free market.\(^{30}\) Moreover, the Italian regime sought to remove price on an incremental basis. In France, by contrast, EDF remained a fully integrated company at the retail level. Regulated offers and market-based offers were provided by the same legal entity and often by the same commercial units. The regulated tariff, on the other hand, was progressively phased out, but only for the largest business customers.

These differences in the sector-specific regime were reflected in the strategies implemented by each of the firms. In France, the data production stream remained within the boundaries of a single legal entity; one integrated commercial unit offered both regulated and market-based offers. Therefore, practices leading to use of client data across markets could be designed and implemented within one organization.

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\(^{28}\) AGCM Decision A511 of 20 December 2018, ENEL/Condotte Anticoncorrenziali nel mercato della vendita di energia elettrica.

\(^{29}\) ENEL judgment...

\(^{30}\) Ibid, para. 7.
In Italy, on the other hand, the use of client data from the regulated to the free segment required the transmission of such data to a distinct entity. Thus, the practices targeted by the AGCM decision related mostly to the behaviour of the ENEL group when collecting consent from clients for the transfer of their data to EE, the branch in charge of market-based offers. These practices therefore concerned essentially one specific stage of the data cycle, that is the collection (and dissemination/transfer) of data. One should note, however, that the practice was but an aspect of a more general strategy of the ENEL group. The incumbent’s ultimate goal was to persuade SEN’s customers to move to the free market – and to do so with EE. It is against this background that the AGCM concluded that the relevant data constituted an essential and non-replicable asset.

In spite of these differences, it seems clear that in both the Italian and French cases the way data of clients remaining at the regulated tariff was created, collected and processed in order to allow targeted commercial practices constituted the core of the prosecuted abusive strategy.

2. The ENEL case before the ECJ

Unlike the EDF case, which was settled and thus escaped judicial scrutiny, ENEL was litigated all the way up to the ECJ. It is therefore useful to analyze whether the Court, which interprets Treaty provisions but does not apply the law to the facts brought before it in the context of preliminary references (Art. 267 TFEU), gave relevant insights of a more general nature.

The ECJ first set the scene by recalling some “fundamentals” on the enforcement of Art 102 TFEU as regards the relevant threshold of effects. According to the Court, it is indeed “sufficient for a competition authority to prove that that practice is capable of impairing an effective competitive structure” (para 48, emphasis added), unless the undertaking concerned is able to show that procompetitive effects outweigh exclusionary effects. This has a few obvious consequences.

First, evidence of actual or concrete effects is not necessarily required, even though it can be taken into account by the competition authority. The potential of the conduct under review to distort competition is sufficient. Effects, however, must not be purely hypothetical. Second, competition on the merits (aka business conducts consistent with effective competitive conditions) allows for exclusionary effects. In other words, a dominant company’s conduct can drive less efficient competitors out of market without necessarily falling under the prohibition. In this context, intent is neither necessary nor sufficient to establish an infringement of Article 102 TFEU. The concept of abuse is, after all, an objective one. However, intent can be taken into account by the competition authority as part of the overall assessment. Third, and as a consequence, where a practice involves the use of means other than those governing “normal” or “effective” competition, it amounts to an abuse. Even in this case, it is possible for the undertaking concerned to prove that the pro-competitive effects outweigh the anti-competitive effects, or is otherwise objectively justified and proportionate to that justification, the burden of proof lying with the dominant

31 ENEL judgment.,
32 See also the Opinion of 9th December 2021 of the Advocate General in C-377/20, Servizio Elettrico Nazionale e.a., ECLI:EU:C:2021:998.
undertaking. Following a well-established line of case law on the right to be heard, the competition authority must duly take into account evidence submitted by the undertaking in this regard.

If some of these elements may seem obvious to competition law aficionados, the question as to how courts and authorities should go about defining conduct departing from competition on the merits remains unanswered. One of the contribution of the judgment lies in the elements brought in this regard. The ECJ suggested that one way, among others, to draw the line between abusive and merits-based competition is to assess whether a theoretical and non-dominant as-efficient competitor would be able to replicate the practice at hand (so-called “replicability” test). The Court thereby expressly confirmed that the replicability criterion (and the as-efficient competitor principle), which had been used in other contexts, may also be used as a tool to analyze non-price strategies.  

The ECJ went on to discuss how these overarching principles can apply in a factual scenario such as the one at hand in ENEL. It seems clear, to begin with, that the case involved the use of non-replicable assets (the Italian incumbent was in a unique position allowing it to seek consent from customers under the servizio di maggior tutela). Second, an abuse of a dominant position could involve the discriminatory exploitation of the non-replicable advantage. In this regard, the ECJ was cautious to point out that “the information provided to the Court does not make it possible to understand the precise nature of the discriminatory treatment identified by the AGCM” (para. 97). Third, the judgement suggests that, in the circumstances of the case, evidence of discrimination would be sufficient, in and of itself, to establish an abuse. Indeed, it is undisputed that the ability of contacting ‘protected’ customers has a certain value for competing undertakings in the free market. Hence, if the incumbent intends to make a commercial use of the data, it should give third parties’ access to such an advantage under non-discriminatory conditions, in order not to impair an effective competition structure. Otherwise, “the subsequent use of that resource should be regarded as giving specific expression to the implementation of a practice which was, at least initially, capable of producing exclusionary effects on the free market.” (emphasis added, para 100).  

However, following the preliminary ruling, the Consiglio di Stato annulled the contested decision. Italy’s highest administrative court concluded that the AGCM had not established discrimination and anticompetitive effects to the requisite legal standard.

The judgment made a few other interesting points, which can be summarized as follows. First, the ENEL case is not a typical “essential facility” case à la Bronner, in the sense that the alleged abuse did not stem from a refusal by SEN to grant access to an essential facility (the consumption profiles of customers in the protected market). It has more to do with discrimination against EE’s competitors in the process of seeking consent to the transfer of data. Second, the ECJ makes a passing reference to the Article 106 TFEU case law, in particular the famous DEI saga (para. 91), to recall that an undertaking holding exclusive rights cannot use non-replicable resources linked to said rights to leverage its (statutory) dominant position on a related market. In a liberalization context, it therefore makes sense to consider that a former incumbent should refrain from using competitive advantages it derives from the former monopolistic period to maintain its dominance in the new era. The ECJ (and the Consiglio di Stato) recalled the special responsibility such undertakings bear in this regard.

34 See, e.g., Case C-52/09, TeliaSonera Sverige, ECLI:EU:C:2011:83.
35 See, a contrario, the Opinion of the Advocate General, supra note 31, at para. 78-79.
36 Case C-7/97, Bronner, ECLI:EU:C:1998:569.
37 See, e.g., Case C-553/12 P, Commission v. DEI, ECLI:EU:C:2014:2083.
This express citation of Article 106 TFEU case law is an element of context that suggests that the references made by the ECJ to the use of competitive advantages derived from current or former exclusive rights to strengthen and/or leverage a dominant position are particularly adapted to the situation of former monopolies and that the judgment should probably not be understood as an attempt to apply this conclusion to all types of exclusionary abuses.

Third, with reference in particular to Article 8(1) of the Charter of Fundamental Rights of the EU, the ECJ recalled that the relevant legal framework for the protection of personal data must be respected. This is a requirement with which ENEL apparently complied by obtaining consent from consumers before transferring data.

The application of the essential facilities doctrine to (energy) data leveraging cases, the concept of competition on the merits and the notion of abuse in a liberalization context, the relevance of the Art 106 TFEU case law in formerly monopolistic sectors an the interface between competition with data protection laws are all these fascinating issues that provide potentially promising avenues for future research.

III. Some issues raised by the decisions and potential avenues for further research

ENEL and EDF both raise a host of new (and not so new) competition issues. These are addressed in turn in the following sub-sections.

A. Recent cases and the “essential facilities” doctrine

The EDF and ENEL cases raise the question as to whether the “essential facilities” doctrine can be (or is mezza voce being) applied in the context of (energy) data leveraging cases, or simply in the energy sector. The recent judgment of the General Court of the EU in the Bulgarian Energy Holding case, where the European Commission (“Commission”) decision was quashed, addressed that issue once again.

In its purest form, the “essential facilities” doctrine was endorsed by the EU Courts, albeit in a fairly restrictive way, in the Bronner case. In that case, the plaintiff was asking access (against a fair remuneration) to a newspaper retail network built by a dominant private undertaking. With a view (essentially) not to hinder the right to property and thus firms’ incentives to innovate, the ECJ devised a legal test with 3 cumulative conditions to be met in order to impose a duty to deal or grant access:

1. refusal of the service is likely to eliminate all competition on the part of the person requesting the service in that market;
2. the service in question is indispensable for carrying on that person’s business, inasmuch as there is no actual or potential substitute for that service;
3. that refusal cannot be objectively justified.

The Commission tends to avoid framing practices that do not constitute strict refusal of access behavior as falling within the Bronner box. Instead, it prefers to define autonomous types of abuse.

40 Case C-7/97, Bronner, ECLI:EU:C:1998:569.
This has also been the case in energy, in particular in the context of commitment decisions (Art. 9 of Regulation 1/2003), when tackling so-called “constructive” refusals to grant access to energy infrastructures, as the public nature of the undertaking concerned and the fact that legacy infrastructure had been built in the former monopolistic area made antitrust enforcement easier. The “essential facility” doctrine was not used in the EDF and ENEL cases described above. It was, however, by the ADLC in the Anode case.\textsuperscript{42}

Concomitantly with the EDF case, the ADLC received a complaint about a similar issue related to access to data in a liberalization context. This complaint was filed by Anode (a professional association of new entrant energy providers) in 2020, asking for interim measures against EDF to obtain access to its customer database, in the context of the end of the regulated tariff for small businesses (“TRV” Blue).

At first glance, the two cases might seem similar. However, there were factual differences between both, which led the ADLC to consider that there was no ground to fine EDF for an abuse of dominant position in the latter. The decision issued by the ADLC in which it rejected the Anode’s complaint is still pending before the Court of appeal.

First of all, in the context of the end of the regulated tariff for small businesses, it should be noted that French legislation (law n° 2019-1147) imposed an obligation on EDF to give access to the data of the customers who were losing their eligibility for the regulated tariffs (TRV). Pursuant to this law, EDF had to provide an updated database to its competitors, and this on a regular basis. However, the heart of this case lied in the fact that the law provided that this obligation would only be in force during 2020, and that, after this date, the competitors had to delete all the data they had accessed by virtue of it.\textsuperscript{43}

Despite this provision, Anode asked EDF to maintain access, after 2020, to data of customers who lost their eligibility for the TRV tariff but who did not choose a “market offer” and were therefore automatically transferred to a specific transitory contract supplied by EDF (“CST”). EDF refused to give access to this data. Against this background, Anode claimed before the ADLC that this refusal constituted an abuse of dominant position and requested that access on an interim basis. However, this the French authority decided not to impose the requested measures.

As mentioned above, the facts of the case were different from EDF. In the latter, to begin with, there was a clear legal void regarding access to EDF data for competitors, whereas, in Anode, there was a regulatory framework setting out the conditions of access. Beyond that, the main difference lies in the fact that, in Anode, there was no evidence that EDF had made any use of the database after the end of 2020 (that is, after compulsory access to competitors ended\textsuperscript{44}). Therefore, there was no possibility to find an abuse consisting of using a non-replicable advantage in order to expand into a competitive market, contrary to what was true in EDF.

In its analysis, the Anode decision mentioned the Commission’s enforcement priorities on abusive exclusionary practices\textsuperscript{45} related to refusal to supply, which recalls general principles such as freedom

\textsuperscript{42}Autorité de la concurrence Decision n° 22-D-03 of 18 January 2022, hereinafter “Anode Decision”.

\textsuperscript{43}This obligation to delete all the data was provided for in Article 9 of the “Arrêté du 12 décembre 2019 relatif à l'identification et à la mise à disposition de la liste des clients non domestiques perdant l'éligibilité aux tarifs réglementés de vente de l'électricité”.

\textsuperscript{44}Para. 151 to 153 of the Anode Decision.

\textsuperscript{45}See Communication from the Commission — Guidance on the Commission’s enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, O.J. 2009, C 45/7, para. 75 to 90.
of contract and property rights. As a matter of principle, and absent “exceptional circumstances”, a dominant company should indeed be able to choose its commercial partners and dispose of its assets. The forced provision of data on the basis of Article 102 TFEU must therefore be approached with care, as evidenced by the applicable legal standard.\(^{46}\)

In the case at hand, the ADLC noted that the strict criteria on which relies the theory of essential facilities were not necessarily met. It follows from the Commission’s enforcement priorities\(^{47}\) that the standard of proof can be lightened when the data held by the incumbent operator has not been acquired under effective competitive conditions but under the protection of special or exclusive rights or financed by state resources. In this context, it is therefore sufficient to demonstrate that refusal to give access to this resource is likely to create anti-competitive foreclosure effects. In the Anode case, the ADLC found that the database constituted a resource stemming from EDF’s former monopoly position and its public services-related duties, and contained data that were not replicable by EDF’s competitors.\(^{48}\) However, the ADLC did not find any risk of exclusionary effect, for the competitors got access to the database for an entire year (2020) and there had been an increase in competition since then. Moreover, customers who were automatically transferred to EDF’s transitory contracts (“CST”) were not locked-in since they could change their offer at any time and at no cost.\(^{49}\)

B. Takeaways for future cases: competition on the merits and anticompetitive effects

1. Competition on the merits and replicability

\textit{ENEL} is remarkable, inter alia, in that it marked the comeback of competition on the merits in discussions around the meaning and scope of Article 102 TFEU. The case law of the preceding (long) decade dealt with the concept of abuse without discussing at length – if at all -- whether or not a given practice is a legitimate method to get ahead in the marketplace. By placing the notion of competition on the merits back at the heart of the discussion, \textit{ENEL} raised the question of which criteria one can use to distinguish between legitimate and illegitimate methods of competition.

This question is particularly relevant in liberalized industries. If one accepts that some practices adopted by incumbents in these industries depart, by their very nature, from competition on the merits, understanding which factors are relevant when drawing the line between abusive and non-abusive conduct is crucial. The judgment in \textit{ENEL} makes it clear, in this regard, that the use of resources or means inherent to the holding of a dominant position to exclude rivals does not come within the scope of competition on the merits.\(^{50}\) As the two decisions discussed in this Chapter show, incumbents in liberalized markets will often find themselves in such a position.

In some instances, the incumbent operator will find itself in a unique position as a result of the legacy advantages from which it benefits. The Court interpreted the facts in \textit{ENEL} as corresponding to such a scenario. In fact, it expressly held, as mentioned above, that an incumbent

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\(^{47}\) See Commission guidance, \textit{supra} note 46, notably para. 82 – this reasoning has since then been confirmed by C-42/21, \textit{Lietuvos geležinkeliai AB}, ECLI:EU:C:2023:12, notably in paras. 86-87.

\(^{48}\) Para. 112 to 114 of the \textit{Anode Decision}.

\(^{49}\) Para. 121 to 138 of the \textit{Anode Decision}.

\(^{50}\) \textit{ENEL} judgment, para 78.
in a liberalized industry “must refrain, throughout the entire liberalisation of that market, from using means available to it on account of its former monopoly”.

In other instances, the unparalleled means and resources enjoyed by an incumbent need not come from legacy advantages (or not exclusively). They may come from other sources. In EDF, non-replicable client data and related IT infrastructure had admittedly a distant legacy origin (i.e. dating back to the early 2000s) but above all continued to be controlled by EDF by reason of its ongoing public service mission. One should note that nowhere did the Court suggest, in ENEL, that the “replicability test” is confined to legacy advantages.

This is probably the reason why Article 102 TFEU cases involving incumbents in sectors recently opened to competition present similarities with Article 106/102 TFEU cases. Indeed, in both types of cases, the existence of exclusive rights constitute a central element of the finding of an infringement, for it tends to facilitate the demonstration as to whether as efficient competitors would be able to replicate the behavior. However, as reminded by the Court in ENEL for Article 102 TFEU cases, the existence of a specific abusive practice by the dominant firm must be demonstrated. In this context, if one is to follow the directions given by the Court in ENEL, the finding that a practice departs from normal competition becomes highly dependent on the appreciation of the facts by the judge, as the final decision of the Consiglio di Stato in ENEL has shown.

2. Analysis of anticompetitive effects

A second crucial takeaway for the enforcement of competition law in liberalized industries relates to the assessment of anticompetitive effects. As the Court has consistently held, effects cannot be purely hypothetical and the evaluation must consider the circumstances pertaining to the relevant economic and legal context. This fact means, in concrete terms, that a finding of actual or potential effects is more likely where a practice has been implemented by an incumbent. The structure of the market, the relative position of the various operators and other factors such as consumer bias inertia mean that the probability of foreclosure will tend to be higher in such scenarios.

ENEL gives several indications about how the contextual analysis may play out in practice. To begin with, and as already pointed out, the judgment strongly implies that evidence of discrimination could sometimes suffice, in and of itself, to prove anticompetitive effects to the requisite legal standard. In fact, the Court goes as far as to suggest that, in an economic and legal context such as the one at stake in ENEL, SEN’s special responsibility within the meaning of Article 102 TFEU involved obtaining consent from its users in a non-discriminatory way.

Second, the limited coverage of the practice does not necessarily exclude a finding of effects in a post-liberalization scenario. The coverage of the practice has become a central factor in the evaluation of the potential of a practice to restrict competition. In fact, cases like Intel suggest that the limited coverage of a practice may be sufficient to rule out a finding of abuse.

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51 Ibid, para. 92.
52 Which is not the case in Article 106/102 TFEU cases, see ECJ, DEI, para. 47.
53 Ibid, para. 70.
54 Ibid, para. 96.
55 Case C-413/14 P, Intel Corp. v Commission, EU:C:2017:632, para 139.
ENEL shows, against this background, that, in some economic and legal contexts, the very modest coverage of a practice is not always a decisive consideration. One should note, in this regard, that a mere 0.002% of SEN’s customer base switched as a result of the practice. In spite of such infinitesimal coverage, the Court held that this factor “cannot be regarded as sufficient”, in and of itself, to show that the behavior is incapable of restricting competition.57

ENEL is not the only example where the Court has held that the specificities of recently liberalized industries may play a role when evaluating the likelihood of harm of a practice. Post Danmark II is an example that stands out immediately.58 Where the incumbent is insulated from competition by means of exclusive rights (at least in some segments), the “as efficient competitor” test is not an appropriate tool to assess the actual or potential impact of a practice. Such circumstances may make the emergence of an equally efficient rival virtually impossible. As a result, Article 102 TFEU will seek to preserve the few sources of competitive pressure that the economic and legal context allows.59

By contrast, cases such as Post Danmark I,60 TeliaSonera61 and Intel62 concerned situations where the existence of as efficient competitors was, at least theoretically, reasonably possible. In such a situation, performing an economic analysis of the possibility for an as efficient competitor to replicate the behavior of the dominant firm would allow to determine whether the practice is capable of producing anticompetitive effects.63

C. The data protection angle in the EDF case

Access to data is key for any operator active in the energy sector at the retail level. Large-scale processing of granular consumption data (e.g. periods of presence/absence at home, the time of day at which one comes home from work, the number of people in the household, etc.) can be used to infer precise living habits and target potential clients with tailored offers. If this may be seen as an opportunity of constant progress from a business perspective, it may also interfere with the private sphere of individuals.

In this context, consumption and other collected data (like contact details or technical data) can constitute personal data within the meaning of the relevant legislation, as soon as they can be linked to a natural person. Therefore, the opening/sharing of data must be done in compliance with the applicable regime. The legal framework for data sharing depends on the nature of the data and the purposes for which it is shared (general market knowledge, adaptation of commercial offers, individual commercial approach, etc.).

The EDF case led to a settlement procedure, leading to a fine accompanied with commitments. To address competition concerns and reintroduce a level playing field among all actors, EDF committed to giving access to contact and consumption data of all its domestic clients under a regulated tariff. From a competition law perspective, this appears to be beneficial in order to foster the liberalization process. However, a commitment made in order to respect competition law does not grant any exemption from, nor takes precedence over compliance with specific regulations on

57 ENEL judgment, para. 57.
58 Case C-23/14, Post Danmark, EU:C:2015:651.
59 Ibid, para 60.
60 Case C-209/10, Post Danmark, ECLI:EU:C:2012:172.
61 Case C-52/09, TeliaSonera, EU:C:2011:83.
63 See C-62/86, 31 July 1991, Akzo/Commission, para 70 to 72; see Post Danmark, para 27; and see ENEL judgment, para. 77.
personal data protection (GDPR\textsuperscript{64}, French Post and Telecommunications Code\textsuperscript{65}, sector-specific energy regulations). Indeed, both competition law and data protection regulation are set to protect two distinct public interests, being free and fair competition on the one hand, and right to privacy on the other hand. In this case, a balance needed to be struck in order to articulate these apparently contradictory objectives, as some of the data transmitted allows for the direct identification of individuals. Although their transmission to third parties is not prohibited by the applicable regulations, it must be done in compliance with certain specific obligations.

The obligations depend on the nature of the data, their degree of sensitivity and the purpose of use, especially the type of commercial prospection which will be implemented with the data transmitted. In that context, EDF proposed implementation methods that took account of the legal framework on personal data protection:

- the most sensitive data likely to be used for electronic commercial prospection (automatic dialer, e-mails, SMS) were transmitted only if the clients gave their express consent (known as the opt-in procedure). Thus, if the customer concerned did not reply to the mail sent by EDF, which automatically amounts to an absence of consent, her most sensitive personal data (surname, first name, billing address, e-mail, telephone, etc.) would not be transmitted to competitors.
- the other data (consumption address, PDL, consumption data, etc.), only likely to be used for prospection by post, were transmitted after the customer has been informed and given the opportunity to object to this transmission (the so-called opt-out procedure).

It is beyond the scope of this chapter to conduct an in-depth discussion on the interaction between the competition and data protection laws. The literature starts to be abundant and the CJEU will increasingly have to rule on the issue. It has recently clarified, e.g., that a national competition authority may use breaches to the data protection framework to establish the existence of an abuse, as long as proper cooperation with the relevant data protection authorities is ensured.\textsuperscript{66} Remedies imposed in the course of competition proceedings must also comply with the data protection framework. Mutually beneficial co-existence of the two regimes will have to be ensured. It is not a coincidence that, as this chapter was being finalized, the ADLC and the French Data Protection Authority (CNIL) issued a joint declaration where they express their desire to deepen their cooperation.\textsuperscript{67} Academic research could usefully start to address the interface of both regimes in specific sector and market contexts.

IV. Conclusions

Conventional wisdom emphasizes the limits of ex post enforcement in recently liberalized industries. Some of these limits have to do with the need to start an investigation in relation to a particular practice. Competition procedures are, moreover, time consuming and require an authority either to establish an infringement or to obtain commitments from the firm. It is universally accepted that energy activities (as well as other industries with similar features, such as telecommunications or rail) cannot be regulated solely by means of Article 101 and 102 TFEU


\textsuperscript{65} Code des postes et des communications électroniques.

\textsuperscript{66} Case C-252/21, Meta Platforms e.a., ECLI:EU:C:2023:537.

\textsuperscript{67} Available at: https://www.cnil.fr/fr/protection-des-donnees-et-concurrence-la-cnll-et-lautorite-de-la-concurrence-signent-une-declaration

Electronic copy available at: https://ssrn.com/abstract=4732445
enforcement. At best, these two provisions can support the liberalization process in a number of ways, but the regulatory heavy-lifting will have to come from sector-specific authorities.

The ENEL and EDF cases show that, for all of its shortcomings, EU competition law presents some advantages vis-à-vis dedicated regulation. A sector-specific apparatus tends to be a high-level instrument that is unable to anticipate every strategy implemented by incumbents. In the same vein, it cannot foresee every single new development in the industry. What is more, legislation is not generally amenable to swift amendment. A Directive, once enacted, will typically not come under review before a few years pass. Against this background, Articles 101 and 102 TFEU can come into play to fill gaps in regulation and deal with some of the challenges that may jeopardize, or at least delay the promotion of effective competition.

In the particular case of data leveraging by incumbent energy operators, the potential abusive practices do not come from the possession and use of a standalone asset, but derive from the internal processes of the firms. Most of the time, data is of little or no use if it is not constantly updated and fed into data management systems. Moreover, firm strategies around data evolve quickly and add constantly new types of use cases. It is therefore almost impossible to define predetermined categories of practices revolving around the use of data.

These cases are indicative of the symbiotic relationship that exists between competition law and regulation. On the one hand, a sector-specific regime creates the conditions in which competition can emerge and flourish – and, similarly, it provides the canvas on which Articles 101 and 102 TFEU can apply. On the other hand, competition law contributes to the success of regulation by tackling, on a piecemeal basis, its institutional and/or substantive flaws. It may be the case that an authority is insufficiently committed to liberalization, that the regime may be, in some respects insufficiently ambitious or that – as in ENEL and EDF – there are some gaps in it.