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# ENERGY COMMUNITY FORUM

## #2 Energy transition:

Climate policy, security of supply, coal & hydrogen projects...

**Webinar – 27 January 2021\***

Second webinar of the « 2021 Energy Community Forum » organised by Concurrences and Energy Community Forum, in partnership with White & Case.

### Marie-Therese Richter-Kuhnert

Marie-Therese Richter-Kuhnert started her intervention by stressing that discussions on energy transition play a critical role in the development of climate policies, the security of supplies and the development of energy technologies.

**“COMPETITION LAW COMMUNITIES MIGHT NOT BE PREPARED ENOUGH TO SUPPORT THAT POLITICAL AIM.”**

**MARIE-THERESE RICHTER-KUHNERT**



The energy transition can be defined as a significant, structural change in the energy system which is driven by political decisions and the aim to reduce carbon emissions. The question is

whether the legal provisions such as competition state aid laws have to be adapted to foster that goal, and how to ensure their integrity. Is competition law fit to serve the energy transition purpose? Competition law communities might not be prepared enough to support that political aim. Ms. Richter-Kuhnert then introduced the panellists and opened the discussions.

## Anes Kazagic

Anes Kazagic focused on sustainable energy transition from the perspective of a coal-based power utility. He stressed that EPBiH has planned for a sustainable power system until 2050, explaining that the main decisive factors for adopting an energy transition plan are the expectations of the international community and economic considerations. Key criteria for long-term planning include the status of the existing power system (75% coal, 20% hydro and 5% renewable energies), climate requirements such as decarbonisation and the Sofia Green Deal declaration, plans for coal phase-out and exit, CO<sub>2</sub> emissions and taxes, carbon costs, environmental requirements, development projects, as well as key performance indicators for optimisation: financial indicators (cash-flow, CAPEX, OPEX, liquidity, debt service coverage), climate indicators (kgCO<sub>2</sub>/MWH, tCO<sub>2</sub>/a), environmental indicators (tSO<sub>2</sub>/a, tNO<sub>x</sub>/a and tPM/a) and social impact.

**“THE AIM IS TO MAXIMISE VALUE FROM EQUIPMENT, OPTIMISE ENERGY SOURCES AND ENSURE SUSTAINABILITY AND FLEXIBILITY IN THE CONTEXT OF A COMPLEX BUSINESS ENVIRONMENT.”**

**ANES KAZAGIC**



Mr Kazagic then explained that the methodology lies on asset management. The aim is to maximise value from equipment, optimise energy sources and ensure sustainability and flexibility in the context of a complex business environment. Long-term projections (especially those of electricity consumption, electricity prices and carbon prices and costs), which he presented, are a function of the key performance indicators. Furthermore, Anes Kazagic showed that concrete measures have been implemented and projects have been initiated, for example: the development of photovoltaic stations in coal mines and the use of biomass co-firing in power stations. Finally, he emphasised the impact of considerations relating to the security of supply in energy transition decision-making.

## Tilman Kuhn

Tilman Kuhn presented the legal perspective on energy transition actions and explained how competition law has been dealing with this shift, whether it imposes limits on energy transition initiatives and to what extent it drives energy transition efforts. He then focused on sustainability considerations in merger control and Article 101 proceedings.

**“IN MOST CASES, SYSTEMATIC CHANGE CANNOT BE BROUGHT UNILATERALLY – COLLABORATION IS KEY!”**

**TILMAN KUHN**



First, Mr Kuhn noted that the basis of the discussion is whether competition is intended to serve fairness and public interest, e.g., whether it can or should be a tool to remedy income inequality and

concentration of economic power, and to address industrial policy issues, for example. Many industries have ground-shaking transformations and unprecedented challenged. In this context, industry-wide cooperation is key and can take several forms: mergers and acquisitions, joint ventures, contractual collaborations of various degrees of rigour. In most cases, systematic change cannot be brought unilaterally – collaboration is key! Tilman Kuhn explained that several non-competition considerations have influenced competition law enforcement already, such as innovation, data privacy and consumer protection.

The question remains whether competition law the right tool to achieve broader goals; it requires balancing legal certainty and the desired social-economic results. Second, Tilman Kuhn elaborated on merger control, noting that Article 2 of the Merger Regulation provides no basis for public policy considerations. However, recital 23 opens the door, as it provides that “the Commission must place its appraisal within the general framework of the achievement of the fundamental objectives” referred to in the treaties. Article 11 of the Treaty on the Functioning of the European

Union also requires integrating the promotion of sustainable development in the EU's policies and activities. Case law is, however, very limited. Then, Mr Kuhn gave an overview of the potential angles for the evolution of merger control: focusing on the rationale of deals, revising market definitions, changing the approach to killer acquisitions, giving better consideration to efficiencies, creating new remedies. But he raised the question, given that none of these merger control tools seems to be particularly fitting to address the sustainability dimension of deals, political exemptions (such as ministerial exemptions in the German merger control regime) could be a preferred tool to allow deals for sustainability benefits that have been blocked for competition reasons, as it allows politicians to take responsibility for the arbitrage in favour of sustainable development.

Regarding Article 101 of the TFEU, Tilman Kuhn explained that both this Article and the Horizontal Guidelines do not refer to sustainability, which is however listed as a goal of the Union in other provisions of the treaties. But Article 101 is supposed to be interpreted in light of those provisions (Articles 9, 11 and 191 of the TFEU and Articles 3(3), 3(5) and 21(2) of the Treaty on the European Union). He then elaborated that there are three basic patterns of sustainability initiatives, notably self-regulation initiatives, technology advancement initiatives and product replacement initiatives. In all of these, he underlined, short-term effects on consumer choice and price contrast with long-term benefits to society as a whole (and thereby consumers).

A distinction between Article 101(1) and Article 101(3) must also be made, as the considerations under the former (ancillary restraints, *Albany/Wouters* doctrine) are different from the considerations under the latter (quantification of efficiencies in the case of social and environmental costs, assessment of long-term versus short-term efficiencies, indispensability and the adoption of safe harbours), and the burden of proof differs. To conclude, Tilman Kuhn called to a more detailed pan-European guidance (preferably with things like safe harbours) and quicker feedback from the agencies.

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## Tonja Leach

Tonja Leach dealt with the example of Canada and its responsibility for a variety of aspects with regards to energy transition and focused on the role of local authorities and communities. She first presented QUEST, a Canadian national non-government organisation that works to accelerate the adoption of efficient and integrated community-scale energy systems by informing, inspiring and connecting decision-makers. Communities that have embraced these principles are referred to as Smart Energy Communities. They seamlessly integrate local, renewable and conventional energy sources to affordably, cleanly and efficiently meet energy

**“SMART ENERGY COMMUNITIES SEAMLESSLY INTEGRATE LOCAL, RENEWABLE AND CONVENTIONAL ENERGY SOURCES TO AFFORDABLY, CLEANLY AND EFFICIENTLY MEET ENERGY NEEDS.”**

**TONJA LEACH**



needs. Those communities understand the importance of building climate change policy on sound energy policy; driving technological change while avoiding technological determinism; maximising the value of infrastructure assets; emphasising institutional innovation; reducing policy uncertainty through alignment and with a sense of community, and restoring public trust and confidence in decision-making institutions.

Tonja Leach explained that QUEST enables smart energy communities by offering programs and services that support and accelerate their implementation through peer-to-peer learning opportunities and workshops, developing knowledge and solutions and influencing decision-makers to set policy and take actions. She outlined the particularities of the energy transition in Canada, noting that some provinces are more progressive than others. Furthermore, Ms. Leach stressed that the role and responsibilities of communities and municipalities have been changing drastically. They now focus on climate change mitigation and resilience, building retrofits, and the electrification of transportation. Communities have been empowered to play a more decisive role.

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Community Energy plans typically include an innovative local economic development instrument and aims to create economic advantage, mitigate climate change and improve energy performance through an integrated approach. Finally, Ms. Leach outlined the current challenges: encouraging the adoption of supportive federal, provincial and municipal policies as well as the appropriate regulatory structures and legislation, planning alignment, defining roles and responsibility, adopting new governance structures, obtaining more effective and efficient funding.

## Questions & Answers

To a question about horizontal sustainable agreements and the risk of greenwashing, Tilman Kuhn explained that contractual collaboration is only authorised if it brings benefits for sustainability, which have to be assessed on a case-by-case basis. Misleading marketing claims will not be considered. He also suggested that those claims concern consumer protection as much as antitrust.

A participant asked a question about EPBiH's investment in hydro-power plants and the risk of black-out, Mr Kazagic stated that some projects are at the preparation phase and outlined their integration within the energy systems. ■