

Competition Law in the Energy Sectors

Market Coupling, Market Splitting, Power Exchanges and the Role of Competition Law

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Duality of Legal Rules

- Effective competition in former (State) monopoly sectors required massive **legislative intervention**, mainly driven by the EU over past 20 years, with binding rules for all EU Member States and Energy Community Contracting Parties
- Full **liberalization** was accompanied by **sector-specific regulation**, e.g. unbundling, third party access to infrastructure at cost-based prices/charges
- Need for strict ex ante regulation shows **insufficient ability** of competition rules to achieve effective market opening
- But: **regulatory gaps and loopholes** trigger ever more detailed provisions at EU and national level, as well as more administration (NRA, ENTSO, ACER)
- What role for **prohibition of cartels/abuse of dominance** (Art. 101 and 102 TFEU) in this setting?

Market Coupling

- In sector inquiry (2007) Commission found **high concentration levels** in (national) electricity generation/wholesale markets and took steps to achieve internal market (ex ante and ex post)
- Market integration can be promoted through **market coupling**: integration of two or more national markets through cross-border allocation mechanism, complex task for Market Coupling Operators (MCO) together with Nominated Electricity Market Operators (NEMO) and TSOs
- Important step to enable **free movement of electricity** in larger area to increase utilization of networks and generation capacities and foster competition.
- Electricity **prices** across the larger (coupled) markets will **converge** if there are no bottlenecks (enough interconnection capacity) with power exchanges playing key role

Examples

- **Since 2001:** German-Austrian single bidding zone for electricity generation/wholesale market
- **2006:** Tri-Lateral Market Coupling integrating French, Belgium and Dutch day-ahead markets
- **2009:** Danish-German market coupling, extended between Sweden and Germany in 2010
- **2010:** Launch of market coupling in Central West Europe (CWE), covering Benelux, France and Germany, the Nordic region and Estonia and in 2011 extended between Norway and the Netherlands
- **2014:** Price Coupling in North Western Europe (NWE) covering 15 countries and 75% of the European power market. In May 2014, Spain and Portugal joined NWE and in February 2015 Italy coupled with France, Austria and Slovenia, covering 19 countries with 85% of European power consumption (Multi-Regional Coupling)

Market Splitting

- But market coupling can also trigger problems if it is **not the optimal market design**: network congestion due to significant input/insufficient output or lack of interconnector capacity
- National **regulators and ACER** shall monitor network congestion and promote/impose most competitive and least disruptive solutions
- Although running against wider market integration goal, market splitting can be seen as a **congestion management tool** provided for in the regulatory framework
- While other options (e.g. redispatch, countertrading) leave the market structure unaffected, market splitting leads to (temporary or permanent) **geographical changes** of existing market configurations
- **TSOs have to comply** with ex ante rules as enforced by regulators, but EU/national competition rules must also be observed, which can lead to conflicts

Specific Implementing Rules

Commission adopts binding sector-specific legislation (tertiary EU law):

- **Capacity Allocation and Congestion Management (CACM) Regulation (2015/1222)** in force since 15.8.2015, based on Art. 18 Regulation (EU) 714/2009
 - *Rules for NEMOs operating day-ahead and intra-day markets*
 - *Calculate cross-border capacity, match and allocate orders, publish prices*
 - *Cooperation between NEMOs to perform MCO functions*
 - *Coordinated redispatch and countertrading, define and review bidding zones (joint process)*
- **Forward Capacity Allocation (FCA) Regulation (2016/1719)** in force since 17.10.2016
 - *Calculation and allocation of interconnection capacity and cross-border trading in forward markets*
- **Electricity Balancing Regulation (2017/2195)** in force as from 18.12.2017
 - *Operation of balancing energy which TSOs use to keep their systems in balance in real time*

Market Coupling and Competition Law

- Competition law does **not play lead role** for solving problems related to congestion management in relevant market areas (coupled or not), because sector-specific legislation applies ex ante
- Competition law, *inter alia*, shall prevent that **dominant companies abuse or extend** their market position to detriment of rivals/consumers
- Crucial aspect of assessing anti-competitive behaviour (or mergers) is **market definition**:
 - *Market coupling might increase number of competitors, so that exercise of market power can be constrained, reducing likelihood of anticompetitive behavior*
 - *But: Relevant geographical market for competitive assessment can vary significantly and market coupling does not necessarily change market definition.*
 - *EdF/Segebel (COMP/M.5549): market coupling improved efficiency in utilisation of interconnection capacity, but did not modify the geographic scope of the (Belgian) market*

What can go wrong under Art. 102?

- TSOs will have to exhaust all **available regulatory options** to address network congestion if and when it occurs
- Depending on the specific case, **omission to do so** may lead to an abuse of their dominant position with hefty consequences (fine, damage claims...)
- Despite specific ex ante rules in place, the Commission found abusive conduct by RWE in the form of „**capacity mismanagement**“ in gas sector (COMP/39.402, 18.3.2009)
- To avoid a fine, RWE offered, and was then obliged to, **divest** its entire German **transmission network** to an independent third party

Market Splitting and Competition Law

- Commission found that Swedish TSO, Svenska Kraftnät (SvK), abused its dominant position on Swedish electricity transmission market by **curtailing export capacity on interconnectors with Denmark** to address congestion within Swedish system (COMP/39.351, 14.4.2010)
- Seen as **discrimination** between different network users and segmentation of internal market: limitation of capacities can affect prices in bidding zones
- SvK offered commitments to **subdivide Swedish transmission system** into two or more bidding zones, instead of a division along national borders
- Commission imposed these commitments SvK and **terminated investigation** without stating an infringement and without a fine

German-Austrian Case

- Common German-Austrian electricity **bidding zone existed** since 2001, came under increased pressure due to German renewables promotion (EEG) causing loop-flows in neighbour countries
- ACER decision (19.11.2016) to **introduce bidding zone border** between Germany and Austria due to structural congestions based on Art. 15 CACM-Regulation: once implemented, would lead to split of German-Austrian wholesale electricity market with price differentials to be expected
- ACER Board of Appeal rejected appeals by E-Control and APG (11.2.2017) as **inadmissible/unfounded**, pending **EU-Court cases**: T-332/17 (E-Control vs ACER) and T-333/17 (APG vs ACER), main pleas: lack of competence for ACER, insufficient proof of congestion at D-A border
- In May 2017, BNetzA and E-Control **agreed on joint** congestion management scheme for German-Austrian border as from 1 October 2018

What's Next?

- Reconfiguration of bidding zone **within Germany**?
 - *Commission plans to get more decisive powers to enforce CACM according to actual bottlenecks, which could lead to split of bidding zone within Germany (North/South)*
 - *Politically highly controversial as this might result in different electricity prices across Germany*
 - *In Oct. 2017, Federal Ministry of Economics announced amendment of electricity network access regulation (StromNZV) to prevent potential split within German territory by TSOs*
- **Infringement of competition law** through market splitting? Depends on who decides to split bidding zone (cf. SvK-case)
 - *TSOs or NRAs: possible infringement of Art. 101 or 102 TFEU (poss. with Art. 106 TFEU) which could lead to Commission decisions*
 - *ACER or Commission: EU institutions are not subject to competition rules, but bound by TFEU and secondary/tertiary EU law, which could lead to Court cases (Art. 263 TFEU)*

Power Exchanges and Competition Law

- Commission decision against EPEX Spot and Nord Pool Spot (COMP/39.952, 5.3.2014): two leading European power exchanges **agreed not to compete** for their spot electricity trading services in the EEA
- Allocation of territories: agreement to protect traditional markets by not attacking each other's „**home markets**“ (EPEX: France, Germany, Austria; NPS: Norway, Sweden, Denmark, Finland) for spot electricity trading services
- For this breach of Art. 101 TFEU, the Commission imposed total **finances of €6 mio.** on EPEX and NPS, after reduction by 10% each for **agreeing to settle** the case

Market Administrators and Competition Law

- Commission decision against Romanian electricity market administrator OPCOM (COMP/39.984, 5.3.2014): **fine of €1 mio.** for abuse of dominant position in Romanian market for facilitating electricity spot trading (Art. 102 TFEU)
- Based on complaint by EFET, Commission found that OPCOM had over five years **discriminated** against wholesale electricity traders on the basis of their **nationality/place of establishment**
- OPCOM required EU-foreign traders to obtain Romanian VAT registration for being admitted to spot markets on power exchange, even though EU traders already had VAT registration in their home countries
- This excluded foreign traders or made it more difficult for them to participate in Romanian electricity spot markets

Power Exchanges as Remedies

- Commission decision against Bulgarian Energy Holding (COMP/39.767, 10.12.2015): destination clauses in electricity supply contracts between BEH's production subsidiaries and third parties, such as traders, imposed **territorial resale restrictions** on third parties for electricity bought from BEH at freely negotiated (unregulated) prices (Art. 102 TFEU)
- No fine imposed, because BEH committed to offer volumes on independently operated day-ahead market via **newly-created power exchange** in Bulgaria, to be set up with assistance of independent third party, control of ownership transferred to Bulgarian Ministry of Finance

Compliance - Cost and Benefits

- Competition rules are **complementary** to sector-specific rules and can be used by Commission when ex ante regulation does not generate the desired outcome
- Full regulatory compliance is **hard to achieve** in the EU because of multiple layers and lengthy processes (incl. Court cases)
- Competition law decisions usually **leave companies discretion** on how to comply, and thus are not suited to achieve specific policy goals more broadly
- But such decisions can be **more intrusive** than ex ante regulation, depending on outcome (high fines, divestment), and have strong precedent value if they are confirmed by Courts
- Companies must keep eyes open to be **compliant on both fronts**, but some strategic choices remain