



What role for competition law in the pursuit of the single energy market?



Efficient and Sustainable Electricity Markets

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The role of competition law



- According to the report (p. 13) *“The application of competition law plays an important role regarding the following issues in the internal energy market selected for this study: energy generation and State aid, capacity remuneration mechanisms (CRMs), and the effectiveness of competition between suppliers.”*
- Followed later by (p. 14) *“While the role of competition law instruments has and will continue to be important to protect and maintain effective competition, their role in achieving the Energy Union Framework Strategy is a supporting one.”*

The role of competition law



- While agreeing on some of the observations including that competition law have limitations I feel that the statement fails to see the pivotal role played by competition law in securing movement of the creation of a single market for energy
- Void of competition law there might not have been any single market for energy

Understanding the role of competition law

- Unlocking the role of competition law when it comes to the single electricity market starts by understanding that there is neither a single market nor a coherent regulatory EU model
- Rather a pattern has emerged of successful generations of models haunted by deficits and political compromises



3 successive generations of models

1st Energy model

- 1st Electricity Directive & Transmission Directive
- ✓ Required a (limited) market opening
- ✓ Adoption of access rules
- ✓ Many derogations and special provisions

Deficits:

- No coordination
- No ownership unbundling
- High risk of regulatory abuse (No NRA rules)
- Limited market opening
- No mandatory access
- No rules on construction
- Many derogations

2nd Energy model

- 2nd Electricity Directive & 1st Crossborder Transmission Regulation
- ✓ Full market opening
- ✓ Mandatory access rules
- ✓ Rules on NRA, TSO/DSO and regulatory unbundling
- ✓ Rules on PSO

Deficits:

- Limited coordination
- No ownership unbundling
- Risk of regulatory abuse
- No rules on congestion management pinning crossborder trade
- No rules on construction

3rd Energy model

- 3rd Electricity Directive & 2nd Crossborder Transmission Regulation
- ✓ Full market opening
- ✓ Mandatory access rules
- ✓ Rules on NRA, TSO/DSO and regulatory unbundling
- ✓ Ownership unbundling
- ✓ Rules on PSO
- ✓ Delegation to Commission

Deficits:

- Limited coordination
- No rules on construction



Competition law as the anchor

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- The pre-liberalization model (*Utility-model*) utilized a system of reserved rights that most likely could be accommodated by Article 106
- The Commissions first attempt to create a single electricity market (1988) would have used Article 106 (3) as basis for a Commission Directive. A step that found no support with the Council compelling the Commission to table a normal Directive in 1992, only to be met with further resistance
- A redrafted and watered down version was then introduced accompanied by a number of infringement cases before the Court of Justice (the electricity cases). A copy of process successfully utilized in telecom a decade earlier
- However, not only would thus stall the process but eventually backfire when it became apparent that the Court of Justice would not rule favorable with the Commission
- An amputated version was eventually adopted in 1996 as the *1st Electricity Directive (96/92)*



Competition law secured implementation

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- Initially, the regulatory model would have been anchored on competition law with a series of Article 106 (3) Directives adopted by the Commission
- Lacking support for this an amputated model was adopted where competition law closed gaps
 - ✓ The lack of mandatory unbundling created a high risk of abuses that could be checked by Article 106
 - ✓ Competition law would give the Commission the power to check the national implementation
 - ✓ Article 101 (3) was used to check and reduce long terms supply agreement to a maximum of 15 years
 - ✓ Article 101 (3) was used in *Jahrehundertvertrag* to request moderations in the German endorsement of indigenous energy under the national PSO
 - ✓ Article 101 (1) was used to monitor *Verbändevereinbarung*, where the German TSO' had agreed on price and terms for the transmission of electricity. While closing a gab it was still a cartel
 - ✓ The Merger Regulation allowed the Commission to request release of capacity on international interconnectors in e.g. *VEBA/VIAG*



Competition law closed lacunas

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Deficits:

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- 2nd Electricity Directive and 1st Crossborder Transmission Regulation closed many gaps. However, a large number of market imperfections would still hamper the single market ambition
- Competition law gave the Commission the power to address some of these
 - ✓ Article 101 (3) was used to endorse the construction of new interconnectors in *Wiking Cable*
 - ✓ The Merger Regulation allowed the Commission to request the expansion of transmission capacity in *Grupo Villar Mir/EnBW/Hidroelectrica del Cantabrico* on international interconnectors, injection of electricity into pools in *EDF/EnBW* and *Synergen* and the relish of balancing power in *Verbund/Energie Allianz*)
 - ✓ The Merger Regulation allowed the Commission to address the slow French implementation of obligations in *EDF/EnBW* by designing a commitment package to the domestic French market regardless of the merger limited to Germany



Competition law as a sledgehammer

- *3rd Electricity Directive* and *2nd Crossborder Transmission Regulation* closed most of the remaining gaps. However, their adoption were somewhat of a marathon
- ✓ Competition law smoothed the adoption and implementation
 - ✓ Article 102 was used in *German electricity wholesale market* and *German electricity balancing market* to secure ownership unbundling in Germany (and divestment of generation capacity) paving the way for incorporating this into the *3rd Electricity Directive*
 - ✓ Article 102 were used in *Swedish Interconnectors* to remedy a dubious Swedish congestion management where internal bottlenecks were addressed by closing the connection to Denmark
 - ✓ Article 102 was used in *CEZ* against hoarding of transmission capacity foreclosing the market
 - ✓ Article 102 was used in *BEH Electricity* against clauses preventing resale of wholesale electricity. Closed against commitment to participate in the creation of a power exchange

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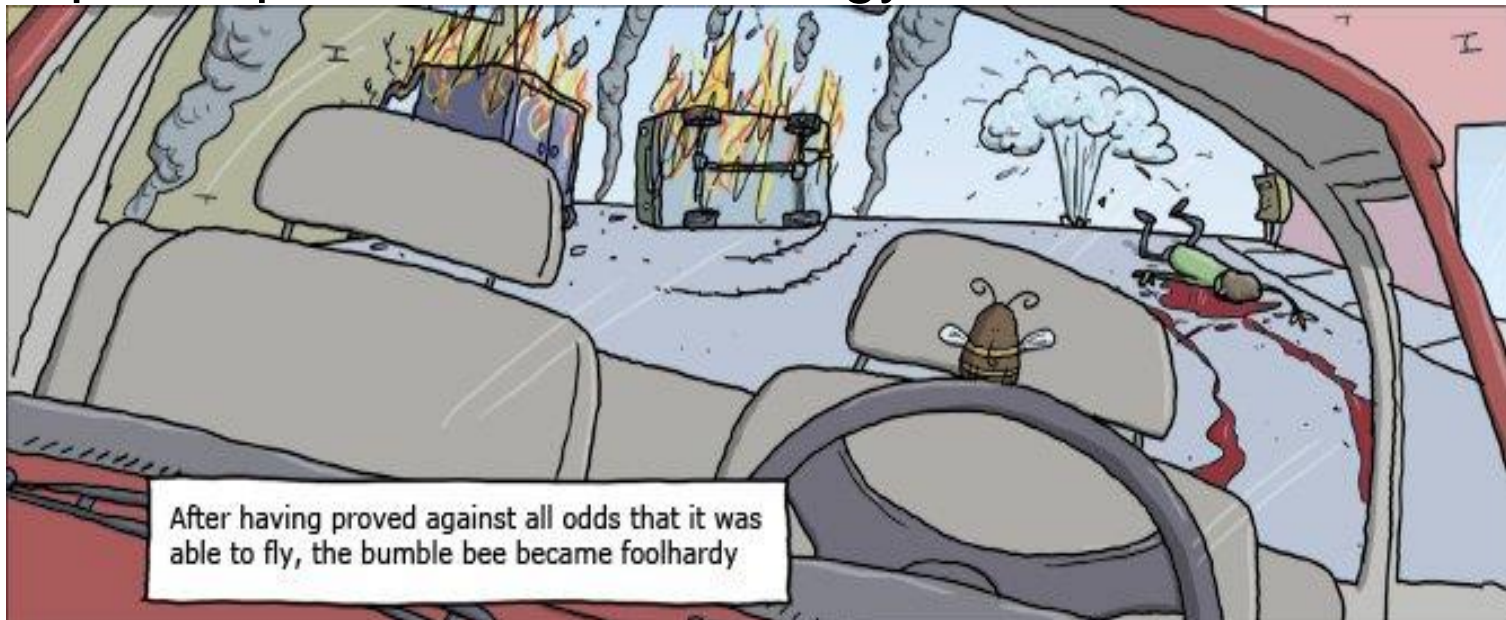
Deficits:

- Limited coordination
- No rules on construction



With a pivotal role for competition law

- The persistent deficits have drafted competition law to serve in a regulatory role by first securing the adoption of a new model and then to close the gabs
- However, competition law might be unsuited for the special problems of the energy sector



Competition law might be unsuited

- *German electricity wholesale market* involved strategic withholding of electricity by a generator with a market share below 30 % in a situation where market price exceeded MC
 - Is single dominance thereby expanded to cover below 30 % market shares?
 - Is excessive pricing thereby redefined as $p > MC$ when it comes to electricity?



Competition law might be unsuited

- The Danish case *Elsam III* involved excessive pricing in 2005/2006 and is still (2017) pending. Moreover, in the process the Danish Competition Authority had to decide:
 - what to consider abusive settling on $p > ATC$
 - what to include in the cost e.g. CO₂- quota
 - what to consider a fair rate of return and how to value the underlying assets (book value or replacement)
 - how to deal with temporary dominance (peak/off peak and open/closed interconnectors)
- With mixed success (case is still pending and many of the decisions can be discussed)
 - See my paper on the case available from <https://ssrn.com/abstract=2856328>



Competition law have contributed

- Competition law have been successful in facilitating the adoption of sector specific regulation
- The *Sector Inquiry* (2007) and *Capacity Remuneration Mechanism inquiry* (2016) have highlighted potential impediments to the single market and secured a better understanding of the sectors with the Commission (and NRA)
- Competition law can check many anti-competitive moves once a market and competition starts to emerges. A special role (on EU-level) henceforth would be the issue of state aid



Cases cited

- Case IV/33.151 - *Jahrehundertvertrag*
- *Verbändevereinbarung*. See XXVIII Report of Competition (1998), pp. 157-159.
- *COMP/M.1673 - VEBA/VIAG*
- Case COMP/E-3/37.921 - *Wiking Cable*
- Case COMP/M.2434 - *Grupo Villar Mir/EnBW/Hidroelectrica del Cantabrico*
- Case COMP/E-4/37.732 - *Synergen*
- Case COMP/M.2947 - *Verbund/Energie Allianz*
- Case COMP/M.1853 - *EDF/EnBW*
- Case COMP/39.388 - *German electricity wholesale market*
- Case COMP/39.389 - *German Electricity balancing market*
- Case COMP/39.351 - *Swedish Interconnectors*
- Case AT.39.727 - *CEZ*
- Case COMP 39.767 - *BEH Electricity*
- *Elsam III*, Danish Competition Council 20 June 2007



Questions



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