

Legal challenges in establishing organised electricity markets and market coupling

Vienna, 14 April 2016

Agenda

1. About us
2. Portrait
3. Liberalisation of the energy sector
4. Security of supply – a threat to liberalisation?
5. An opposite trend – results from Liberalisation
6. Conclusion?

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BBH is known as “the” law firm of public utilities. But we are far more than that – in Germany and also in Europe. The decentralised utilities, the industry, transport companies, investors as well as political bodies, like the European Commission, the Federal Government, the Federal States and public corporations appreciate BBH’s work.

- ▶ Accredited professionals: ca. 250; total staff: ca. 550
- ▶ Offices in Berlin, Munich, Cologne, Hamburg, Stuttgart and Brussels

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Dr. Dörte Fouquet



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- ▶ Studies of Law at the Universities of Marburg and Hamburg
- ▶ 1982 Research assistant, University of Hamburg
- ▶ 1988 Ministry for the Environment and Energy, Hamburg
- ▶ 1991 Liaison office of Hamburg and Schleswig-Holstein to the European Commission in Brussels
- ▶ 1993 Partner at law firm Kuhbier, Brussels
- ▶ Since 2011 Partner at BBH Brussels

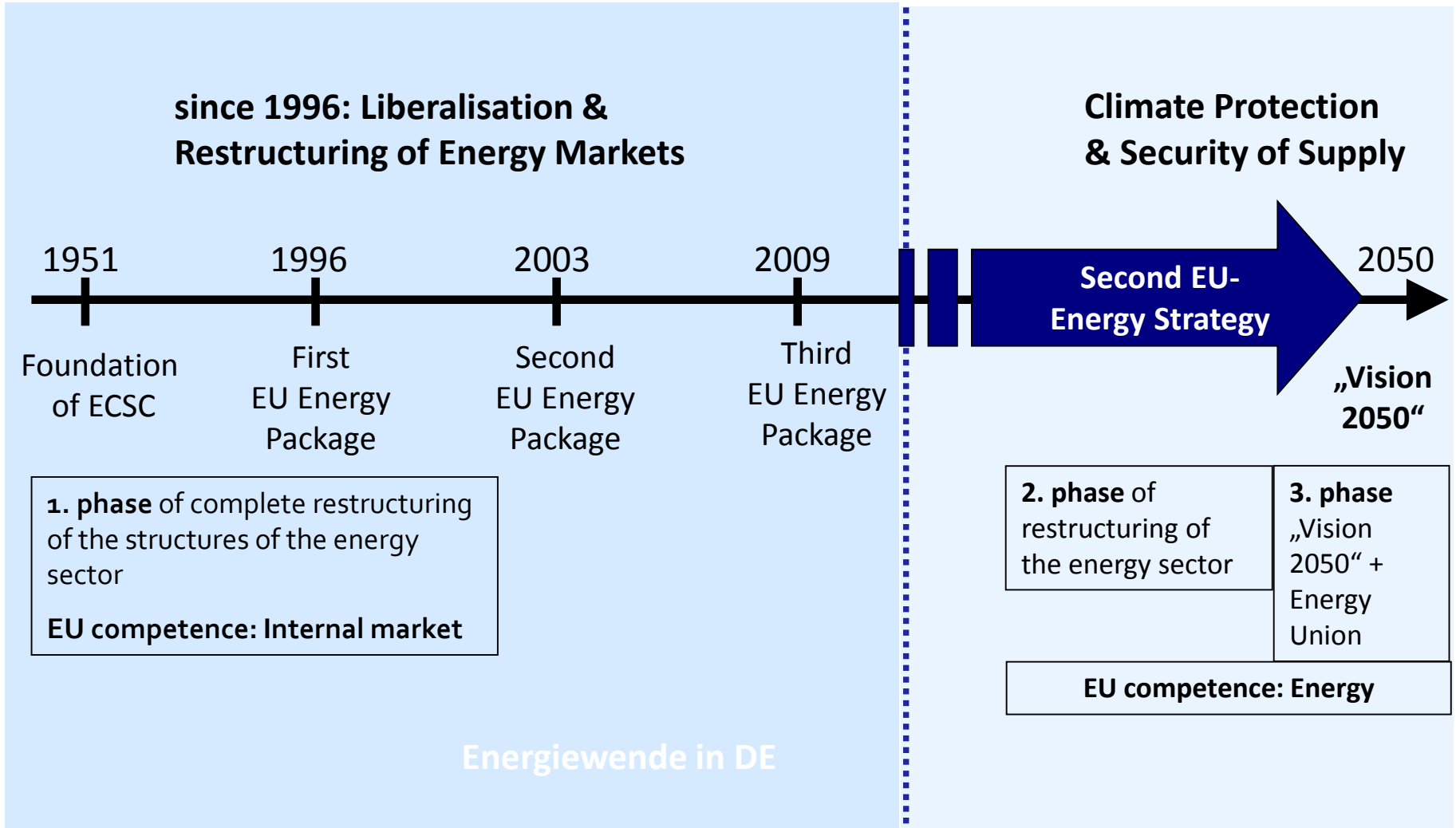
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The Energy Strategies of the EU

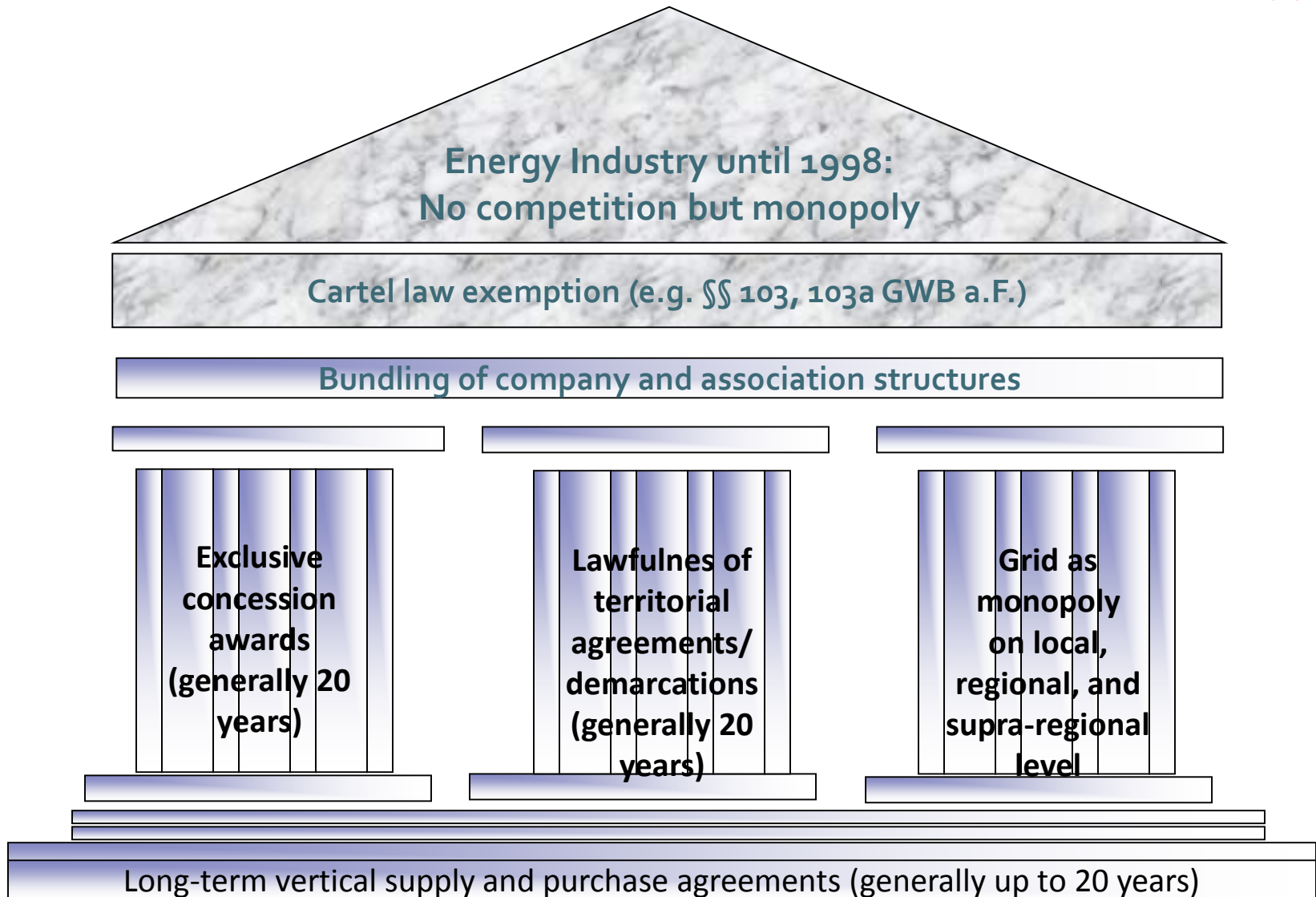


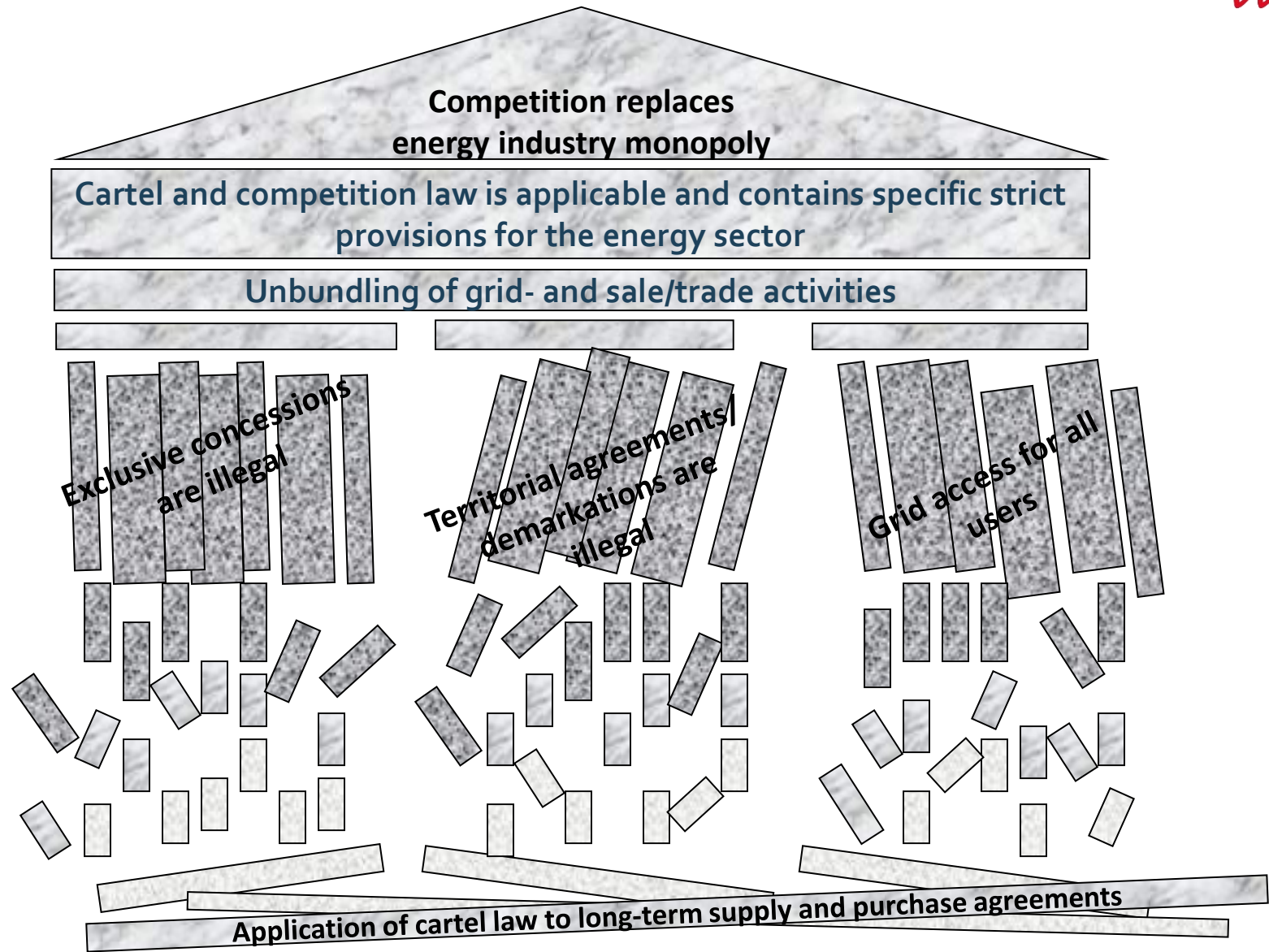
The liberalisation of the European Energy Markets



- ▶ The Third Energy Package (Directive 2009/73/EC and Regulation (EC) No. 715/2009) intends to achieve the completion of the internal market.

- ▶ **Essential elements of liberalisation:**
 - Complete market opening and application of cartel law to the energy sector
 - Unbundling of grid operation
 - Grid access regulation
 - Grid investment regulation
 - Trade and supply regulation
 - Independent national regulatory authorities and European regulatory cooperation





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The EU Security of Supply Strategy

- ▶ Already in May 2014, the EU Commission published its communication paper on an EU Security of Supply Strategy
- ▶ Five major elements of the strategy:
 - Increase energy efficiency
 - Increase energy production within the EU and diversify energy suppliers and routes
 - **Complete internal energy market** and build necessary infrastructure
 - Speak with one voice in external energy policy
 - Strengthen emergency and solidarity mechanisms and protect critical infrastructure

Stress-tests and reactions

- ▶ At the same time, political tensions around gas imports from Russia
 - In 2014, Member States performed „stress tests“
 - Mainly examining the consequences of a halt or disruptions in gas supply from Russia
 - And results showed deficiencies and problems which needed to be addressed
 - Certain immediate actions were taken
 - In particular to prepare for the winter 2014/2015
- ▶ ... and since then, Security of Energy Supply has become a real issue within the EU Energy Policy...

Now one of the pillars of the Energy Union!

Security of Supply in the Member States

- ▶ Not only the EU reacted, but so did Member States
 - EU focussed largely on gas
 - But: Many Member States were quite concerned about electricity
 - Higher shares of variable Renewable Energy were said to cause imbalances and endanger security of electricity supply
 - Building Power Plants to back up for potential deficits were said to be insufficiently profitable
 - Would not run enough, i.e. would not generate enough income
 - Idea? = Capacity markets and mechanisms
 - i.e. government paying for capacity to be kept at hand, not for electricity produced, or for electricity potentially produced in the future

Security of Supply in the Member States

- ▶ Various different systems evolved in the Member States
 - Capacity markets
 - Auctioning for (new) capacity to be built
 - E.g. France, UK
 - Strategic reserves
 - Keeping certain capacity as back-up, by paying them for not selling on the wholesale market
 - E.g. Germany
 - ...
- ▶ Reaction by the European Commission?
 - Potential distortion of the internal electricity market!!!
 - Critical assessment under (in particular) EU State aid law

Market regulation

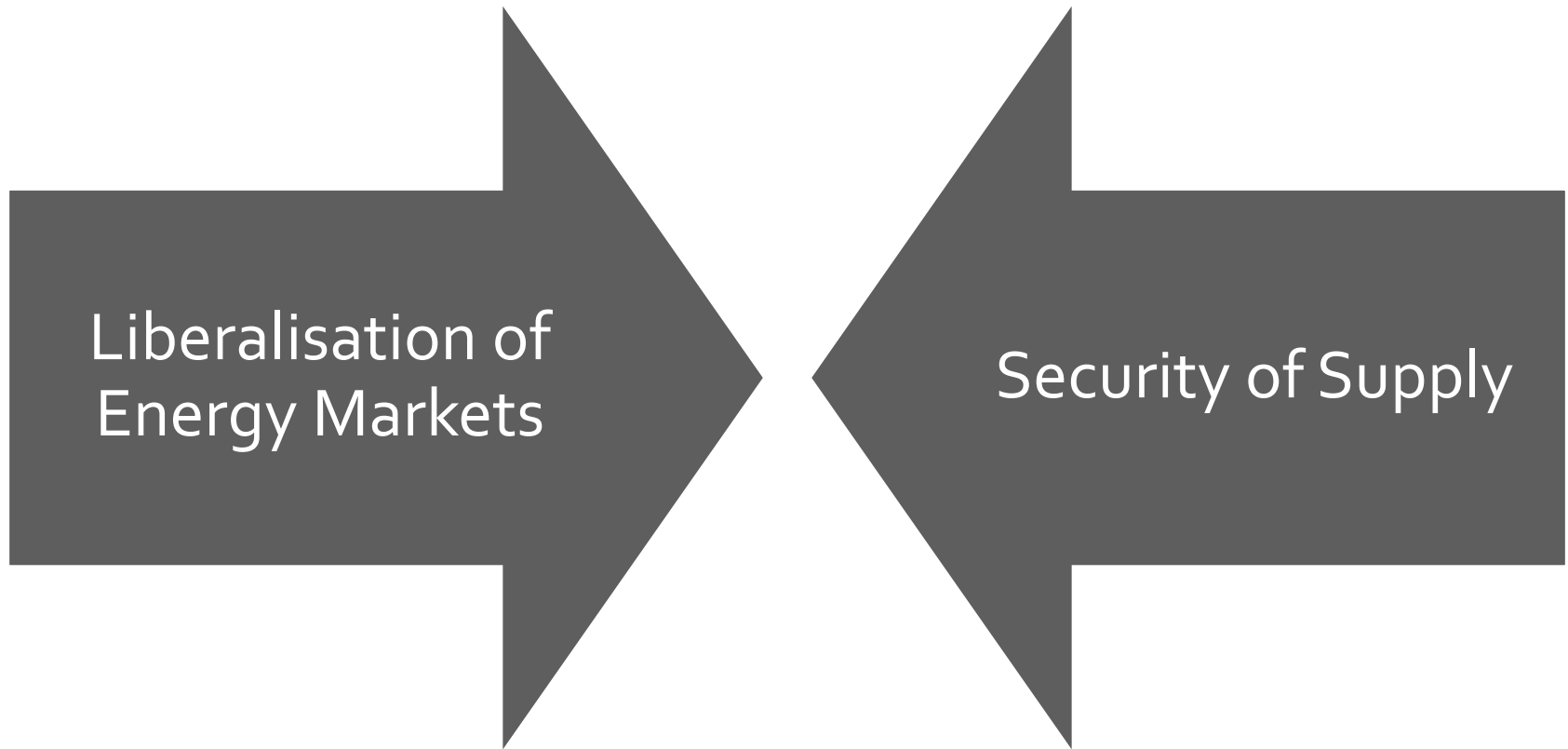
Competition law as policy tool

- ▶ State aid law is a powerful tool for the European Commission
 - **First of all:** State aid is illegal – general prohibition of state aid according to art. 107 (1) of the AEUV
 - **This means:** Every **selective advantage** granted to a recipient by state intervention or through **state resources** is forbidden if **competition** may be **distorted** and **trade** between Member States may be **affected**
- ▶ **But:** State aid is not illegal if compatible with specific policy objectives
 - Policy objectives are, e.g., achievement of climate targets
 - Security of Supply is one of those objectives
- ▶ **But:** Capacity market addressed in **State Aid Guidelines**
 - Very close scrutiny on the necessity and proportionality of any such measure

Another example – European Commission on LNG and gas storage

- ▶ In February 2016, the EU Commission published the EU strategy for LNG and gas storage
- ▶ Four major elements of the strategy:
 - Build the necessary infrastructure to allow all EU Members to access international LNG markets
 - Completion of the internal gas market
 - Efficient use of storage facilities
 - Working closely with international partners to promote free, liquid and transparent LNG markets
- ▶ But – two conflicting positions here?
 - Internal market: „How much LNG comes into the EU markets will ultimately depend on the global gas prices.“
 - Security of Supply: „The EU will use its foreign policy instruments...to ensure full access to the benefits of the growing global market in LNG.“

The Dilemma... ... in market regulation...



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The development of market coupling

- ▶ Originally evolved through the markets
 - Power exchanges throwing different markets together – making it possible to „bid accross borders“
 - Supply and demand could better be matched that way
 - From 2012, regions and exchanges applying market coupling
 - Central Western Europe (EPEX Spot (German-Austrian and France))
 - Belpex (Belgium) and APX- ENDEX (Netherlands))
 - Nordic region (Nord Pool Spot (Norway, Sweden, Finland, Denmark, Estonia, Lithuania))
 - Central-Eastern Europe (OTE (Czech Republic and Slovakia) and HUPX (Hungary))
 - South Western Europe (OMIE (Spain and Portugal))
 - and Central-South Europe (GME (Italy) and Borzen-BSP SouthPool (Slovenia))

... going into Legislation

- ▶ In June 2015, the EU then adopted Regulation on Capacity Allocation and Congestion Management
 - Objective = Single day-ahead and intraday coupling
 - i.e. mandatory market coupling throughout the entire EU
 - Therefore: introduction of certain set of harmonised rules for capacity calculation, congestion management and trading of electricity
 - ENTSO-E strongly involved

... and into even more legislation...

- ▶ EU Commission currently working on an EU „market design“
 - Objective:
 - New framework, “suitable for an **interconnected EU-wide electricity market** providing **clear price signals for new investments** and facilitating the further **development of renewables**, to promote regional cooperation and coordination on energy policies, to enable cooperation on development of renewables, including on support schemes, to safeguard appropriate governance and regulatory framework as well as to provide a truly European dimension to **security of electricity supply.**”
 - Main Features
 - “Energy Only” market
 - No capacity markets, but possibly strategic reserve?
 - Full integration of Renewable Energy
 - Demand Response
 - ...

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Organized energy markets – not an easy task

- ▶ Development of EU energy markets has seen trends
 - From very concentrated and liberalized...
 - ... too more liberalized...
 - ... back to more regulated...
 - ... towards more open and „coupled“...

- ▶ ... and there is still some way to go to the completion of the Internal Energy Market...
 - And likely there will be ups and downs again...

Thank you very much
for your attention.

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