



# Approaches and hurdles on the way to fair competition on the electricity wholesale markets – can digitalization help?

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# Overview

## **Setting the Scene**

### **I. Legal foundations**

1. European Competition law
2. European Electricity Regulatory Law

### **II. Case Law/Examples**

### **III. The promises of digitalization**

### **IV. Conclusion**

# Setting the Scene

- 1. Electricity is essential for every country and all sectors**
  - 1. SoS is pivotal**
  - 2. “Fair“ prices are also essential (internationally competitive prices)**
- 2. Distorted prices pose great risks for consumers, the economy and for political stability**
  - 1. Too low priced → risks SoS, lack of investments, export of low prices**
  - 2. Too high prices → social problems, economic problems, political unrest**
- 3. Historically, in Europe we had mostly monopoly situations with too high prices (e.g. generation overcapacity)**
- 4. The EU Internal Market can help to break up monopolies**
- 5. Monopolists will always fight to retain their dominant market position**
- 6. Question:  
How can we open the market without (too many) problems?**

# I. Legal Foundations

## 1. European Competition Law

*Art 101 TFEU – Prohibition of Cartels*

*Art 102 TFEU – Prohibition of market abuse*

## 2. European Electricity Regulatory Law

The Electricity Market Directive (EMD)

Regulation on Wholesale Energy Market Integrity and Transparency (REMIT)

## 3. Many tertiary legal rules (Network Codes, ACER REMIT Guidance, etc.)

## 4. Additional national laws & rules

# I. Legal Foundations

## 2. European Electricity Regulatory Law

- Regulatory requirements apply regardless of the market share of the companies; the activity carried out is the decisive factor → electricity market participation
- *Ex-ante* compliance, obligations to collect and transmit data for surveillance
- Compliance obligations combines principles of competition law and criminal law → separate body of law
- Division of competence as well as cooperation between ACER and national regulatory authorities

# I. Legal Foundations

## 2. European Electricity Regulatory Law

- The Electricity Market Directive (EMD) regulates the responsibilities and competencies of the national regulatory authority
- Regulation on Wholesale Energy Market Integrity and Transparency (REMIT) regulates forbidden market practices and obligations of market participants to register and transfer data;

# I. Legal Foundations

## 2. European Electricity Regulatory Law

- Art 43 ff EMD: Unbundling of Transmission System Operators
- Unbundling of energy companies under company and ownership law dates to the first 3 regulatory packages since the 1990s
- Combination of competition law procedures and regulatory requirements → room for manoeuvre and innovation
- Example: Capacity Release Programmes; the ARENH mechanism in France

# I. Legal Foundations

## 2. European Electricity Regulatory Law

- Art 57 EMD: Independence of the national regulatory authority (NRA have obligation to assure competition & working markets)
- Art 58 f EMD: Duties and powers of the national regulatory authority  
→ approval of tariffs and terms and conditions of electricity companies
- Decisions by national regulatory authorities can be appealed; recourse to courts that have jurisdiction under national law

# I. Legal Foundations

## 2. European Electricity Regulatory Law ( REMIT)

- Art 3 REMIT: Prohibition of insider trading
- Art 4 REMIT: Obligation to publish insider information
- Art 5 REMIT: Prohibition of market manipulation
- Art 5a REMIT: Risk management for algorithmic trading → recent amendment due to increased digitalization of the energy sector
- Art 8 REMIT: Obligation of market participants to report wholesale energy market transactions to ACER
- Art 9 REMIT: Obligation of market participants to register with their national regulatory authority
- Art 13 ff REMIT: Competence of national regulatory authority to investigate national energy wholesale markets & impose fines
- Art 18 REMIT: Penalty design by member states

## II. Case Law/Examples

- Bulgaria: Decision No. 833/18.07.2019 by the Bulgarian Commission for Protection of Competition (BCPC)
- National Electricity Company EAD (NEK) fined with BGN 315 612
- Infringement of Art 102 TFEU & corresponding Bulgarian laws
- NEK unilaterally and unjustifiably modified the hourly forecast schedules submitted by producers of renewable electricity
- NEK allocated additional unreasonable costs for imbalances upon renewable producers that were members of a special balancing group of NEK for more than 4 years

Further reading: <https://competitionlawblog.kluwercompetitionlaw.com/2020/01/07/the-bulgarian-national-electricity-company-sanctioned-for-abuse-of-dominance-on-the-market-of-balancing-energy-of-renewables/>

## II. Case Law/Examples

- Romania: Decision by the National Energy Regulatory Authority (ANRE)
- Supplier Alive Capital S.R.L was fined RON 400 000 (EUR 80,955)
- Investigation of trades on an OTC platform administered by OPCOM
- Violation of Art 5 REMIT (market manipulation), in particular wash-trades type A – B – A
- Sanctions were part of a broader investigation by ANRE

Further reading: <https://www.acer.europa.eu/remit/coordination-on-cases/enforcement-decisions>

## II. How to open the Markets – in Practice

- Competition law and regulatory law on their own are usually insufficient for breaking up monopolies
- Market integration with neighboring countries sometimes helps (IF I/C capacity is sufficient)
- Often Governments need to step in (often as owners of national champions)
- Sometimes NRAs need to wait for the „right“ opportunity and seek allies
- Approach needs to be adjusted to political and market realities

# III. Is Digitalization a solution ?

- The level of digitalization in the electricity sector is often quite low due to insufficient competitive pressure
  - Often OK in technical sectors and trading (REMIT)
  - Customer oriented automation often rudimentary (SM data use in home automation, hourly prices, instantaneous supplier switching, RT network monitoring with DSM, etc.)
  - Some AI use in marketing / sales
- Often NRAs or Governments are initiators of digitalization! (SM role out; cyber risk protection, forced hourly tariffs, REMIT reporting, etc.)
- So far, only moderate benefits of digitalization outside of operational network management (at TSO level)

# IV. Conclusion

- Competition law and regulatory laws on their own will NOT assure market opening and competitive prices for electricity
- Digitalization can contribute to better enforcement through increased transparency (mostly in trading)
- To open the market (and lower electricity prices), additional measures are usually needed (and sometimes a little bit of luck and pragmatism on the side of NRAs)
- There are some lessons to be learned from a few EU MS that have been struggling with these issues

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