Competition Law in the Energy Sectors

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

Robert Klotz
Partner, Brussels

Vienna, 4 December 2017
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):

  - 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)

  - Calculation and allocation of interconnection capacity and cross-border trading in forward markets

  - Operation of balancing energy which TSOs use to keep their systems in balance in real time
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)
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 fines 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.