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Chapter 4 - EU Energy and Competition

Analysis of Current Trends and a First Assessment of the New Package

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ABSTRACT

With three waves of internal energy market legislation already adopted and a fourth just tabled, a key question is "do we have an institutional structure that can effectively deliver the ambitious goals of the EU energy and climate change policy?". To answer this question, the chapter employs a benchmark comparison, using general EU competition law as a benchmark for an effectively enforced EU policy. It compares the current as well as the emerging institutional structure of EU energy market regulation with that of EU competition law, to assess the extent to which there is a 'competition law-ization' of energy market institutions.

The chapter finds that the Third Package of 2009 created an institutional structure that shares a number of features with competition law, hence laying the grounds for an effective institutional structure. The new 'Winter'package unveiled in November 2016 builds on the institutional *acquis*. However, there are also new trends – in particular a shift to relying on tools that require more Member State co-operation with the Commission.This trend might limit the effectiveness of competition law-ization unless such co-operation concerns aspects that are complementary to the core subject matter of competition law.

Keywords

1. Institutions
2. Effectiveness
3. Competition law-ization
4. NRAs
5. ACER
6. Energy Transition

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1. Introduction

Since 1996 the EU has put in place legislation to enable the transition from electricity and gas systems traditionally dominated by vertically integrated national incumbents that owned and operated generation and network assets and were often the only importers and exporters of electricity or gas, into competitive well-functioning and integrated markets.

Three packages of legislation were adopted between 1996 and 2009. The 1996-1998 measures[3] constituted a first somewhat tentative step towards market liberalisation by removing exclusive rights enjoyed by incumbents to produce, supply and transport gas and electricity and requiring them to negotiate with new entrants on the terms of access to their networks. These Directives were subsequently replaced and repealed by the second package in 2003.[4] This package required full market opening, national sector regulators, regulated third party network access, regulated or negotiated access to storage and further unbundling of integrated companies. [5]

In 2009 the EU adopted what was then called the 'Third Package' of energy legislation.[6] The Third Package crystallised the following key aspects of energy regulation or Sector Specific

[3] Directive 96/92/EC of the European Parliament and of the Council of 19 December 1996 concerning common rules for the internal market in electricity, OJ 1997, L 27/20-29. Directive 98/30/EC of the European Parliament and of the Council of 22 June 1998 concerning common rules for the internal market in natural gas, OJ 1998, L 204/1-12.

[4] Directive 2003/54/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity, OJ L 176/37-56. Directive 2003/55/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in natural gas, OJ L 176/57-78.

[5] The Gas Directive was complemented by the Gas Regulation (Regulation (EC) No 1775/2005 of 28 September 2005 on conditions for access to the natural gas transmission networks (OJ 2005 L 289/1) , which expanded on several of the provisions in the Directive. It introduces qualitative obligatory minimum requirements for access to transmission systems (network tariffs, third party access services, capacity allocation, transparency, balancing and trading of capacity rights).

[6] Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity ('Electricity Directive' or "ED"), OJ L 211/55-93. Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009concerning common rules for the internal market in natural gas ('Gas Directive' or "GD"), OJ L 211/94-136. Regulation (EC) No. 713/2009 of the European Parliament and the Council of July 2009 establishing an Agency for the Cooperation of Energy Regulators ('ACER Regulation'), OJ L 211/1-14. Regulation (EC) No 714/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the network for cross-border exchanges in electricity ('Electricity Regulation'), OJ L 211/15-35. Regulation (EC) No 715/2009 of the European Parliament and of the

Regulation ("SSR"): (1) unbundling of vertically integrated undertakings; (2) third-party network access; (3) cross-border trade; and (4) a network of regulatory and supervisory institutions.

Prior to the launch of the first package of internal energy market measures in 1996-1998 there was very little competition on either the electricity or the gas markets. National markets were reserved to national vertically integrated incumbents. The application of the Treaty competition rules were therefore of limited relevance before that date. As the General Court held in case T-360/09 Eon Ruhrgas and Eon v Commission, competition could not be affected when the two national operators were granted monopoly in gas supply in their national territories by national law at the relevant time.[7]

The launch of energy market liberalisation, albeit limited in scope changed this situation rapidly and irreversibly as the Commission began a series of investigations as well as a sector-wide inquiry. In time, the drive to create well-functioning, integrated markets through common legislative rules has been strengthened by a rigorous and systematic enforcement of the Treaty rules on competition and more recently, state aid.

Since the adoption of the so-called Third Package in 2009 there has been a move away from conventional generation towards the deployment of capital-intensive low margin cost, variable and often decentralised electricity from renewable energy sources (RES E) that is expected to become more pronounced by 2030 and certainly by 2050 if the EU's low-carbon ambitions are to be realised.

The Renewable Energy Directive 2001/77[8] as amended by the 2009/28 Directive , [9]has established a European framework for the promotion of RES, setting mandatory targets for achieving a 20% EU share of renewable energy in final energy consumption (and a 10%) share in transport) by 2020. In the future electricity demand will progressively reflect the increasing electrification of transport and heating.

At the time the Third Package was launched this paradigm shift was hardly foreseen and certainly not anticipated. As a consequence, in February 2015 the Commission adopted the Communication on 'A Framework Strategy for a Resilient Energy Union with a Forward-Looking Climate Change',[10] heralding upcoming changes in the legislation. In the same year

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Council of 13 July 2009 on conditions for access to the natural gas transmission networks ('Gas Regulation'), OJ L 211/36-54.

[7] T: 2012:332., at para 155. The General Court went on to partially annul the Commission decision finding that the of agreement of July 18, 1975, between GDF and Ruhrgas to construct and operate the gas pipeline MEGAL together was in breach of Article 101 TFEU.

[8] OJ 2001 As of 1 January 2012 Directive 2009/28/EC on the promotion of the use of energy from renewable sources (OJ 2009 L 140/16) repealed and replaced the earlier Directive 2001/77/EC (OJ 2001 L283/33) imposed binding national targets.

[9] OJ 2009/28, OJ 2009 L 140/16.

[10] The challenges electricity systems face are reflected in the European Commission Communication of February 2015 on *"A Framework Strategy for a Resilient Energy Union with a Forward-Looking Climate Change Policy"* COM(2015) 80 final where the Commission announced a new electricity market design linking wholesale and retail markets. As part of the legislative reform process needed to establish the Energy Union, it also announced new legislation on security of electricity supply.

the Commission's Directorate –General in charge of energy, DG ENER, started to engaged in an extensive analysis of the policy options for a possible revision of the main framework governing electricity markets and security of electricity supply in Europe.[11] On November 30, 2016, the Commission unveiled its proposals for new rules in the Communication "Clean Energy for all Europeans".[12]

With three waves of legislation already adopted and a fourth just tabled, from an institutional perspective one of the key questions is "do we have an institutional structure that can effectively deliver the goals of the EU energy policy?". The question is salient because the recurrent waves of legislation are partly a response to the paradigm shift discussed above, but it could also be put down to an ineffective institutional structure.

To answer this question this chapter uses a method of benchmark comparison, using competition law as a benchmark of an effectively enforced EU policy, and compares the institutional structure of EU energy regulation with that of EU competition law, to assess the extent to which there is a 'competition law-ization' in the latter institutions.[13]

The use of competition law as a model of effectively enforcement is warranted because competition law is commonly regarded as a successfully enforced EU policy. In addition, the import of competition law institutions into fields of EU regulatory policies has been pioneered by telecommunication regulation starting in 2000.

Thus, '*competition law-ization'* is a useful short hand to review the institutional structure emerging from the Third Package and its effectiveness, and to provide a first assessment of the proposed changes in the new Winter Package.

The chapter is structured as follows: section 2 outlines "competition law-ization"; Section 3 makes an assessment of "competition law-ization" of the energy sector in the period in which the Third Package was in force (2009 – 2016); Section 4 then discusses certain elements of the new package from the perspective of "competition law-ization"; Section 5 provides concluding remarks.

2. Competition law-ization as a Tool To Analyse the Effectiveness of Institutional Structures in Delivering EU Policies

From a legal-institutional perspective, the 'classic' architecture of enforcement in the EU has relied on a system where rules are made in Brussels and their enforcement is handed down to the Member States, the chief example of this approach being the Directive. If Member States

[11] See European Commission (2015) Consultation on a new Energy Market Design COM(2015) 340 final, available at https://ec.europa.eu/energy/en/consultations/public-consultation-new-energy-market-design.

[12] See Commission press release "Commission proposes new rules for consumer centred clean energy transition", and the links to the various proposals at https://ec.europa.eu/energy/en/news/commission-proposes-new-rules-consumer-centred-clean-energy-transition.

[13] See F.M. Salerno, The Competition Law-ization of Enforcement: The Way Forward for Making the Energy Market Work? EUI Working Paper 2008/7, available at http://cadmus.eui.eu/handle/1814/8108.

fail to implement the relevant rules, the Commission can bring legal action – i.e. inftingement proceedings - before the Court under Article 258 TFEU.

Competition law enforcement is premised on a different architecture, which to a large extent explains its effective enforcement. Three features stand out in the institutional design of competition law:[14]

1. Direct access to regulatees

First of all, competition law benefits from direct enforcement. The Commission is able to adopt decisions which are directly binding on regulatees. It does not require ayn intermediation by Member States.

2. Networked enforcement

Second, as part of the so-called 'modernization' of competition law in 2003, the Commission has managed to push a successful decentralisation of enforcement, while retaining control of the network of enforcers. The result has been a multiplication of its enforcement reach.

3. Private enforcement

Third, competition law vests in private entities rights (and obligations) that can be enforced in (national) courts. As a consequence, private enforcement complements public enforcement in a common effort to ensure effectiveness. Over the years private enforcement has become more and more prominent (especially as regards article 101 TFEU). This is a very strong weapon to complete the armoury of enforcement tools which make competition policy an effectively enforced policy.

Competition law-ization of the structures of enforcement impacted the telecommunications sector when, in 2002, the Commission adopted the so-called 'new regulatory framework',[15] which borrows heavily from competition law. This approach has remained unchanged in EU telecommunications regulation throughout the years.

When the Third Package of legislation was approved, competition law-ization in the energy sector was scant and barely developed. The next section sketches an account of competition law-ization in the period 2009-2016.

[14] For an institutional analysis of competition law enforcement, see L. Laudati 'The European Commission as a Regulator: The Uncertain Pursuit of the Competitive Market'in G. Majone (ed) Regulating Europe (Routledge, 1996).

[15] See Directive 2002/21/EC.

3. Institutional trends in the energy sector 2009-2016

A. An Overview Of The Legislative Framework

The 2006 Sector Inquiry [16]

The legislative process was preceded by a sector inquiry. In the Commission's final report, it reiterated and confirmed the five areas of concern identified in both the EU gas and electricity markets in its interim report: (i) market concentration; (ii) vertical foreclosure; (iii) lack of market integration; (iv) lack of transparency; and (v) price formation.[17]

Findings of the Sector Inquiry for the Gas Sector

Incumbents' long-term supply contracts act as a barrier to entry. Despite the third party access regime, there is insufficient effective access. The incumbent operators of the pipelines and storage infrastructure may favour their own affiliates and this suggests that current levels of unbundling are not sufficient.

Cross-border competition is very limited and new entrants have difficulty securing transit capacity due, in particular, to legacy contracts and ineffective congestion management mechanisms on transit pipelines.

Infrastructure users need more reliable, timely and transparent information on access to networks and to transit and storage capacity so that all users are on an equal footing.

Finally, pricing is not market-based as gas wholesale prices are mostly determined by oil prices rather than gas supply/demand dynamics .

Findings of the Sector Inquiry for the Electricity Sector

The generation markets remain national in scope and concentrated. The analysis of trading has suggested that generators have the scope to raise prices and to withdraw available capacity. Thus incumbents still enjoy market power.

Despite the requirements of the liberalisation directives, new entrants again face problems of access to infrastructure, due to lack of liquidity, arising from the high level of integration of generation and supply, which means incumbents have the incentive and ability to favour their affiliates as opposed to competing suppliers.

[16] Commission Communication COM(2006)851 and the more detailed Commission Staff Working Paper (SEC(2006)1724

[17] The Preliminary Report is available on the DG Competition website at http://ec.europa.eu/comm/competition/antitrust/others/sector_inquiries/energy/#16022006

As in the gas market, the lack of cross-border trade prevents new entrants from challenging the position of the incumbents. Here also, the establishment of an integrated single EU electricity market is being hindered by insufficient interconnector capacity, long-term legacy capacity reservations and lack of incentives for investing in long-term capacities.

As for transparency, more than 80% of users are not content with the current level of transparency with respect to information on availability of interconnectors and transmission networks, on generation, on balancing and reserve power and on load. National differences in market conduct regulations and supervision add to users' difficulties.

Price setting is complex. The Commission expressed concern that electricity prices may not be the result of fair competition - although even specialists cannot agree on the extent of the influence of fuel price increases and the EU emissions trading scheme on electricity prices.

The shortcomings identified in these key areas called for urgent action and priority was to be given to four areas: (1) achieving effective unbundling of network and supply activities, (2) removing the regulatory gaps (in particular for cross border issues), (3) addressing market concentration and barriers to entry, and (4) increasing transparency in market operations.[18] The Commission acknowledged that *"only a strengthened regulatory framework can provide the transparent, stable and non-discriminatory framework that the sector needs for competition to develop and for future investments to be made".*[19]

The Commission's intentions concerning regulatory proposals to be made in this regard were set out in its Communication on "Prospects for the internal gas and electricity market" which was presented in parallel to the Final Report[20]. The Sector Inquiry had identified four main fundamental deficiencies in the competitive structure of current electricity and gas markets which would have to be addressed by *regulatory* measures:

Proposed Regulatory Measures

Structural conflicts of interest: a systemic conflict of interest caused by insufficient unbundling of networks from the competitive parts of the sector;

Gaps in the regulatory environment: a persistent regulatory gap particularly for cross border issues. The regulatory systems in place have loose ends, which do not meet;

A chronic lack of liquidity, both in electricity and gas wholesale markets: the lifeblood for our markets is lacking and the market power of pre-liberalisation monopolies persists;

A general lack of transparency in market operations in the sector.

[18] See also *E.WÄKTARE, K. KOVÁCS and A. GEE,* The Energy Sector Inquiry: conclusions and way forward, Competition Policy Newsletter , Number 1 — Spring 2007

[19] Communication from the Commission, Inquiry pursuant to Article 17 of Regulation 1/2003 into the European gas and electricity sectors, at p. 13.

[20] COM(2006) 841, Communication from the Commission, Prospects for the internal gas and electricity market

The Main Objectives of the Third Package

The main objectives of the two directives and three regulations that constitute the Third Package adopted in 2009 aimed to deal with the shortcomings identified in the Sector Inquiry and the Commission's assessment of the first and second packages, and can be summarized as follows:

- Improving competition through better regulation, unbundling and reducing asymmetric information;
- Improving security of supply by strengthening the incentives for sufficient investment in transmission and distribution capacities; and
- Improving consumer protection and preventing energy poverty.

Importantly for the perspective of this chapter, the Third Energy Package considerably modifies the regulatory landscape as it was the first attempt to co-ordinate and unify energy regulatory oversight at the European level.

It should however be emphasised that although its launch followed closely on the heels of the Commission's so-called "20-20-20 Climate Change" package in 2007[21], co-ordination between two policies was far from optimal. The convenient fiction that the three objectives of competition, carbon reductions and security are mutually re-enforcing turned out to be just that – a fiction.

Nevertheless in 2011, the European Union committed to reduce greenhouse gas emissions to 80-95% below 1990 levels by 2050. For this purpose, the European Commission adopted an Energy Roadmap[22] and a roadmap for moving to a competitive low carbon economy.[23]

The Third Package mainly focused on improving conditions for competition by strengthening the so-called level playing field. The most important root cause for the absence of competition was perceived at that time, and as confirmed by the sector report to be the existence of VIUs, which not only controlled essential facilities (such as electricity transmissions systems) but also enjoyed significant market power in the wholesale and often retail markets. Ex post competition control although potentially far-reaching was not considered to be sufficient.

As a result, a large number of ex ante regulatory measures adopted under the 3rd Package sought to directly or indirectly address this issue, for example by strengthening the unbundling regime[24], improving the conditions for cross-border market integration and

[21] 20% carbon reduction by 2020; 20% RES_E production target by 20 20 and an energy efficiency aspiration of 20% by 2020. For a detailed description see, COM(2008) 30 final.

[22] http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52011DC0885&from=EN

[23] COM (2011) 112; http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52011DC0112

[24] For a full analysis, see L Hancher and FM Salerno in Biondi et al., EU law after Lisbon, 2012, OUP.

lowering entry barriers by improving market transparency. Stricter sector-specific regulatory oversight was also considered a prerequisite to enhancing competition.

B. An Assessment Of The Institutional Structures From The Point Of View Of Competition Law-Ization

1. Direct Access to Regulatees: certification procedure and third-party access exemption decisions

To address the issue of unbundling, the Third Package created a system of certification of TSO which provides the Commission with a form of direct access to regulates. More specifically,

- a candidate TSO can start to operate only if it has been approved following the certification procedure (laid down in Article 10 Electricity and Gas Directives in combination with the provisions of Article 3 of the Electricity and Gas Regulations).
- A candidate TSO must apply to its NRA, which is under an obligation to open a certification procedure upon notification by a potential TSO - or upon a reasoned request from the Commission.

The Third Package provides that the Commission must provide a prior opinion on the certification and that the NRA, when adopting its final decision on the certification, must take utmost account of this Commission opinion. [25] In practice, the NRAs and TSOs have almost always conformed to the Commission's views. When the Commission issues negative comments, TSOs typically adopt the changes requested by the Commission to avoid a refusal of certification - which could result in their inability to operate.[26]

As a consequence, the certification process has given to the Commission a powerful tool to dictate regulation at the national level, which is the functional equivalent of direct access to regulates in the area of competition law. [At the same time it might be noted that as the Commission only adopts opinions, the regulatees cannot challenge them directly].

Exemption decisions are another example of direct access to regulatees.

- As a general rule, energy infrastructures are subject to third-party access. However, major new infrastructure may be exempted in certain circumstances. The exemption provides incentives, e.g., for particularly risky investments such as cross-border gas pipelines or LNG terminals which could not be implemented if the usual rules applied.
- The process for the exemptions is as follows:

[25] Article 3 of the Electricity Regulation and the Gas Regulation.

[26] The Commission has recently commenced infringement proceedings against Germany, however.

- Article 17 of the Electricity Regulation and Article 36 of the Third Gas Directive, grant NRA the possibility to exempt new infrastructure from third-party access rules, provided certain conditions are fulfilled.
- Article 17(7) of the Electricity Regulation and Article 36 of the Gas Directive provide for the Commission to be notified of the decision by the NRA on an exemption request.
- Article 17(8) of the Electricity Regulation and Article 36 of the Gas Directive provide for the Commission to approve the exemption or to take a decision requesting the notifying bodies to amend or withdraw the decision to grant an exemption.

Exemption decisions are thus another good illustration of a case of direct access to regulates because the Commission has the power to dictate directly the rules by which ultimately TSOs managing new infrastructures need to abide by.

2. Networked enforcement: ACER, REMIT, ENTSO and competition law

A number of developments in the Third Energy Package point towards a significant level of 'networked enforcement'.

ACER

The Third Package requires Member States to set up national regulatory authorities that are independent not only of the target industries but also of the governments.[27] This strict requirement is highly unusual and is not replicated in other regulated sectors.[28]

Nevertheless NRAs remain subject to democratic or judicial control.[29] Furthermore their remit is rather restricted. Their primary functions are to regulate access to gas[30] and electricity networks as further detailed in Article 37 of the Electricity Directive [31] as well as

[27] See Recital 33 of Dir 2009/72

[28] See further P. Larouoche study for CERRE, http://www.cerre.eu/sites/cerre/files/120306_IndependenceAccountabilityPerceivedQualityofNRAs.pdf

[29] Recital 34 of Dir 2009/72 provides: "Energy regulators need to be able to take decisions in relation to all relevant regulatory issues if the internal market in electricity is to function properly, and to be fully independent from any other public or private interests. This precludes neither judicial review nor parliamentary supervision in accordance with the constitutional laws of the Member States. In addition, approval of the budget of the regulator by the national legislator does not constitute an obstacle to budgetary autonomy. The provisions relating to the autonomy in the implementation of the allocated budget of the regulatory authority should be implemented in the framework defined by national budgetary law and rules."

[30] Article 34 GD on upstream pipelines does not require the involvement of an NRA

[31] And Art xx GD

to certify TSOs compliance with the relevant set of unbundling rules (see Art 9 to 10 in both the ED and GD), and to approve network plans (Art 22).

Regulatory supervision of number of important TSO functions need not be delegated, however: e.g., Art 13(4) of the Third Gas Directives states that: "*The regulatory authorities where Member States have so provided or Member States may require transmission system operators to comply with minimum standards for the maintenance and development of the transmission system, including interconnection capacity*".

The NRAs find in the newly created ACER a forum for coordination. ACER[32] is a "network agency" which must cooperate with the Commission and the NRAs to further the completion of the internal market.[33] ACER's main mission is to support the NRAs and to coordinate their actions where necessary. ACER is not a regulatory authority as such.

ACER has limited and specific competence for interconnections or cross-border issues, it interacts with the NRAs and, it cooperates with the already existing European regulatory forums, such as the Council of Energy Regulators (CEER).[34] ACER's most important task is issuing opinions and recommendations which can be addressed to the TSOs, NRAs, European Parliament and the Council or the Commission.

A distinction must be made between the advisory and decision-making competencies of ACER.

Advisory competences

Articles 5 to 11 of the ACER Regulation define the Agency's tasks[35]. According to the ACER Regulation, the tasks of the Agency are to complement and coordinate the work of the NRAs as well as to participate in the creation of the European network rules.

Under certain conditions it can take binding individual decisions on the terms and conditions for access and operational security for cross-border infrastructure and give advice on various energy-related issues to the European institutions. It also is entrusted with monitoring and reporting developments on the EU energy markets and

[32] In fact there are over 40 agencies in the EU that contribute to EU governance by various executive or regulatory tasks. Eleven of these can be seen to be specifically energy-related – see EP study on governance, op. cit. at n.

[33] Florian Ermacora, *The Agency for the cooperation of Energy Regulators*, in Christopher Jones (ed.), *EU Energy Law, Volume I – The Internal Energy Market – The Third Liberalisation Package*, 3rd edition (2010),

[34] See Saskia Lavrijssen and Leigh Hancher, *Networks on Track: From European Regulatory Networks to European Regulatory "Network Agencies"*, 34(1) Legal Issues of Economic Integration (2008), p. 23-55.

[35] Certain tasks are also defined in the Electricity and Gas Regulations

has to prepare an annual market monitoring report in cooperation with the European Commission, the NRAs and other relevant organizations.

ACER delivered its first market monitoring report in November 2012, covering the year 2011, which was prepared jointly with CEER and in close cooperation with the European Commission.[36] The report included an assessment of the internal energy market, and successive reports have focussed inter alia on retail prices, network access and barriers to the Internal Energy Market. In addition, in September 2014 ACER produced of its own initiative a report entitled 'A Bridge to 2025' seting out a sumary and analysis of the challenges likely to face the energy industry in the coming yeasrs, and the regulatory responses to tackle these. Many but by no means all of these proposals are taken up in the new Winter Package.

Decision-making competence

According to the ACER Regulation, ACER's decision-making powers are very limited. ACER is competent to adopt individual decisions on technical issues where those decisions are stipulated in Directive 2009/72/EC, Directive 2009/73/EC, Regulation 714/2009/EC and Regulation 715/2009/EC. For example, ACER will be able to decide on the terms and conditions for the access to and operational security of a cross-border infrastructure. [37]

Moreover, ACER may adopt a decision granting exemptions from TPA to new major electricity inter-connectors or gas infrastructures if the respective infrastructure is located on the territory of at least two Member States. However, such decisions can be taken only as a last resort when the NRAs concerned, cannot reach an agreement or they ask the Agency to make a decision. [38] It has six months to make the decision. ACER must consult the NRAs and applicants concerned.[39]

ACER and REMIT

Regulation 1227/2011 on wholesale market integrity and transparency (REMIT) entered into force on December 28, 2011[40]. REMIT imported the prohibition against insider trading and market manipulation from the financial regulation into the energy sector.

REMIT is relevant from an institutional perspective because of the division of competences between ACER and NRAs.

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[36] ACER/CEER, Annual Report on the Results of the Monitoring the Internal Electricity and Natural Gas Markets in 2011

[37] ACER Regulation, Articles 8 and 9(1).

[38] See ACER Regulation, Article 9(1); Electricity Regulation, Article 17; and Gas Directive, Article 36(4).

[39] Electricity Regulation, Article 17(5) and Gas Directive, Article 36(5).

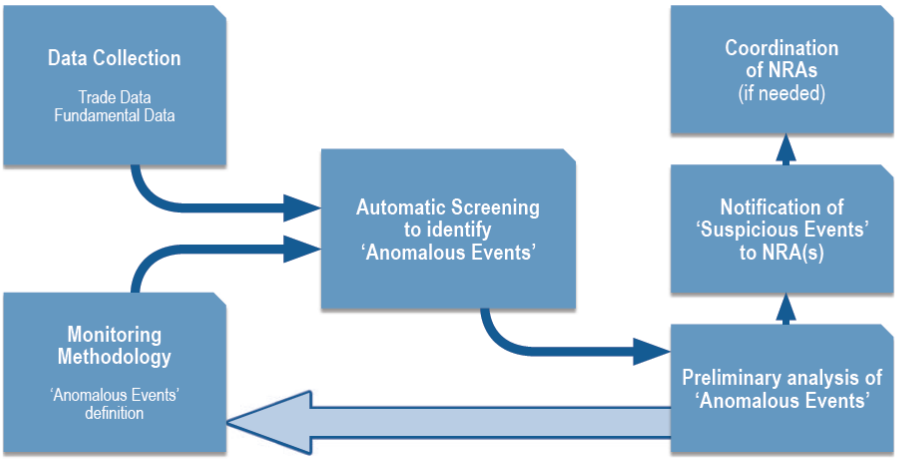
[40] (REMIT), OJ L 326/1-16.

ACER has been tasked with the collection and screening of the wholesale market transaction data across the European Union and an initial assessment of anomalous events before notifying suspected cases to the national regulatory authorities for investigation.

Although the NRAs should carry out their monitoring and enforcement tasks, ACER is expected to play a central role in the REMIT monitoring framework. A consistent European approach to market monitoring should avoid the risk of energy market transactions being relocated to jurisdictions where monitoring is considered to be less effective.[41]

The figure below (from ACER's 2016 REMIT Report) illustrates this approach.

Figure 6: The Agency's Market Surveillance Approach



Pursuant to Article 16(1) REMIT, ACER should ensure that the NRAs carry out their tasks under REMIT in a coordinated and consistent way. ACER should also coordinate the investigation of suspected cases of market abuse by national competent authorities when they involve more than one jurisdiction.[42]

Thus, whereas in the financial sector these rules are implemented by NRAs acting alone, in energy the institutional design is such that national trading platforms collect all the trading data and send it to ACER, the agency of energy regulators. ACER has the capability to analyse and process the trading data and then ACER alerts a national authority competent for a given trading platform about suspicious patterns of trade and then that NRA conducts the enforcement process.

REMIT enforcement is thus an example of networked enforcement because the enforcement competence is really divided between the supranational level (in this case ACER), and the national one, and this creates a powerful network of enforcers.

ENTSOs

[41] ACER, Work Programme 2012, at p. 3.

[42] Article 16(4)(c) REMIT

As regards ENTSOs, the Electricity Regulation stipulates that "*to ensure optimal management of the electricity transmission network and to allow trading and supplying electricity across borders in the Community, a European Network of Transmission System Operators for Electricity (the ENTSO for Electricity), should be established*" (Recital 17), to which all TSOs should participate (Article 4). The Gas Regulation has identical provisions on the establishment of an ENTSO for gas TSOs (recital 16 and Article 4).

One of the ENTSOs' key task is to develop the Network codes (NC) as provided for in Article 6 Electricity Regulation (and equivalent in Gas Regulation). These NCs specify technical rules on the operation of EU electricity and gas markets. They are designed to flesh out non-essential and technical rules and can only be adopted in areas listed in the relevant Articles.[43]

In order to ensure their cooperation, ACER has to monitor the execution of the ENTSOs' tasks, [44] and provide its opinion on the ENTSOs' network codes, the annual draft work program and the 10-year EU network development plan. When giving its opinion, ACER has to keep in mind the principles of non-discrimination, effective competition and the efficient and secure functioning of the European internal energy markets. [45]

ACER has to ensure that these 10 year plans will bring a sufficient level of cross-border interconnection open to third-party access. If this cannot be ensured, ACER has to prepare a duly reasoned opinion, together with recommendations, and present it to the ENTSOs, and also to the Commission, the Council and the European Parliament.[46]

Competition law

Finally, the period 2009-2016 saw unprecedented competition law enforcement in the energy field, especially through the use of commitment decisions.[47] This enforcement has been very clearly aimed at supplementing the goals of energy regulation especially unbundling.

Sometimes the enforcement of competition law has gone even beyond supplementing SSR or the traditional 'can opener' role for energy market liberalisation,[48] by elevating regulatory

[43] NCs should not be confused with the guidelines provided for in Art 18 of Electricity Regulation 712/2009 and Gas Regulation equivalent.

[44] See ACER Regulation, Article 6(2); and Regulation (EC) No. 714/2009 of the EP and of the Council of 13 July 2009 on conditions for access to the network for cross-border exchanges in electricity ('Electricity Regulation), OJ L 211/15-35, Article 9; and; Regulation (EC) No. 715/2009 of the EP and of the Council of 13 July 2009 on conditions for access to the natural gas transmission networks ('Gas Regulation'), OJ L 211/36-54, Article 9.

[45] ACER Regulation, Article 6(3) and (4).

[46] ACER Regulation, Article 6(4); Electricity Regulation, Article 9(2); and Gas Regulation, Article 9(2).

[47] See C Jones et al., EU Competition Law and Energy Markets, 2016, ch. 4.

goals to the level of competition law offenses. The Swedish interconnectors case is a case in point where the theory of harm was essentially that the use of a re-dispatching technique which penalized exports was an abuse of dominance.[49]

The systematic use of competition law to pursue the goals of the Third Package automatically coincides with a high degree of competition law-ization, given that competition law enforcement and SSR enforcement became almost indistinguishable.

3. Private Enforcement: preliminary rulings on public service obligations, internal market and State aid

The significant number of preliminary rulings in the period 2009-2016 is a good indicator of a significant level of private enforcement in the EU energy regulation.

In particular, the cases dealing with public service obligation, starting with *Federutility*,[50] show that European regulation has empowered private parties to police the national legal order for measures which run contrary to EU law. These cases are a strong signal of how much private parties have taken EU law into their hands and use it to counter national rules that they thought were incompatible with the European law. This is very close to an example of what we see as private enforcement in the competition law area.

Another string of preliminary rulings in the energy sector concern the rules on support for renewables. These cases too show that private parties have questioned internal market aspects of national rules. Cases like *Essent* I,[51] *Alands*,[52] *Essent* II,[53] show the extent to which private parties have used the European law to question the compartmentalization of the system of support for renewables.

A third trend which is still related to renewables but from a State Aid perspective is also relevant to gauge private enforcement. In cases like *Vent de Colère*[54] private parties have used European law to challenge aid which Member States have not notified the Commission for prior approval ex Article 108(3) TFEU.

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[48] Lowe Philip et al.: *Effective unbundling of energy transmission networks: lessons from the Energy Sector Inquiry*, Competition Policy Newsletter (2007).

[49] See Commission decision of April 14, 2010, relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union and Article 54 of the EEA Agreement - Case 39351 – Swedish Interconnectors, available at http://ec.europa.eu/competition/antitrust/cases/dec_docs/39351/39351_1223_2.pdf.

[50] See Judgment of 20 April 2010, Federutility and others (C-265/08, ECR 2010 p. I-3377) ECLI:EU:C:2010:205.

[51] See judgment of 11 September 2014, Essent Belgium, C‑204/12 to C‑208/12, EU:C:2014:2192.

[52] See judgment of 1 July 2014, Ålands Vindkraft, C‑573/12, EU:C:2014:2037.

[53] See Judgment of 29 September 2016, Essent Belgium (C-492/14) ECLI:EU:C:2016:732.

[54] See Judgment of 19 December 2013, Vent De Colère and others (C-262/12) ECLI:EU:C:2013:851.

Interestingly, these preliminary rulings are likely to be only the tip of an iceberg. Potentially there are many more cases of private parties seeking redress before national courts and using European energy law to keep in check national regulations which they consider to be incompatible with the European law. For instance, in 2012 and in 2016 the Spanish Tribunal Supremo handed down two important judgments on public service obligations as regards supply of energy to vulnerable customers, and by making an admirable analysis of the national provisions in the light of EU law.[55]

In sum, the string of preliminary rulings in the energy sector in the relevant period is also a powerful signal of how much this field has been 'competition law-ized'.

4. A First assessment of the New Package

A. Background To The Proposed Rules

Despite the panoply of measures, as well the large number of competition actions brought by DG Comp against most of the major incumbents, a recent Technical Report by the European Commission on 'the economic impact of enforcement of competition policies on the function of EU energy markets" published in late 2015, concluded that between 2005 and 2012 the intensity of competition on both wholesale and retail markets has declined. [56]

The goal of completing the internal market has also proved elusive. In February 2011 the European Council set the objective of completing the internal energy market 'by 2014 but by June 2016 the European Council called for 'Single Market strategies 'including energy, and actions plans to be proposed by the Commission and to be completed by 2018.

Indeed full and timely transposition of the complex provisions of the Third Package had been a challenge for most Member States and in fact none of the Member State had achieved full transposition by the deadline of March 2011. This resulted in the Commission opening a large number of EU Pilot cases as well as infringement procedures for failure to implement the Directives and/or for contravention of the requirements of these measures.[57] Other measures such as the Security of Supply Directive on electricity have been fully implemented but are considered inadequate in themselves to deal with security issues.[58]

The failure of the Third Package to deliver more intensive competition in a fully integrated energy market is to be explained by a number of factors. On closer inspection it is evident

[55] Tribunal Supremo sentencia no. 1425/2012, de 7 de febrero and sentencia no. 2334/2016, de 2 de noviembre.

[56] Published on 16.11.2015, at http://ec.europa.eu/competition/publications/reports/kd0216007enn.pdf

[57] See further, http://ec.europa.eu/energy/sites/ener/files/documents/2014_iem_communication_annex6.pdf

[58] See Report on progress concerning the SoS electricity Directive, COM (2010) 33o final.

that its three core objectives are in fact pursued by different actors with different powers and duties/ subject to various legal constraints. The misfit between the internal energy market with 20-20-20 goals, and the Climate Change Package of measures adopted in 2009, only exacerbates this. The Third Package takes the wholesale market as its core vehicle through which competition takes place and where costs and prices are established, whereas the climate change agenda- as announced in the 2014 Framework promotes technologies outside the wholesale market (and which are often zero marginal cost).

Moreover, the new Article on energy in the TFEU - Article 194 TFEU- added complexity to the issues. According to Article 194, the main aims of the EU's energy policy are to ensure the functioning of the energy market, ensure security of energy supply in the Union, promote energy efficiency and energy saving and the development of new and renewable forms of energy, and promote the interconnection of energy networks. However, as noted, these goals are sometimes difficult to reconcile.

As regards competences, Article 194 states that energy policy is a shared competence between the EU institutions and the Member States, albeit that the Commission enjoys exclusive competence in relation for example to the enforcement of the EU state aid rules. At the same time, Member States are entitled to determine their own 'energy mix' (Art 194(2)) although the extent of their freedom to do so in derogation from the Treaty provisions on free movement, state aid and competition is by no means certain. [59]

Against this backdrop, in November 2016 the Commission proposed a set of new measures which aim at improving the current framework. The next section attempts a first assessment of the proposed rules from the institutional perspective and the suggseted benchmark that we propose.

In particular, using the competition law-ization tool, the next section discusses the proposed institutional changes and whether they confirm the previous institutional trend or may well indicate a deparure t from it. This is not just an academic exercise but is important in order to understand what has to be dealt with and why from an institutional perspective in context of the Commission's proposed 'new market design initiative'. [60]

B. First assessment of the new rules from an institutional perspective

Overview

The previous section showed that in the period between 2009-2016, the period in which the Third Package came into force, there has been a significant level of competition law-ization. The table below summarizes this finding.

[59] See further A. Johnston

[60] IEA "*Re-powering markets*" (2016) suggests: "A market design with a high temporal and geographical resolution is therefore needed".

Direct Access to Regulatees	Networked enforcement	Private enforcement
TSO Certification **Decisions on exemption from third-party access**	**ACER** **REMIT** **ENTSO** **competition law**	**Preliminary rulings on public service obligations, internal market and State aid**

The next section takes stock on the new package which was on unveiled on November 30, 2016, from an institutional perspective. A word of caution is in order both because the new package is new and because it is large, involving eight measures of draft legislation, running to more than 100 pages. As a consequence, the assessment below is by necessity, highly tentative.

In general, the new package builds on the *acquis*, aiming at improving rather than eliminating or replacing the current framework. From an institutional perspective the question is whether the new package continues the trend of competition law-ization and to what extent.

1. Direct Access To Regulatees: certification and exemption continued and the new emphasis on competition law

The new package maintains the procedure for certification and exemption from third party access, which will thus remain a feature of direct access.

As regards competition law, the increased emphasis on State aid as a tool to complement EU energy regulation (as opposed to antitrust) may have an ambiguous impact on competition law-ization, which deserves to be treated under the heading of direct access (rather than networked enforcement, given that State aid approval is an exclusive competence of the Commission).

This is because, in formal terms, State aid is a type of instrument which brings together the Commission and Member States only; private parties are only considered as a source of information. But in practice, State Aid is also a powerful tool to address regulatees directly, precisely because, even if the EU State aid rules target, by definition, *State* measures, the aid measures have a beneficiary and the beneficiary is always an economic actor on the market. Through State Aid control the Commission thus may enjoy form of quasi direct access to regulatees – and can impose important conditions on them[61].

[61] A useful example is to be found in its varioius decisions on capacity mechanisms - the Commission has only found theses to be compatible if the Member State accepts certain conditions including commitments to expand interconnectors.

2. Networked Enforcement: new powers and a trend towards regionalization

Several provisions confirm a trend towards more networked enforcement

- First, ACER will have (i) more responsibility in elaborating and submitting the final proposal for a network code to the Commission (Article 5 of the draft Regulation establishing a European Union Agency for the Cooperation of Energy Regulators (recast) – the "Draft ACER Regulation"); (ii) a new role as regards regulatory matters left to a group of regulators only (Article 7 of the Draft ACER Regulation); (iii) a new supervisory role as regards the Regional Operational Centres for electricity– "ROCs" (on which see below- (Article 8 of the Draft ACER Regulation); (iv) a new supervisory power over power exchanges in the context of the market coupling process (Article 9 of the Draft ACER Regulation); and (v) a new power to approve the EU-wide methodology for assessing generation adequacy, which will then unlock Member States' ability to set up capacity remuneration mechanisms (Article 10 of the Draft ACER Regulation).

- Second, the expanded role of the ENTSOs. In particular, the ENTSO for electricity – ENTSO-E will have new responsibilities in connection with (i) the EU-wide resource adequacy assessment, (ii) technical specifications for cross-border participation in capacity remuneration mechanisms (Article 27(1), of the draft Regulation on the internal market for electricity (recast) - the "Draft Electricity Regulation");and (iii) the cooperation within the ROCs (Article 27(1), (e) and f) of the Draft Electricity Regulation);

- Third, the addition of a new element in the institutional architecture, that is the creation of the ROCs between TSOs. All TSO within a region designated by ACER under its new tasks will have to set up a ROC (in the territory of one of the Member States within the region). According to Article 32(3) of the Draft Electricity Regulation: "*Regional operational centres shall complement the role of transmission system operators by performing functions of regional relevance. They shall establish operational arrangements in order to ensure the efficient, secure and reliable operation of the interconnected transmission system*". A list of the ROCs' tasks is set out in Article 34 of the Draft Electricity Regulation. These tasks include "*coordinated capacity calculation*", "*facilitate the regional procurement of balancing capacity*", "*regional week ahead to intraday system adequacy forecasts and preparation of risk reducing actions*", and a number of tasks related to coordinated management of crisis situation. ROCs have the power to adopt decisions that are binding on the member TSOs (Article 38 of the Draft Electricity Regulation). ROCs report to ACER as well as to the relevant NRAs.

The creation of the ROCs signals a move which is specific to the energy sector. While there are numbers of regulatory cornerstones which are valid across the EU (e.g., that energy prices should be the product of demand and supply), a number of significant aspects of regulation (e.g., the borders of bidding zones) will be left to a new institutional entity that is this regional aggregation of TSOs.

This is a new approach and is unique to energy (in telecommunications there is a strong drive towards a *single* approach across the EU). It shows that EU regulation in the energy sector follows a specific trajectory marked by a mix of 'single-ness' of the internal market and regionalization, that is to have common concepts where possible but then a number of its specific aspects are varied at an intermediate level –the regional level-between the Union and the single Member State.

This development marks a step towards a different sort of competition law-ization. From an institutional perspective, competition law enforcement is highly 'standardized', in the sense that the Commission has the power to maintain a consistent approach across the network, steering all NCAs into one direction. By contrast, in the case of energy, the Commission seems ready to relinquishing power to a sort of intermediate body which is the aggregation of TSOs, leaving th e supervison of these RCOs to NRAs (subject to some ACER oversight).

3. Private Enforcement

Perhaps one of the most remarkable features of the new package is the extent to which it re-regulates markets, thus impacting directly on operators' rights and obligations.

First of all, one may consider the rules on market design, e.g., the principle that prices should be the result of supply and demand. This is significant novelty. In the past, the use of pool markets or power exchanges was the result of spontaneous convergence but it was not part of EU law. Thus, the institutional landscape of electricity trading was left entirely to national dynamics. EU law colonized this field, first by introducing rules on market coupling which provide for a number of obligations on power exchanges and subject them to regulatory oversight.[62]

Now the new package sets out detailed provisions on how markets should be designed, which in turn gives operators clear rights and obligations. These operators may thus be able to invoke EU law against national implementing measures which they may deem contrary to EU law – just as it was the case in the past with, e.g., public service obligations.

A similar dynamic may impact the new rules on retail tariffs and their progressive abolition. As noted, this is an aspect which enjoyed centre stage in preliminary rulings in the past. The new package lays down clear rules, and operators can be expected to follow up in national fora to enforce their rights. The same applies to the new rules on consumer protection, including the obligation to provide information to customers, the rules to favour the switching

[62] Regulation 2015/1222 of 24 July 2015 establishing a guideline on capacity allocation and congestion management.

between suppliers, and on billing practices. These developments can be seen as part of a trend towards 'private enforcement' of EU energy regulation.

4. A Tentative Conclusion On The Institutional Direction Of The New Package

The foregoing suggests that a trend towards more competition law-ization. However, this conclusion must be nuanced by taking into account the main aspect of the draft regulation on the Governance of the Energy Union (the "Draft Governance Regulation").

As its main objective the Draft Governance Regulation provides for Integrated National Energy and Climate Plans (Article 3). These plans are the key instrument to ensure that Member States comply with the general direction of EU energy policy – that is all five objectives listed in the Regulation and further detailed in its Annex II.. The main enforcement tool in the hands of to the Commission is a recommendation (Articles 26 and 28). This calls for two comments:

First of all, elevating these plans and the follow up recommendation to the main institutional tool to elicit compliance is not exactly in line with competition law-ization, which is built on the Commission ability to steer a policy by directly accessing regulatees, without Member State intermediation. As a consequence, a continuing trend towards competition law-ization is now also combined with the introduction of a tool that requires cooperation between the Commission and Member States.

Second, the choice of a recommendation as the legal instrument begs the question as to its effectiveness. Perhaps, a parallel can be instructive with another field of EU law where recently recommendations have been adopted as a tool to elicit compliance, that is the excessive deficit procedure (Article 126 TFEU). The Excessive Deficit Procedure operationalises the limits on the budget deficit and public debt given by the thresholds of 3% of deficit to GDP and 60% of debt to GDP not diminishing at a satisfactory pace.

If a Member State is going beyond the 3% threshold, the Commission has the power to issue a recommendation with corrective measures. However the recommendation is only the start of a very elaborate process –also provided in the legislation- to cajole a Member State into complying with its duties, a process which may eventually involve sanctions.

The effectiveness of recommendations in the field of Article 126 TFEU is at best unclear. Often Member States manage to invoke a variety of formal and informal avenues to obtain additional leeway. Thus, the experience of the excess deficit procedure casts a shadow on the proposed use of recommendations to steer EU energy policy, also because –in contrast to the excessive deficit procedure- the current proposal does not envisage any specific sanctions.

Perhaps this negative assessment could be mitigated if one could assume that failure to comply with a recommendation triggered a fast recourse to the infringement procedure. However, even if this assumption proved correct, infringement procedures have limited

ability to coerce compliance, not least because of the time-lag between the launching of the procedure and a final Court judgment.

At first sight the new package seems to continue the trend towards competition law-ization. However, the use of the Integrated National Energy and Climate Plans as the core mechanism to compliance with EU energy law in the Draft Governance Regulation shows a powerful trend also towards a 'classic' model of cooperation with Member States, rather than direct Commission intervention and direct access to regulatees.

Only time will tell if these two trends might indeed be mutually reinforcing, e.g., because the plans concern aspects which are complementary to the areas at the core the competition law – ization, or whether the effectiveness of competition law-ization will be limited by Member States and how they instrumentalize the new plans.

5. Concluding remarks

The Third Package brought about an institutional structure that shares a number of features with competition law. In a number of respects this type of SSR provides for direct access to regulatees, a network of enforcement, and an empowering of private operators to act as 'SSR enforcers' alongside NRAs. This process can be described as a 'competition law-ization' of the institutional structures of EU energy regulation.

The new package unveiled in November 2016 builds on the *acquis*, reinforcing the network aspects of enforcement and the role of private operators. However, there is also a shift to more Member State involvement through the adoption of Integrated National Energy and Climate Plans and the related Commission Recommendation to Member States as key institutional devices. Competition law-ization and cooperation with Member States may nonetheless have the potential to be complementary –rather than contradictory– trends.