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Liberalization & Competition in the EU Energy Markets



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Commission Tools

- Competition rules
- Liberalization Directives

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EU Competition Rules

- Level playing field for all participants through the application of:
 - Anti-trust rules (arts. 81, 82 and 86)
 - Merger regulation rules
 - State Aid rules (art. 87)

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EU Regulatory Models: Electricity

- Sector specific rules addressed in a Directive
- Harmonisation attempts to establish common rules for all players
- Creation of an Internal Market in electricity

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EU Competition Rules

- The Commission:
 - Will encourage the decentralised application of competition rules
 - Will normally not intervene in areas where:
 - sector specific regulation provides more detailed rules or,
 - goes beyond the requirements of EC Competition law

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EU Competition Rules

- The Commission:
 - Will intervene where:
 - There are cases having a particular political, economic and legal significance for the Community, I.e. affecting competition in several MS
 - To ensure a minimum level of harmonization of rules covering market conduct

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Article 81 EC

- Prohibits agreements with the
 - object or effect of
 - distorting competition
 - which may affect trade between Member States
- Those agreements are automatically null and void
- Some exemption possible if conditions fulfilled

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Article 81 EC

- Exemptions when an agreement:
 - Contributes to improve production or distribution of goods
 - Promotes technical or economic progress
 - Allows consumers a fair share of the benefit
 - Does not contain restrictions which are not indispensable
 - Does not eliminate competition

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Article 82 EC

- Prohibits undertakings from
 - abusing
 - a dominant position
 - that affects trade between Member States
- Must be *dominance + abuse*
- Can include joint dominance

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Article 82 EC

- Prohibition to impose unfair (i.e. predatory or excessive) selling prices or other unfair trade conditions
- A price is unfairly high if it is excessive in relation to the economic value of the service provided

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Concept of Dominant Position

ECJ Continental Can judgement

“...the power to behave independently, which puts them in a position to act without taking into account their competitors, purchasers or suppliers.”

Types of behaviour caught by Articles 81 and 82

- Activities between undertakings
 - Market sharing or customer allocation
 - Collective bidding and boycotts
 - Exclusive agreements for:
 - Supply
 - Purchase
 - Conditions for dealing with third parties
 - Joint ventures where competition between joint venturers is effectively eliminated

Types of behaviour caught by Articles 81 and 82

- Activities by dominant undertakings
 - Exclusionary activities
 - Refusal to supply key products
 - Sale only on long-term basis
 - Denial of access to essential facilities
 - Excessively high or low prices
 - Certain discounts
 - Bundling\tying

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Article 86 EC

- Application of competition rules to:
 - Public undertakings and undertakings to which Member States grant special or exclusive rights
 - Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly

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Conditions for application

- Neutrality with respect to public or private ownership of companies
- Freedom to define what constitutes services of GEI subject to control for manifest error
- Proportionality so that restrictions on competition do not create unnecessary distortions of trade

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Types of behaviour caught by Article 86 EC (Electricity)

- Network security reliability
- Security of supply
- Right to be connected to the grid
- Special consumer protection
- Service standards

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Article 86 EC

- Examples of application: recovery of stranded costs
 - Austria: Annual payments (up to Euro 132 million) to a lignite fired plant as a compensation for a service in the GEI as regards security of supply
 - Spain: Premiums (up to Euro 1774 million) for the generation of electricity out of indigenous coal as a compensation for a service in the GEI as regards security of supply

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Article 87 EC

- Incompatible Aid
 - Any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods

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Article 87 EC

- Compatible Aid:
 - Aid having a social character granted to individual consumers on a non-discriminatory basis
 - Aid to make good the damage caused by natural disasters or exceptional circumstances
 - Aid granted to certain areas of the FRG

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Article 87 EC

- May be compatible Aid:
 - Aid to promote economic development in areas with abnormally low standard of living or with serious underemployment
 - Aid to promote the execution of an important project of common European interest
 - Aid to facilitate the development of certain economic activities or economic areas

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Article 87 EC

- Relevant criteria for the determination of aid as State Aid:
 - It brings an advantage to the beneficiary
 - Positive benefits such as subsidies, cross-subsidies, cash facilities
 - Relief from charges, such as tax credits, social charges and other payments
 - It is financed through State resources
 - It is selective, benefiting only some companies

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Article 87 EC

- Examples of application: recovery of stranded costs
 - Austria: Annual payments (up to EURO 456 million) to hydropower projects, financed by contributions of the regional network operators and other customers
 - Longest possible duration of the compensation system: 31 December, 2009

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Article 87 EC

- Examples of application: recovery of stranded costs
 - Spain: Compensation (linked to the evolution of the market price) for investments in electricity production assets by electricity companies formerly covered by the State tariff fixing mechanism
 - EURO 8664 million will be paid until 31 December, 2010, financed through a levy on electricity consumption

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Competition Policy Considerations

- Free competition on supply side suppliers. DG Com will investigate:
- Companies acting on the same product and geographical market that do not enter into competition with each other (Cartel or jv arrangement)
- Companies acting in different geographical markets - restrictions to import or export a product into or from other national markets

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Competition Policy Considerations

- Free competition on demand side customers
- Customers shall have the possibility to change/choose freely between suppliers
- Locked in customers - customers that have entered into long-term exclusive supply contract with the dominant operators

EC Merger Control

Transactions subject to review

- Notification is compulsory
- Concentration with a Community dimension
 - Community dimension: turnover threshold
 - Concentrations: change of control or decisive influence
 - Joint-ventures: full functionality

EC Merger Control

Transactions subject to review

- Community dimension:
 - Thresholds:
 - combined turnover is 5 billion worldwide and
 - individual turnover of at least two parties is €250 million EU-wide
 - unless each party achieves 2/3 turnover in same MS
 - NB: secondary thresholds*
 - Exclusive jurisdiction (*NB: exceptions*)

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• Regulation of Infrastructure at
EU level: Commission

involvement

- Creation of electricity/gas regulatory for a integrated by EC officials, national representatives and industry associations
 - Evaluate progress in the implementation of the Directives
 - Provide assistance in their interpretation
 - Propose solutions to some implementation problems

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• Regulation of Infrastructure at
EU level: Commission

involvement

- Proposed New Package on Energy Infrastructure
 - List of priority projects (12)
 - Action Plan (13 measures)
- Possibility to use a Commission's Directive (EC Art. 86.3) to speed up the liberalization process

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Conclusions

- Liberalization creates a series of competition problems that need to be addressed to ensure the success of market opening
- In liberalizing industries EC competition law intervenes against restrictions on competition which either:
 - impede the creation of a level playing field
 - have the effect to preserve historic monopoly supply areas

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Conclusions

- Enforcement activities of the Commission are mainly focus on restrictive practices with a structural impact
- e.x. network issues and cross border trade problems in the electricity sector



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