

Competition versus cooperation – new approaches on the energy market considering aspects of competition law

Professor **Adrian Dumitru TANȚĂU**¹
PhD. student **Ana-Maria Iulia ȘANTA**²

Abstract

The common energy policy of the European Union is a current topic on the agenda of European institutions, reflected in package “Clean Energy for All Europeans”, proposed by the European Commission. Despite several harmonization attempts, the consensus needed for a common policy and for an Energy Union has not been reached yet. One possible element why we still do not have a common energy market is the lack of competition in the energy sector. In this context, the present research paper analyzes to what extent competition can be a key-factor in ensuring the modernization of the energy sector. Aspects of competition law which are relevant for building a common energy market are highlighted in the present research paper. Furthermore, the present article raises the question how important cooperation is, searching the proper balance between competition and cooperation. The present article uses an interdisciplinary research method, combining the analysis of primary and secondary European law, of legal instruments and provisions, considering the teleological method, with the assessment from a business and economics point of view. Case law and case studies from Member States of the European Union provide best practice models for the energy sector and present an international comparative perspective.

Keywords: competition, cooperation, energy market, competition law, clean energy, Energy Union.

JEL Classification: K21, K22, K32, K33

1. Introduction

Clean Energy is a currently debated issue on the agenda of European institutions, given the increasing importance of promoting sustainability at global level. In this international context the European Union aims to foster the use of alternative sources for producing energy. Such renewable resources have a good impact on the environment and on the health of European Union consumers. This trend is reflected in the package “Clean Energy for All Europeans”, which was proposed by the European Commission in November 2016. This package contains measures for designing a new energy policy at European Union level and possible instruments for designing a new energy market, a common energy market of the European Union. This ambitious project would generate better living conditions for

¹ Adrian Dumitru Tanțău - Bucharest University of Economic Studies, Bucharest, Romania, adrian.tantau@fabiz.ase.ro.

² Ana-Maria Iulia Șanta - Bucharest University of Economic Studies, Doctoral School of Business Administration, Bucharest, Romania; University of Vienna, Faculty of Law, Vienna, Austria, anamaria_iulia_santa@yahoo.com.

the European Union energy consumer, convenient energy prices and a clean environment. It would as well contribute to a sustainable use of energy resources, which is an important aspect, as the energy resources of the European Union are limited. It is a very challenging project, as it is an interdisciplinary topic, related to business, economics, European Union law, national law, that has to be harmonized, environmental issues and aspects of policy. In this context, it is interesting to analyze why the European Union still does not have such a common energy market, although there were several steps performed in this direction. The present article presents the challenges that the European Union is confronted with when building a common energy market, emphasizing the significant role of competition in this context. It presents as well how aspects of competition law are reflected in the energy sector and how more competition in the sector would contribute to an improvement of the sector. The present paper discusses the importance of competition authorities in the context of a liberalized and deregulated energy sector. Besides illustrating the benefits of competition in the sector, the present research points out the importance of cooperation in this field at European Union level.

The new perspective presented by this research paper compared to existing literature is given by the new topic of an Energy Union at the level of the European Union as a basis for common policies and strategies reflected in the documents of the package “Clean Energy for All Europeans”. Another new aspect in the energy policy is the consumer focus and the drafting of policy measures in order to achieve the best possible situation for the consumer in terms of convenient prices but as well of good living conditions. A new approach is proposed offering more competition in the sector, combined with a consolidated cooperation, on an institutional basis, between Member States of the European Union and their authorities. Given the fact that these topics are newly debated subjects at European Union level, there is a research gap in this field.

This approach is illustrated as well in the structure of the present paper, which shows to what extent competition is necessary in the energy sector and to what extent cooperation is needed and ensured by an institutional framework allowing it. The present article uses a multidisciplinary research method, combining aspects of law, business and economics. The analyzed issues are illustrated by case law and case studies regarding the liberalization of the energy market, which offer an international perspective on the debated topic. The legal instruments contained in the package “Clean Energy for All Europeans” will be analyzed considering the teleological interpretation method.

As this field is a dynamic one and it will for sure expand, the conclusions of the present research can be further developed and used as well for other research projects or papers.

2. Research topic

The present paper addresses a very new and currently debated topic, namely drafting a common energy policy at European Union level, based on common values and resulting in an Energy Union and in a common energy market. This would be the strongest form of market integration in this sector, similar to the general common market of the European Union but limited to the niche of the energy sector.

In the past twenty years there have been several attempts of reaching more integration within the energy sector, starting with harmonized standards and continuing with European Union Directives in specific energy sectors, such as electricity or gas, but a common energy market is still not in place. These steps towards harmonization are analyzed in the present research, outlining the principles and values that build the basis for such a common framework. The present paper addresses the question why this common energy market is still not in place despite the harmonization efforts in this sector. Furthermore, it illustrates the challenges and possible impediments on the way towards a common energy market. It further outlines the role of competition and of competition authorities in improving the functioning of a common energy policy in a liberalized energy sector, emphasizing the role of cooperation at European Union level in this field.

The liberalization and deregulation process on the energy market had as consequence an improved importance of competition authorities³, which is an aspect illustrated in the present research paper.

The improved competition in the sector should be balanced by a proper degree of cooperation between authorities, a cooperation that is designed at institutional level. The package “Clean Energy for All Europeans” contains legal instruments for a common framework in the field of energy and it contains instruments at institutional level, for example the creation of the Agency for the Cooperation of Energy Regulators⁴. This dimension of cooperation is analyzed in the present research paper. The cooperation related on the transfer of competencies from national level to the supranational level of the European Union is as well considered.

The studied literature shows that already twenty years ago there were plans drafted for building a common energy market or at least a harmonized energy sector⁵. The potential of renewable energies was mentioned already at that time⁶.

The documents contained in the package “Clean Energy for All Europeans” point out at transparency and at the consumer focus as key elements of

³ See Sioshansi, Fereidoon, P. and Pfaffenberger, Wolfgang: *Electricity market reform – an international perspective*. Oxford: Elsevier, 2006, p. 49.

⁴ See http://ec.europa.eu/energy/sites/ener/files/documents/1_en_autre_document_travail_service_part1_v2.pdf, consulted on 1.10. 2018.

⁵ See Briche, Brigitte: *Die Elektrizitätswirtschaft in der Europäischen Union, Institutionelle und materielle Aspekte*, Nomos Verlagsgesellschaft Baden-Baden, 1997, p. 50.

⁶ *Idem*, p. 15.

the common energy policy⁷. They are as well goals of the internal market of the European Union, not only of the energy market. These goals must be achieved in the context of the single market of the European Union, which is in fact the core of this construction⁸.

The importance of free competition in the energy sector⁹ and of free access to the market, without any discrimination¹⁰, is outlined in the studied specific literature. The provisions of European Competition Law must be applied in the energy sector, an element that is stated as well in the studied literature¹¹.

Evaluations of European institutions, for instance the evaluation of the European Commission has been considered in the present article. This evaluation points out that progress has been achieved on the energy market at European Union level, that consumers now have more benefits, but that there is still space for improvement. The market still has some access barriers that should be removed in order to build a common market. State aid should be as well avoided, as it disturbs competition on the market¹².

The present research is in line with the previous literature, further developing it in the new context of European policies, of consumer-oriented strategies and of sustainability, which are promoted at global level. By adding these new dimensions of great importance, the present paper brings a contribution to research and builds a bridge between previous literature and current international debates and trends.

3. Research structure

According to the research topic, the structure of the present paper highlights on the one hand the important role of competition and competition law applied in the energy sector in order to create a modern business environment, with the better options for energy consumers.

On the other hand, the paper shows how important cooperation is for having a common framework at political, legal, economical and institutional level. Cooperation between Member States is performed in the field of energy, by establishing the Agency for the Cooperation of Energy Regulators. Cooperation is performed as well in terms of competition issues by means of the European Competition Network.

⁷ See <https://ec.europa.eu/energy/en/news/new-electricity-market-consumers>, consulted on 1.10.2018.

⁸ See Lengauer, Alina: *Einführung in das Europarecht*, Europäisches Verfassungsrecht (2014/2015), p. 89.

⁹ See Sioshansi, Fereidoon, P. and Pfaffenberger, Wolfgang, *op. cit.*, 2006, pp. 35-48.

¹⁰ See Glachant, Jean-Michel and Lévêque, François: *Electricity reform in Europe – Towards a Single Energy Market*, Edward Elgar Publishing Limited, Cheltenham, UK, Northampton, MA, USA, 2009, p. 85.

¹¹ Briche, Brigitte, *op. cit.*, 1997, pp. 90-103.

¹² See http://ec.europa.eu/energy/sites/ener/files/documents/1_en_autre_document_travail_service_part1_v2.pdf, consulted on 1.10.2018

The aspects of competition theory and of competition law are illustrated by practical examples, by case studies showing how the liberalization process of the energy sector has been developed in some European countries. These can serve as best practice models.

Relevant case law shows how competition law provisions found their application in the energy sector and how this issue was reflected in the judgements of the Court of Justice of the European Union. Becoming part of the European Union law order, these principles gained a high importance and must be observed by every Member State of the European Union.

4. Research methodology

The present article uses an interdisciplinary research method, which combines an interpretation of legal aspects, mainly European Union Law aspects, with the assessment from an economic perspective as well as from the perspective of European policy. This interdisciplinary research approach is appropriate for the interdisciplinary topic of the paper. The relevant literature (such as books, monographies, scientific articles, relevant legislation, jurisprudence, websites) has been studied. Literature written about twenty years ago has been considered in order to study the evolution of trends and ideas at European Union level. The literature review outlined that the present article is in line with previous research.

The provisions of European Union Law have been analyzed. For this reason, primary law has been analyzed, for instance the Treaty on the Functioning of the European Union, with a special focus on article 101 and 102 regarding European Competition Law. Secondary law has been as well analyzed in the present paper, for instance the proposal for a Directive on the promotion of the use of energy from renewable sources and the proposal for a Directive of on energy efficiency.

The teleological interpretation method has been used in order to point out the importance of the goals of the European Union and of the Common Market Policy. Legal provisions have to be analyzed considering these common goals that represent values of the European Union, such as consumer protection, sustainability and solidarity.

Another research method that has been used is the interpretation of case law. In this context, the case *Almelo* has been analyzed in the present paper. The importance of the case *Almelo* is given by the fact that it points out that competition rules must be applied in the energy sector and as well in the fact that in the *Almelo*-case energy is defined as a commodity¹³. The importance of European Union law is as well outlined in the case *Costa versus E.N.E.L.*¹⁴, which shows the

¹³ See Case C-393/92 Municipality of *Almelo* and others v NV Energiebedrijf Ijsselmi, Judgment of the Court of 27 April 1994, European Court Reports 1994 I-01477, ECLI identifier: ECLI:EU:C:1994:171, para 28.

¹⁴ See Case 6-64 Flaminio *Costa v E.N.E.L.*, Judgment of the Court of 15 July 1964, English special edition, 1964 00585, ECLI identifier: ECLI:EU:C:1964:66.

prevalence of European Union law over national law and the fact that national law must be in line with the provisions of European Union law.

Case studies are referred to in the present paper in order to provide best practice models for the energy sector. The liberalization of the energy market in the United Kingdom is a very often used example that shows the importance of unbundling of energy production and energy distribution.

Another studied example is the Nordic electricity market, that includes Denmark, Finland, Norway and Sweden. This model shows the positive effects of separating the energy sector into a competition-based field, such as energy generation and retail and a regulated field, such as the distribution of energy¹⁵.

The German energy market provides the example of investing in the sector considering aspects of environment and sustainability. It shows as well how important is to find the right degree of regulation in the energy sector and to find the proper balance between competition and regulation¹⁶.

The presented case studies offer a comparative view of the analysed issues and illustrate an international perspective on measures to be taken to improve the energy market.

5. Solutions

The conducted research pointed out that there is need for more competition in the energy sector. This would lead to better conditions for the consumer. A business environment with no discrimination and with transparent market conditions, including market access with no barriers¹⁷, is needed. Otherwise there will exist a market foreclosure in the energy sector and a common market will not be in place at the level of the European Union. The rules governing European Competition Law should apply in the energy sector in order to have a functional common market, like the internal market of the European Union. Therefore, article 101 of the Treaty on the Functioning of the European Union applies in the energy sector, so that anti-competitive agreements, like cartels or other coordinated market behavior, are forbidden. Horizontal agreements as well as vertical agreements that result in price fixing or in the distortion of competition on the market are forbidden. The legal exemption in article 101 paragraph 3 of the Treaty on the Functioning of the European Union applies if the conditions are fulfilled, if there is a significant improvement of the conditions for the consumer, with measurable benefits for him, if there still is enough competition on the market and if the principle of proportionality is observed¹⁸.

The provisions of competition law are thus very important for the design of the common energy market at the level of the European Union. Given this fact,

¹⁵ See Sioshansi, Fereidoon, P. and Pfaffenberger, Wolfgang: *op. cit.*, 2006, p. 145.

¹⁶ *Idem*, pp. 235-236.

¹⁷ See Glachant, Jean-Michel and Lévêque, François, *op. cit.*, 2009, p. 85.

¹⁸ See Treaty on the Functioning of the European Union, Consolidated version of the Treaty on the Functioning of the European Union, OJ C 326, 26.10.2012, art. 101 (3).

competition authorities have an important role in this context, as they have important tasks in ensuring a functional market. National competition authorities as well as the European Commission as supranational competition authority of the European Union are important actors in this constellation. The competition authorities at national level and supranational level cooperate within the European Competition Network in solving cross-border competition issues.

This shows that cooperation is a key aspect related to the common energy market of the European Union. There is need for more cooperation within the Member States of the European Union, which could be performed given the institutional framework of the package “Clean Energy for All Europeans”, which foresees an Agency for the Cooperation of Energy Regulators¹⁹. This cooperation would improve the interconnection on the energy market. Interconnection on the energy market is still at low level²⁰, so there is potential for improvement. Member States of the European Union must as well cooperate when establishing the competency transfer from national level to the supranational level of the European Union, as the energy sector is one with shared competencies.

The consumer focus is a key-feature of a common energy policy at the level of the European Union and it represents an element of novelty in the harmonization of the energy sector compared to the previous harmonization attempts. A consolidated consumer protection and the principle of transparency must be considered when drafting the project of a common energy market of the European Union²¹.

The orientation towards sustainability represents a new orientation of the common energy policy and responds to the situation of energy poverty that our society is dealing with at global level.

These solutions can be further analyzed and improved and could be used as well in future research projects, as there is a research gap in this new, developing field of great interest.

6. Conclusions

Building a common framework in the energy sector has been a topic of great interest within the European Union. Several attempts creating an integrated market have been performed. Important steps have been made by the harmonization of rules and standards on the energy market. Furthermore, several fields of the energy market, such as electricity and gas, have common European Union Directives that bring a legislative alignment of provisions. Nowadays there

¹⁹ See http://ec.europa.eu/energy/sites/ener/files/documents/1_en_autre_document_travail_s_service_part1_v2.pdf, consulted on 1.10. 2018.

²⁰ Mastropietro, Paolo; Rodilla, Pablo; Battle, Carlos: *National capacity mechanisms in the European internal energy market: Opening the doors to neighbours*. „Energy policy”, 2015, volume 82, pp. 38-47.

²¹ See Gundel, Jörg and Lange, Knut Werner: *Die Umsetzung des 3. Energiebinnenmarktpakets*, Tagungsband der Zweiten Bayreuther Energierechtstage 2011, Mohr Siebeck Verlag, Tübingen, 2011, p. 24.

are common values upon which a common policy can be drafted at the level of the European Union. The Energy Union can be established as long as there are common values and a common policy for this sector. A next step would be a common energy market of the European Union. In order to achieve such a common market, competition must be improved in the sector. At the same time, it is important to find the right balance between competition and cooperation within the sector. The package “Clean Energy for All Europeans” aims to create a common legislative and institutional framework for such a cooperation. The elements that are considered when building the common energy market are the consumer focus and the environment protection in order to ensure sustainability.

Given the fact that the consumer-focus and the sustainability are nowadays principles, values of the European Union and topics of great interest, debated at European Union level but as well at global level, the present research can be further developed, so that the results of the present paper can be further improved and they can be used as a starting point for future research in this dynamic field.

Bibliography

1. Briche, Brigitte: *Die Elektrizitätswirtschaft in der Europäischen Union, Institutionelle und materielle Aspekte*, Nomos Verlagsgesellschaft Baden-Baden, 1997.
2. Glachant, Jean-Michel and Lévêque, François: *Electricity reform in Europe – Towards a Single Energy Market*, Edward Elgar Publishing Limited, Cheltenham, UK, Northampton, MA, USA, 2009.
3. Gundel, Jörg and Lange, Knut Werner: *Die Umsetzung des 3. Energiebinnenmarktpakets*, Tagungsband der Zweiten Bayreuther Energierechtstage 2011, Mohr Siebeck Verlag, Tübingen, 2011.
4. Lengauer, Alina: *Einführung in das Europarecht*, Europäisches Verfassungsrecht (2014/2015).
5. Mastropietro, Paolo; Rodilla, Pablo; Battle, Carlos: *National capacity mechanisms in the European internal energy market: Opening the doors to neighbours*, „Energy policy”, 2015, volume 82.
6. Sioshansi, Fereidoon, P. and Pfaffenberger, Wolfgang: *Electricity market reform – an international perspective*. Oxford: Elsevier, 2006.
7. Treaty on the Functioning of the European Union, Consolidated version of the Treaty on the Functioning of the European Union, OJ C 326, 26.10.2012.
8. Proposal for a Directive of the European Parliament and of the Council amending Directive 2012/27/EU on energy efficiency, Eur-Lex (official website) retrieved from URL <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1485938766830&uri=CELEX:52016PC0761> [accessed on 12.01.2018].
9. Proposal for a Directive of the European Parliament and of the Council on the promotion of the use of energy from renewable sources, Eur-Lex (official website) retrieved from URL <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52016PC0767R%2801%29> [accessed on 12.01.2018].