

Unbundling – A Solution for More Competition on the Energy Market

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Abstract

The energy sector is one of great importance within the European Union, as it is a strategic field, having at the same time a high impact on consumers. Taking into consideration these aspects, the European Union aims at creating a common energy policy, which could be the basis for a common energy market at European Union level. This vision receives a concrete expression in the package “Clean Energy for All Europeans”, an initiative of the European Commission proposing a common legislative framework for an Energy Union, with a focus on promoting energy efficiency and renewable energy, for the benefit of the consumers within the European Union and for a modernized energy sector. In the past twenty years there were several attempts to design a common energy policy, based on harmonized standards and on common values. The results of these harmonization attempts are reflected in the package “Clean Energy for All Europeans”. Nevertheless, the European Union does not yet have a common energy market and one possible reason is the lack of competition in this sector. The liberalization of the energy sector achieved some progress in this direction, but there is still potential for improvement. The present article analyzes possible solutions adopted in several countries in order to ensure a more competitive energy sector. Given this context, the present paper deals with the assessment of unbundling as a solution for achieving more competition in the energy sector. Applying the provisions of competition law in the field of enforcement of energy law and its importance are research topics of the present article. In order to answer to the research questions, a multidisciplinary approach is used in the present article, combining aspects of law, business and economics. Case studies illustrate the liberalization of the energy sector in several countries and relevant case law completes this image with the legal perspective on the analyzed market issues. A comparative international perspective is used as a research approach in the present article in order to enlighten interdisciplinary aspects related to unbundling as a solution for more competition on the energy market.

Keywords: unbundling, competition, energy market, energy sector, Energy Union, competition law, energy law.

JEL Classification: K21, K22, K32, L51, M21

1. Introduction

Energy policy is a field of great interest on the current agenda of European Union institutions, addressing at the same time topics of law, business and economics. This field is connected to aspects related to energy as a strategic field, to energy supply, to consumer protection, to energy law and competition law. As it is an

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important field, the European Union aims to design a common energy policy, based on common values and on harmonized standards. This vision regarding the future of the energy sector in the European Union is illustrated in the package “Clean Energy for All Europeans” that was initiated by the European Commission in November 2016 and which contains concrete proposals for a modernized energy sector, based on a common energy policy and on an Energy Union. Important documents of this package, for instance the new Energy Efficiency Directive³ and the new Renewable Energy Directive⁴.

During the past twenty years, there were several harmonization attempts on the way to the Energy Union. The package “Clean Energy for All Europeans” released like the first harmonization attempts twenty years ago as well, at the initiative of the European Commission, is a result of the progress achieved in creating a common legal and institutional framework allowing a common energy policy and a common energy market. Given these attempts to create a unified framework in the field of energy policy, an interesting research topic is related to the fact that despite these harmonization attempts, a common energy market of the European Union does not yet exist. One of the possible reasons is the lack of competition in the energy sector. It is important to consider the fact that this sector was once a state-owned sector, a monopoly which was subject to a gradual liberalization process, shaped differently in each country. The present paper evaluates these issues and analyzes competition as a possible factor to ensure a competitive energy sector. Furthermore, it analyzes and assesses unbundling as a possible solution for more competition on the energy market, illustrating the perspectives and limitations of unbundling in this context.

The present paper deals with the question to what extent unbundling can be a solution for achieving more competition in the energy sector. The implementation of this concept in several countries is illustrated by case studies showing different opinions on this approach. Relevant case law is used in order to complete the image with the legal perspective regarding unbundling as a tool for achieving more competition in the energy sector.

2. Research topic and research methodology

The research topic of the present paper is one of great importance and of high interest at the European Union level. Competition is identified to be one of the main reasons why there is not yet a common market of the energy at the level of the European Union. The present paper analyzes the liberalization process in the energy sector, with a special focus on unbundling as a solution in order to ensure more competition on the energy market. The perspectives opened by unbundling as well as its limitations are assessed in the present paper. The research question in this context is to what extent can unbundling be a solution in order to ensure more competition on the energy market, how this concept is implemented in several countries and what challenges are related to it, if there are limitations which make the concept not the most

³ See <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32018L2002&from=EN>, accessed on 20 November 2025.

⁴ See https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2018.328.01.0082.01.ENG&toc=OJ:L:2018:328:TOC, accessed on 20 November 2025.

appropriate method for liberalization of the market. The present paper addresses as well the question how to find the proper balance between regulation and liberalization on the energy market, taking into consideration that the energy sector is a strategic sector. Nevertheless, energy has been defined as a commodity⁵, so that the rules of the Common Market of the European Union should apply as well for this product. But the European Union does not have exclusive competencies regarding energy policy, as it does have for the issues related to the Common Market of the European Union. In this context of shared competencies between the European Union and the Member States of the European Union, the design of a common energy policy is based on the collaboration between the supranational level of European institutions and the national level of the European Union Member States.

In order to deal with the abovementioned research questions, the legal provisions of European Union Law - primary and secondary law - are analyzed in the context of the energy policy. Provisions of competition law and of energy law are as well analyzed in the context of the common energy policy of the European Union. The theological method is used for the interpretation of these provisions, taking into consideration the overall objectives of the energy policy and as well of the Common Market of the European Union.

The aspects related to competition law and to unbundling as a solution for a more competitive energy sector of the European Union are illustrated by case studies from European countries. Relevant case law is as well analyzed in order to complete the image with the legal perspective on the researched issues. Case studies and case law are presented in a comparative manner, in an international perspective.

Energy policy is an interdisciplinary field, bringing together issues of competition law, energy law, European policies, business and economics. Taking into consideration the multidisciplinary dimension of the research topic, a multidisciplinary research method is the most appropriate in order to deal with the research questions. The legal perspective is completed by the economic perspective on the presented topics, bearing in mind the European Union policy context of the adopted measures.

The present paper is in line with the research of the previous literature, adding the new perspective of European energy policies to the already researched aspects. By adding this new dimension, the present research outlines the importance of the topic and it brings a contribution to legal research in this field, placing it in the European context. This contribution represents the originality and the novelty of the present research paper.

3. Results, discussions and solutions

The results of the present research outline the fact that more competition is needed in the energy sector. More competition would contribute to finding better solutions for the consumer, to achieve more transparency and to offer more convenient energy prices. The consumer focus is a new element in the energy policy, illustrated as such in the “Third Energy Package” and emphasized in the measures of the package

⁵ 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.

“Clean Energy for All Europeans”.

The energy sector needs a transparent market, with transparent access to the market and with no market barriers⁶. Market barriers lead to market foreclosure in the energy sector, which would be against the rules of European Competition Law and of the Common Market of the European Union. The provisions of European Competition Law should be applied as well in the energy sector, as energy is defined by the Court of Justice of the European Union as a commodity, in the case *Almelo*⁷. Being a commodity on the Common European Market of the European Union, the European Competition Law is applicable. Unbundling is a solution in this context, in order to comply to article 101 and 102 of the Treaty on the Functioning of the European Union. By applying unbundling in the energy sector, activities related to producing energy are separated from network operation activities. This is important, especially taking into consideration the fact that energy was a state-owned sector, which was subject of nationalization in European countries. The energy sector is thus a field where a transformation occurred from state monopoly to a gradually liberalized sector. Nevertheless, the sector is one with an oligopolistic market structure, with few important actors at European Union level. Transforming a state monopoly into a liberalized market was not an easy task. This issue is reflected in the case *Costa versus E.N.E.L.*, where the Italian Costa refused to pay his energy bill due to the fact that the energy sector was subject of the nationalization process in Italy in the 1960s, a process that, according to the Italian Costa was against European Union Law. He wanted the case to be debated at the European Court of Justice and the result was one of the most important decisions of the European Court of Justice in the field of European Union Law, which is the case *Costa versus E.N.E.L.*⁸. This case defines the primacy of European Union Law over national law, which became a basic principle of European Union Law.

In former times, vertical integrated companies were the actors of the energy sector. By controlling generation of energy as well as the distribution network, these vertical integrated companies could control the energy prices on the market and influence them. Fixing or influencing the fixing of prices by agreements is an anti-competitive behavior prohibited by article 101 of the Treaty on the Functioning of the European Union. Coordinated behavior of the market participants, which is very likely in an oligopoly structured market, is as well an anti-competitive behavior prohibited by article 101 of the Treaty on the Functioning of the European Union. Establishing a price without being influenced by other market participants when establishing the price is a form of abuse of dominant position, as described in article 102 of the Treaty on the Functioning of the European Union and thus as well an anti-competitive behavior. In this context, unbundling in the field of energy can be a tool to ensure a more

⁶ See Jean-Michel Glachant, François Lévêque, *Electricity reform in Europe – Towards a Single Energy Market*, Edward Elgar Publishing Limited, Cheltenham, UK, Northampton, MA, USA, 2009, p. 85; Jörg Gundel, Knut Werner Lange: *Die Umsetzung des 3. Energiebinnenmarktpakets, Tagungsband der Zweiten Bayreuther Energierechtstage 2011*, Mohr Siebeck Verlag, Tübingen, 2011, p. 76.

⁷ 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.

⁸ 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.

competitive energy sector and to avoid the above-mentioned types of anticompetitive behavior. Unbundling is a process with more dimensions: it refers to a separation in terms of legal entities, of accounting activities and as well to functional unbundling within vertical integrated companies.

If a company has a very strong position on the market and if there are chances that the market turns into a monopoly, the solution in order to avoid this situation would be to divest assets and thus promote competition in the sector and making it possible for other market participants to act on the market, a solution that complies to the rules and provisions of Regulation 1/2003⁹.

The perspectives opened by unbundling in the energy sector are positive, as unbundling can be used as a tool in order to avoid anti-competitive behavior and thus unbundling can contribute to avoid fines from the European Commission due to non-compliance to European Competition Law, fines that can amount up to 10% of the company's turnover. Moreover, by promoting competition in the fields of producing and retail of energy, sectors that are separated from the network operation, unbundling can contribute to ensuring better conditions for the benefit of the energy consumer.

The limitations of unbundling as a solution for more competition could be seen in the market structure of the energy sector, which is an oligopolistic one, where the market participants can anticipate how their competitors would act like and they could even be tempted to have a coordinated market behavior. The separation between generation of energy and network activities could be a challenge, as the sector has been an integrated one for a long time and the transformation from a monopoly to a liberalized market is a gradual process, with a different evolution on each national market of each country¹⁰. The particularities of each country and of each national market should be considered when assessing this liberalization process. The approach of several countries in Europe towards unbundling is reflected in the following case studies.

Great Britain is one of the most cited examples for unbundling and it is worldwide studied as a model regarding unbundling¹¹. Britain proceeded to unbundling in the context of an unefficient business environment with a too high degree of influence given by the political factor. In order to improve this situation, Britain implemented unbundling as a solution for functional competition in the energy sector, thus separating transmission of energy by generation of energy and creating competition among companies in charge with generation. By creating competition in the sector, no one of the market actors can influence the prices, like vertical integrated companies did¹².

The concept of unbundling has been implemented as well on the Nordic electricity market, in the countries Sweden, Denmark, Finland and Norway, by

⁹ See Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.

¹⁰ See Ana-Maria Iulia Șanta, *Die Gestaltung eines gemeinsamen Energiemarktes auf der Ebene der Europäischen Union*, Springer Gabler Verlag, 2021, p. 35. DOI: 10.1007/978-3-658-33355-3; Alina Lengauer, *Einführung in das Europarecht: Europäisches Verfassungsrecht*, 120 S. 4. Auflage Aufl. Wien: Facultas. 2014 Studienliteratur.

¹¹ See Fereidoon P. Sioshansi, Wolfgang Pfaffenberger, *Electricity market reform – an international perspective*. Oxford: Elsevier, 2006, p. 122, <https://doi.org/10.1016/B978-0-08-045030-8.X5000-0>.

¹² Ibid, pp. 111-117.

separating competitive activities, like generation and retail of electricity on the one hand and regulated activities, like transmission and distribution, on the other hand¹³.

Unbundling was as well implemented on the German market, showing that it is important to have a good regulation of network access. At the beginning Germany did not want to have strong regulation in this field, but this proved to be necessary and as a consequence the “Bundesnetzagentur” was created as a regulator¹⁴. The German case pointed out the importance of regulation on the energy market, especially in the sector of transmission and distribution of energy, regulation which is necessary in order to avoid crisis situations¹⁵.

A challenge is thus given by the fact that energy is a strategic sector and energy supply is a strategic activity that cannot be interrupted. This makes it difficult to find the proper balance between free market for the energy sector, with enhanced competition and the proper degree of regulation in order to ensure a safe energy supply. Being a strategic field, the approach towards the transfer of competencies from the national level to the supranational level of the European Union is different from one European Union Member State to another. Some Member States wish to keep more competencies in the field of energy policy at national level. As it is a field with shared competencies, it is important to find a balance in order to make cooperation between Member States of the European Union possible. Due to the shared competencies in the energy sector, it is a challenge to design a common energy policy or a common energy market of the European Union. For the Common Market of the European Union and for related competition issues, the European Union had exclusive competencies, so that it was easier to elaborate a common policy for the Common Market than it is for the energy field, where the collaboration between countries must be achieved on the basis of shared competencies.

The results and solutions of the present paper can be further analyzed and improved according to the evolution of the energy sector and could be used as a basis for future research projects, that will for sure be necessary, as there is a research gap in this new, developing field of great interest at European Union level.

4. Conclusions

The issue of competition in the energy sector is one of great importance in order to ensure a functional energy market, an Energy Union and a common energy policy of the European Union, goals designed in the initiatives of the European Commission in the package “Clean Energy for All Europeans”. Unbundling in the energy sector can be a tool ensuring more competition on the energy market, which would have as consequences a better business environment and benefits for the consumer in the European Union at the same time, thus generating a win-win-situation. The provisions of European Competition Law must be applied in the energy sector and given this context, unbundling could contribute to creating a more competitive energy

¹³ Ibid, p. 145.

¹⁴ Ibid, pp. 235-236.

¹⁵ Ibid, p. 380; Paolo Mastropietro, Pablo Rodilla, Carlos Batlle, „National capacity mechanisms in the European internal energy market: Opening the doors to neighbours”. *Energy policy*, Vol. 82, July 2015: 38-47.

sector. This process is as well related to challenges, especially in finding the right balance between competition and regulation on the energy market.

Taking into consideration the recent developments at European Union level in the energy sector, this field will further improve, so that further research will be necessary and the results of the present article could be used for future research in the field of energy policy of the European Union.

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