Kommentar:

CENTRE FOR ENERGY, PETROLEUM AND MINERAL LAW AND POLICY

STUDENT NUMBER: 999944060

PROGRAMME: LL.M European Energy and Natural Resources Law and Policy

COURSE: EC Energy and Natural Resources Law and Policy

TITLE OF THE RESEARCH PAPER: Did EC competition law, as it was implemented by the Commission and the European Court of Justice prior to the Adoption of the Internal Energy Market Directives, effectively facilitate the liberalisation of European Energy markets and to what extent will its enforcement be strengthened owing to the member states' efforts to implement the Directives ?

ABSTRACT OF THE PAPER:

This research paper examines the application of EC Competition Law in the energy sector prior to the adoption of the Internal Energy Market Directives. It explains that the weak approach, taken by the Commission and Court in the Energy Judgements, to implement the internal market provisions and the general EC competition law is caused by heterogeneous structures of the energy sectors, by both political and economic opposition against liberalisation and by a threat of domestic courts that may challenge the supremacy of EC Law over constitutional law if European institutions unilaterally demand the restructuring of economic sectors without prior consent of the Council as it is expressed in harmonising directives pursuant to Art. 95 ECT.

Wordcount: 4448

PRESENTED TO: Professor Cameron

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Research Paper

Did EC competition law, as it was implemented by the Commission and the European Court of Justice prior to the Adoption of the Internal Energy Market Directives, effectively facilitate the liberalisation of European Energy markets and to what extent will its enforcement be strengthened owing to the member states' efforts to implement the directives ?

by

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LL.M Programme

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Abbreviations

CCGT	Combined Cycle Gas Turbine
EC	European Communities
ECT	Treaty establishing the European Economic Community, as amended by the treaty of Amsterdam
EU	European Union
IEMD	Internal Electricity Market Directive
IGMD	Internal Gas Market Directive
PSO	Public Service Obligations
TPA	Third Party Access

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Kommentar:

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1. Introduction

This paper will not only discuss the efficacy of the application of EC competition law in the energy sector by the European Commission and the European Court of Justice [ECJ] prior to the adoption of the Internal Electricity[1] and Gas Market[2] Directives but will also interrogate whether the implementation of these Directives creates a more comprehensive framework for the enforcement of EC competition law in the energy sector that enables the European Institutions to response efficiently to future anti-competitive behaviour of marketers in terms of Art.81, 82, 86 and 87 ECT1997[3]. This approach is primarily justifiable as this sector is closely related to member states' sovereignty so that any extension of the scope European law which will include energy utilities forms an extremely important step of the completion of the internal market in terms of the free movement of goods pursuant to Art.23 ECT and the freedom of services under Art.39 ECT. Secondly, energy is a key-element of European integration because the transnational co-operation in the coal and steel industry was regarded as being crucial to avoid militaristic tensions between European nations[4]. A similar concept dominates the EURATOM treaty that was originally designed to ensure both funding for research in nuclear technology and supply with ores by ensuring supranational control on this sector due to its potential

[1] 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 L 027, 30/01/1997, p 20 [hereinafter, IEMD].
[2] 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 L 204, 21.7.98, p 1(not yet completely implemented) [hereinafter, IGMD].
[3] Treaty Establishing the European Economic Community, March 25, 1957 (entered into force January 1, 1958) as amended by the Treaty of Amsterdam Amending The Treaty on European Union, The Treaties Establishing the European Communities and Certain Related Acts, Oct 2, 1997, Official Journal of the European Communities 97/C/430/01 (entered into force May 1, 1999) (hereinafter, ECT).
[4] q.v. W. Churchill's speech in Zürich in 1946.

risks[5]. Thirdly, the outstanding relevance of the principles of Competition Law for the performance of free market economies calls for a stringent application of antitrust rules to virtually all business sectors. It will be shown that the argument of special characteristics of the energy sector as a whole is no longer persuasive and that competition law is necessary to prevent the undertakings on liberalised markets from creating private monopolistic entities by means of unrestricted international mergers[6].

Lastly, it has to be stated that a comprehensive European Energy policy accompanied by operational competition rules is crucial to define the acquis communitaire carefully, which has to be implemented by the Central and Eastern European countries while they will accede the EC in the near future. As the energy sectors of these Countries are still partly depending on the organisational decisions of the former socialistic era, it is very important to offer precise guidelines for the energy sector rather than a prospect of indefinite vagueness and contradictory attitudes in different member states.

The paper will initially address the basic concepts of competition law. Then, it will assess the activities of the commission and the ECJ in order to implement the EC competition law prior to the adoption of the IEMD and the IGMD. Subsequently, it will underline the limited value of these efforts and the main reasons are analysed. The next part deals will question to what extent the directives and their domestic implementation by the member states provide for a legal and administrative

[5] France was interested in funding for research whereas Germany was interested in American supply with ores.

[6] Market distortions that are caused by private monopolies are exemplified by the practices of British Gas PLC after its privatisation in 1986. Practices of Standard Oil included inter alia that railway companies shipping oil for competing refiners had to pay a levy to Standard oil, q.v. D. Yergin , The Prize, The Epic Quest for Oil, Money and Power (1st ed.) (London, U.K., Simon & Shuster UK Ltd, 1991) p 39.

framework that facilitates and guarantees long term liberalised competitive markets characterised by large numbers of both sellers and willing and able consumers, by transparency and by the removal of market entry or exit barriers. It will be concluded that the Directives should be regarded as successful despite of certain drawbacks as the Commission may overcome these especially by addressing remaining preferential tariffs and monopolistic structures by means of judging them as illicit state aids pursuant to Art.87 ECT.

2. Background

Before focusing on the legal structure of EC competition law prior to the adoption and implementation of the IEMD and the IGMD, the basic concepts underlying competition law will be reported.

2.1 Theories of competition

The concept of competition is controversially discussed between economic and legal scholars.

2.1.1 Classical Theory of Natural Competition

The classic concept of natural competition is described as a contention for superiority in a given environment where each entity uses the method of trial and error in order to outperform inferior entities without trying to amend external factors[7].

The classic societal function of competition is that it shall serve as a democratic, de-central procedure of allocating freedom, wealth and power within a society[8].

[7] S.C. Jain, Marketing Planning & Strategy (4th ed.) (Cincinnati, U.S., South West Publishing, 1993) p 74; R. Wish, Competition Law (3rd ed.) (London, U.K., Butterworths, 1993) p1.
[8] S.C. Jain, Marketing Planning & Strategy (4th ed.) (Cincinnati, U.S., South West Publishing, 1993) p 74; R. Wish, Competition Law (3rd ed.) (London, U.K., Butterworths, 1993) p 1.

Competition replaces former aristocratic or autocratic models of power distribution. It is connected to the freedom of contract and the recognition of individual property rights. The latter are related to the idea of human rights that every state has to grant to individuals because no one is interested in weakening its human rights by becoming a nation's citizen pursuant to the concept of the fictitious societal contract[9]. The economic consequence of natural competition in the business world is that two companies with identical products can not co-exist for a long period of time. Pursuant to this classic concept Competitions will arise, if a state simply removes tariffs and non tariffal trade barriers like quotas and subsidies and secondly abandons any economic policies apart from orders according to policy law and criminal law[10].

2.1.2 Neo Classical Theory of Natural Competition

The Neo Classical Theory of competition focuses on the different patterns of the formation of equilibrium prices on different market structures. Three market structures are distinguished: monopolistic markets, unilateral or bilateral oligopolistic markets, polypolistic markets. The key-idea is that the allocative and productive efficiency is maximised in a polypoly. Perfect competition occurs if a large number of sellers, of willing and able consumers is available for homogenous products, if the market is transparent and if there are no barriers to market entry or exit[11]. Under these circumstances the equilibrium price will be at the level of the marginal costs of

[9] This concept is introduced by Hobbes and J. Locke in order to explain why the state has to grant and respect certain liberty rights.
[10] V. Emmerich, Kartellrecht (8th ed.) (München, Germany, C.H.Beck, 1999) p 4; A. Smith, An inquiry into The Nature and Causes of The Wealth of Nations (5th ed.) (Amhurst, U.S., Prometheus Books, 1789/1991) p 103 and 502; D. Ricardo, The Principles of Political Economy and Taxation (1st ed.) (Amhurst, U.S., Prometheus Books, 1817/1996).
[11] R. Wish, Competition Law (3rd ed.) (London, U.K., Butterworths, 1993) p 2.

the producers[12]: Each producer will manufacture as much goods as if the marginal costs for one additional unit exceed the marginal revenue of selling the unit (ceteris paribus). Contrarily, a monopoly is characterised by artificial production restraints that increase the equilibrium price as the producer cedes to produce an additional unit if the marginal costs for this unit are not reflected in an additional marginal revenue[13]. Additional, any incentive for productive efficiency is lost[14].

2.1.3 Theory of monopolistic and dynamic competition

The neo classical model is challenged by the argument that perfect competition is not feasible in practise. As a matter of fact, every company intends to achieve a temporary monopoly in one small sector due to product diversification and technological advancement before other companies follow to contend the predecessor. According to this observation, competition policy should not attempt to establish perfect competition[15]. Contrarily, it shall invent the options that assure that the procedure of entering diversified product markets is facilitated so that successor companies attain the predecessor's superior expertise quickly[16]. These so-called 2nd best options might even limit competition in certain aspects.

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[12] R. Wish, Competition Law (3rd ed.) (London, U.K., Butterworths, 1993) p 2.
[13] e.g. Marginal Revenue Pricing: In a monopoly, the producer will sell 50 units for $ 1,000 each (marginal revenue $ 50,000), rather than producing 51 units and selling them for $ 988,4 each (revenue $ 50,000) even if the marginal costs are only $ 100.
[14] Liebenstein, *Allocative Efficiency vs X-Efficiency*, Am Ec Rev 393 (1966).
[15] V. Emmerich, Kartellrecht (8th ed.) (München, Germany, C.H.Beck, 1999) p 6; R. Wish, Competition Law (3rd ed.) (London, U.K., Butterworths, 1993) p 4.
[16] J.M. Clark, Competition as a Dynamic Process (1st ed.) (Washington, U.S, Brooking Institution, 1961); The Theory of contestable markets also agrees to focus on facilitated entry to every business sector in order to shorten monopolistic periods due to the development of new products, q.v. R. Wish, Competition Law (3rd ed.) (London, U.K., Butterworths, 1993) p 12.

2.1.4 Theory of workable competition

Initially, the theory of workable competition refers to the above mentioned dynamic aspects of competition. Being conscious of the practical limits of competition policy, it stresses that the public authorities shall nevertheless try to install a competitive environment by four means: prohibition of collusive agreements, of abuses of dominant positions, retaining competition in oligopolistic markets and merger control[17]. It also intends to protect small and medium sized enterprises[18]. Basically, it distinguishes precisely between different industrial sectors and products which fulfil like functions for the consumers: industrial organisation hypothesis and Harvard School[19]. For each sector and product, both the prevailing behaviour of marketers and the market structure is taken into account which shall dominate the market outcome. The retrieved data is assessed in order to invent 2nd best options by which application the catching up process of succeeding companies is facilitated. The major drawback of this concept is that the relation between behaviour, structure and market outcome is not one of unilateral causation but a multilateral determination so that predictions of future market outcome are not feasible so that the invention of effective 2nd best options is highly questionable.

[17] R. Wish, Competition Law (3rd ed.) (London, U.K., Butterworths, 1993) p 11.
[18] R. Wish, Competition Law (3rd ed.) (London, U.K., Butterworths, 1993) p 12.
[19] K. Kaysen and D.F. Turner, Antitrust Policy (1st ed.) (Cambridge, U.S., Harvard University Series on Competition in American Industry, 1965) p 44 and 82.

2.1.5 Chicago School

The Chicago School is based on the neo-classical theory of perfect competition and denies any empirical evidence of interconnections between marketers' behaviour, structure and outcome[20]. It focuses on the removal of entry barriers and the efficiency of companies so that mergers and vertical integrations are generally regarded as positive because they facilitate research and development.

2.1.6 Strategic Competition

Although the modern concept of strategic competition recognises the above mentioned societal function of competition as a de-central power distributor, it emphasises that the definition of competition shall include an additional factor:

The contention for superiority shall be characterised by the necessity that every marketer should try to gather information about competitors and the external business environment and analyse the results carefully.

By this means, a company is enabled to predict the future influence of its own major interventions on the entire system[21]. Thereby, a competitor may affect the entire process of rebalancing power between the contestants so that certain external factors may be internalised[22]. Finally, the effect of the own major investments can be assessed at an early stage so that the development and protection of competitive advantages is facilitated.

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[20] A. Bork, The Antitrust Paradox (1st ed.) (New York, U.S., Bentham Books, 1978) p 53; J. Chandler, The Visible Hand (1st ed.) (Cambridge, U.S., Harvard University Press, 1977) p 37.

[21] e.g. Game Theory.

[22] For example, after Japan opened its markets in the 19th century is focused on labour intensive industries due to the scarcity of natural resources and the need to export in order to receive foreign currency reserves that can be used to pay for imports. Later, it concentrated on capital intensive industries (shipyards) before turning to high technology products; q.v. S.C. Jain, Marketing Planning & Strategy (4th ed.) (Cincinnati, U.S., South West Publishing, 1993) p 74.

2.2 Evaluation

The neo-classical theory of perfect competition combined with both the idea of dynamic competition and the concept of strategic competition seems to offer the best explanation about the functions that this phenomenon shall fulfil in liberal market economies. However, it has to be stressed that some sectors have to be addressed as natural monopolies like network bound activities like inter alia transmission and distribution networks for electricity and gas in which only one or few marketers will reach the economies of scale to achieve a reasonable return on their investments[23]. However, even in these sectors competition is a superior option which may include frequent bidding rounds for the operation of the system[24].

Therefore, no single comprehensive theory is capable of providing sufficient advice on the perfect organisation of competition law and policy of every business sector. Additionally, anti trust policy is everything but an isolated economic discipline. It is closely linked to the modern economic theories which controversially dispute the correct concepts of duly affecting the business cycle[25]. From a theoretical point of view it is convincing to resent the introduction of new policy options to competition law pursuant to the Chicago and to leave the internalisation of social costs to specific regulations for business sectors. However, in practical terms, competition policy has to deal with the growing need for the internalisation of environmental costs that were traditionally imposed on the society as a whole[26].

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[23] R.Schmalensee, The Control of Natural Monopolies (Cambridge, U.S, Harvard University Press, 1979) p 12; R. Wish, Competition Law (3rd ed.) (London, U.K., Butterworths, 1993) p 7.
[24] e.g. The Bidding system for Private Railways in the U.K. with extended bidding periods.
[25] One concept favours anti-cyclical measures of deficit spending and surplus saving; q.v. J.M. Keynes, The General Theory of Employment, Interest and Money (1st ed.) (.Amhurst, U.S., Prometheus Books, 1936/1997) p 67. Another concept focuses on monetary policy i.e. combating inflation in order to lower interest rates so that investment is fostered; q.v. M.Friedman, Dollars and Deficits, Monetary Policy and the Balance of Payments (1st ed.) (London, U.K., MacMillan, 1968) p 107.
[26] R. Wish, Competition Law (3rd ed.) (London, U.K., Butterworths, 1993) p 5.

Therefore, various forms of environmental, labour, social and welfare policies - including state aids that assist old industries with structural problems or infant industries that need protection in initial stages - affect the application and implementation of competition law in Europe. Finally, it might be necessary to establish a prior consent between the Member States about the allocation, ranking and proportional attainment of legitimate policy goals that may interfere with the competition provisions. Finding a practical concordance between these options without putting the European integration at risk is a strong argument why the liberalisation of energy markets required sectional directives instead of teleological interpretations of general EC competition law. This has to be considered if one questions why the ECJ rejected the commission's interpretation of competition provisions in order to liberalise domestic energy markets in the energy cases[27].

[27] ECJ Case C-157/94 *Commission v Netherlands* [1997] ECR I 5699, ECJ Case C-158/94 *Commission v Italy* [1997] ECR I 5789, ECJ Case C-159/94 *Commission v France* [1997] ECR I 5815, ECJ Case C-160/94 *Commission v Spain* [1997] ECR I 5851.

3. The complex relation between EC Law and Domestic Law as a facilitator of Sectional Secondary EC Legislation

For a correct assessment of the energy policy of the Commission and the relative judicial self restraint of the ECJ in the energy sector as expressed by the energy cases, it is indispensable to examine the complex relationship between EC law on the one hand- especially the internal market provisions dealing with the free movement of goods pursuant to Art.23 and 28 et seq. ECT, the free movement of services pursuant to Art.49 et seq. ECT and the competition law under Art.81 et seq. ECT - and the domestic constitutional law of the Member States on the other hand.

3.1 Legal nature of EC Law

As it is not yet prudent to regard the EC as federal state in terms of public international law[28], one can distinguish two views of the legal nature of EC law.

3.1.1 Thesis of EC Law Forming a New Legal Order

The first discussed option is to regard EC law as a new legal order between both domestic and international law[29]. This legal order shall take precedence over domestic law[30]. Superficially, this seems to be advantageous because the EC is no longer a pure economic integration, has unlimited duration, and strong supranational elements including an majority votes and autonomous judicial review.

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[28] R. Streinz, Europarecht (4th ed.) (Heidelberg, Germany, C.F.Müller, 1999) p 41 and 42.
[29] ECJ Case 6/64 *Costa v ENEL* [1964] ECR 585.
[30] ECJ Case 6/64 Costa v ENEL [1964] ECR 585; Case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal SpA*[1978] ECR 629; ECJ Case C-213/89 *R v Secretary of State for Transport, ex p Factortame Ltd* (No 2 & 3) 3 CMLR 1, [1991] AC 603; ECJ Case C-221/89 *R v Secretary of State for Transport ex p Factortame Ltd* (No 2 & 3) 3 CMLR 589, [1992] 1 QB 680; R. Wish, Competition Law (3rd ed.) (London, U.K., Butterworths, 1993) p 37.

3.1.2 Theory of EC Law as Public International Law

Contrarily, primary and secondary EC law may be seen as ordinary public international law[31]. As the formation of primary EC law including its subsequent amendments still follow the procedure of the adoption and ratification of international treaties as laid down in Art.6 et seq. Vienna Convention on the Law of the Treaties[32], it is persuasive to argue that primary EC Law has sustained the international legal nature. Consequently, the secondary law shall share this character as it is derived from public international legal bases of authorisation. Another supportive argument is that the common foreign and security policy and common justice and home affairs pursuant to Art.11-28 and 29 seq. of the Treaty of European Union are public international law without any doubts due to their intergovernmental structure[33].

3.2 General Superiority of EC Law to Domestic Law except of core principals of Domestic Constitutional Law

As a result of the public international legal nature of EC law it is necessary to decide which legal systems prevails if EC Law collides with domestic law. This question is extremely relevant for the energy sector as any attempt to amend the structure of domestic energy industries by means of EC Law challenges not only domestic acts of parliament and secondary legislation but also the constitutions of the member states as such because the involved issues like granting regulatory or negotiated third party access to private owned networks of companies issued with monopolies regarding

[31] R. Streinz, Europarecht (4th ed.) (Heidelberg, Germany, C.F.Müller, 1999) p 39.
[32] Vienna Convention on the Law of the Treaties, May 23, 1969 (entered into force January 27, 1980) UNTS Vol. 1155 p 331, 8 ILM 679.
[33] Treaty on European Union, February 7, 1992 (entered into force November 1, 1993) as amended by the Treaty of Amsterdam Amending The Treaty on European Union, The Treaties Establishing the European Communities and Certain Related Acts, Oct 2, 1997, Official Journal of the European Communities 97/C/430/01 (entered into force May 1, 1999).

the transmission, distribution of electricity and gas may cause a non-justifiable violation of the freedom of property.

3.2.1 Moderate Theory of Monism with Superiority of Public International Law

The moderate theory of Monism states that public international law - including EC Law - and domestic law form a single legal system in which the former supersedes the latter. In contrast to strict monism, domestic law that violates international standards is regarded as valid until an international court sustains the violation. Additional, international law may provide damages.

3.2.2 Moderate Theory of Dualism with Specific Provisions Regulating Collisions

According to the moderate theory of Dualism international and domestic law forms separate legal systems which may collide incidentally. For these interactions, collision rules shall define the prevailing legal order. In terms of EC law, the collision rules seem to provide an unlimited prerogative application of EC law pursuant to Art.10 and 249 ECT: Art.10 ECT binds the member states to honour their obligation under EC law so that violating national legislation has to be abolished and new contradictory legislation is prohibited. Art.249 ECT states the direct applicability of Regulations.

However, two aspects must not be neglected: The proportionality principle demands that contradicting national legislation is only regarded as non applicable in EC related matters. It should still judged as valid as long as it determines domestic topics or third country affairs[34].

Secondly, a Member State's constitution may prevent the parliament from adopting and implementing an international treaty that conveys sovereignty by establishing or

[34] e.g. Statutes concerning foreign nationals in general are still valid as long as they cover the circulation of Non-EC citizens.

amending a supranational organisation that does not follow the core principal of its own constitution[35].

3.2.3 Retained Superiority of Core Constitutional Principles

In order to balance the need for a comprehensive European integration without allowing circumvention of the principles of constitutional law the rulings of the Federal German Constitutional Court established an extremely complex system that limits the scope of sovereignty transfer to the EC[36]: It can be summarised that an international treaty amending the EC which ignores the given limitations will be regarded as a breach of the constitution, even if the treaty was formerly adopted and transformed by the parliament. Additionally, Acts of European institutions that violate the minimum standards of civil right pursuant to the German constitution or its structural principles[37] may cause the national legislation that adopted the ECT to become invalid.

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[35] Conveyance of Sovereignty in terms of public international does not mean a real transaction. The country only promises not to execute the relevant sovereign rights as long it is a member of the international organisation q.v. M. Schweitzer, Staatsrecht III, Staatsrecht, Völkerrecht, Europarecht (6th ed.) (Heidelberg, Germany, C.F. Müller, 1997) p 20.

[36] general precedence of EC law over constitutional law, q.v. BVerfGE 22, 293,295; idem EuR 168 (1975); precedence of EC law over primary and secondary legislation, q.v. BVerfGE 31,145,173 (1971); precedence of constitutional law unless a written catalogue of EC civil and human rights is adopted that reflects domestic constitutional standards in 1974, q.v. BVerfGE 37,280; Questioning whether a written catalogue of civil rights should be still regarded as a prerequisite of EC Law supremacy; q.v. BVerfGE 52, 187, 202; EC civil rights protection seems to be similar to domestic standards of protection, q.v. BVerfGE NJW 1259 (1983), BVerfGE 58,1, BVerfGE 59, 63; the Federal Constitutional Court will regard constitutional remedies against primary and secondary EC law as evidentially inadmissible as long as the core aspects of domestic civil rights and structural principles are not in question, q.v. BVerfGE 73, 339, 375; ECJ Jurisdiction stating a direct effect of directives that are not implemented on time is deemed to be covered by the domestic Act that had adopted the ECT, q.v. BVerfGE 75, 223; the federal Constitutional Court states that it will admit cases if the ECJ fails to implement the expected domestic standards, q.v. EuR 273 (1989); the Court inaugurates a co-operative relation to the ECJ that is based on a supremacy on EC law and ECJ jurisdiction over constitutional law in 1993 as long as the core principles of domestic constitutional law are not at stake, q.v. BVerfGE 89, 155.

[37] Primarily the principles of federalism, democracy, constitutional state and the principle of social justice and the welfare state pursuant to Art. 20 (1)-(3) of the German Constitution.

However, this stringent national judicial review is partly restricted in practical terms, because domestic constitutional remedies are considered as being evidentially not admissible, as long as the constitutional court deems that the ECJ will review the formation, application and interpretation of EC law according to a catalogue of EC civil rights and structural principles that are similar to constitutional standards.

3.3. The Relationship between Art. 81-86 and National Competition Law

By applying the developed findings to anti trust issues, one should expect that EC competition Law generally prevents national cartel authorities from applying colliding domestic competition legislation. However, it must not be ignored that different requirements of EC and domestic competition law often cause serious difficulties in reality[38]: This is especially true, if domestic law prohibits a collusive agreement with appreciable effect on community trade which the Commission might either exempt under Art.81(3) ECT or might have exempted pursuant to a block exemption issued on the basis of a Council Regulation under Art.83(2)lit.b ECT. The literature prefers the double barrier theory[39] that enables national authorities to apply more stringent domestic provisions whereas the ECJ argues in favour of unlimited precedence of EC law[40].

[38] R. Wish, Competition Law (3rd ed.) (London, U.K., Butterworths, 1993) p 39, 40 and 238.
[39] V. Emmerich, Kartellrecht (8th ed.) (München, Germany, C.H.Beck, 1999) p 402-403.
[40] ECJ Case 14/68 *Walt Wilhelm v Bundeskartellamt* [1969] ECR 1, 23.

3.4 Evaluation: Directives pursuant to Art. 95 ECT instead of Art. 86 (3) ECT

Such a system of judicial review and domestic cartel authority practice that undermines the doctrine of priority of EC Law will be very likely to threaten European institutions if they try to integrate a new business sector by means of a more comprehensive interpretation of general treaty rules. The severe impact that the opposition of a group of Member States' governments can have may be exemplified by the collapse of the ECSC market order for hard coal in 1959[41]. If constitutional courts interfere with European institutions, their reputation is at stake. Therefore, it is crucial for the Commission and the ECJ to co-ordinate their policy concepts with the member states well in advance. The more important a business sector is, the more diverse it is organised in terms of ownership and utilities[42] with exclusive rights in the general economic interest, the closer the implications to sovereignty are, the greater the need for co-operation between the Member States will be.

[41] Owing to a series of mild winters the demand for hard coal had decreased so that the stock of coal dramatically increased in 1959. The then High Authority (Commission) claimed import regulations and production quotas pursuant to the Art. 58 and 74 ECSC-Treaty. As the member states were either interested in cheap import coal (Italy and The Netherlands) or in alternative measures to master the crisis, i.e. subsidising the local coal industries (Germany), the Council refused the Authority's proposal. The efficacy of the market order war spoiled and the institution's prestige, too; q.v. . p.153.

[42] International Energy Agency, New Electricity 21: *Designing a Sustainable Electric System For The Twenty First Century*, Conference Proceeding, Paris 22nd - 24th May 1995, Introduction, p vi; International Energy Agency, *Electricity Supply Industry, Structure, Ownership and Regulation in OECD Countries*, OECD paper, 1994, p 63.

This thesis is justified by the history of the adoption of the IEMD and the IGMD which not only took a long and difficult period of time to negotiate[43] but also contain a large number of structural weaknesses including long transitional periods a serious number of derogations[44] .

The scales of mandatory initial market opening are limited, too[45]. However, these complex issues are so close to national sovereignty that they could not have been addressed adequately solely by means of more or less secretive harmonisation directives which are based upon the general authorisation for secondary competition law in Art.86(3)1st Variant ECT[46]. Although Competition Commissioner Brittan backed by Jacques Delors threatened to use this authorisation in the energy sector, it was never applied[47].

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[43] In 1986, the Council agrees on the need of integration of the energy sector. The Commission's working paper on obstacles against an internal energy market is released in 1988 followed by the Council Directive 90/377/EEC of 29 June 1990 Concerning a Community Procedure to improve the Price Transparency of Gas and Electricity Prices Charged to Industrial End Users, the Council Directive 90/547/EEC on the Transit of Electricity Through Transmission Grids of October 29 1990, OJ L 313, 13/11/1990, p 30 and the Council Directive 91/296/EEC of 31 May 1991 on the Transit of Natural Gas through Grids, OJ L 302, 12/06/1991 p 2. The first final proposal of the Commission regarding the IEMD was issued in 1991, q.v. Com 91 final, 548; OJC 65/14 14 March 1992. The IGMD was put at hold until the IEMD was adopted and it took a long time to agree on the parallel admissibility of TPA and the Single Buyer Model; q.v. P.K. Lyons, EU Energy Policies in the mid-1990s, A Business Intelligence Report, (Surrey, U.K., EC Inform, 1996) p 6, 8-11; P.K. Lyons, EU Energy Policies towards the 21st Century, A Business Intelligence Report, (Surrey, U.K., EC Inform, 1998) p 30; J.H. Matlary, Energy Policy in the European Union (1st ed.) (MacMillan Press Ltd, London, U.K., 1997) p 50.

[44] Derogation related to public service obligations [PSO] under Art. 3 (3) IEMD; derogation owing to refusal of Third Party Access [TPA] due to lack of capacity under Art. 17 (5) IEMD; refusal of single buyer transactions due to lack of capacity 18 (4) IEMD; Refusal of authorisation to construct a direct line due to PSO reasons pursuant to Art. 21 (5) IEMD; derogation from TPA on grounds of reciprocity under Art. 19 (5) IEMD; safeguards under Art. 23 IEMD; exemptions for transitional regimes due to stranded investments concerning Chapter IV, VI and VII pursuant to Art. 24 (1)-(2) IEMD; Derogations for small isolated systems from Chapter IV-VII.

[45] Art 19 IEMD. The minimum market opening will achieve 35% in 2003; q.v. B. Derkin and C. Levasseur, *Energy* in The EC Law of Competition 738 (J.Faull and A.Nikpay, eds., Oxford, Oxford University Press, 2000).

[46] This authorisation has limited power as the Commission admits that is may only be used to specify existing general obligations rather than to establish absolutely new commitments; q.v. The Commission, *XXVth Report on Competition Policy,* 1995, COM (96) 126 p 50.

[47] P.K. Lyons, EU Energy Policies towards the 21st Century, A Business Intelligence Report, (Surrey, U.K., EC Inform, 1998) p 34.

First of all, such a Directive may be inconsistent with EC Law if the Council is already discussing a Directive under Art.95 ECT but it will definitely infuriate some Member States[48]. Secondly, such a procedure would have raised serious critique related to the democratic legitimisation of secondary EC legislation in terms of the subsidiarity principle under Art.5(2) ECT. Backed by the consent of the Council and the Co-decision of the European Parliament, the Commission and the ECJ can take a far more stringent approach if they apply and interpret EC law without having to face serious prospects of being challenged by reluctant constitutional courts that are inevitably approached by the opponents of liberalisation.

This might explain why the Commission did not issue Directives pursuant to Art.86(3) ECT that oblige the Member States to re-organise their electricity and gas sectors compared with the approach taken to foster the liberalisation of the telecommunications sector where this strategy was partly applied successfully[49]: Additionally, several of the telecommunications Directives pursuant to Art.86(3) ECT were challenged in court[50] causing delays so that harmonising Directives under Art. 95 ECT apparently became the most promising option[51]. Lastly, it can be underlined that even if the framework of the IEMD and the IGMD includes some loopholes it is far more comprehensive that the primary competition law so that it is easier to

[48] e.g. France's reaction on the Terminal Directive, q.v. A.Winckler and R. Subiotto, *European Control of Monopolistic Utilities: France v Commission*, JENRL 212 (1991).

[49] Successful examples are: Directive 90/388/EEC of the Commission of 28 June 1990 on Competition in the Markets for Telecommunications Services, OJ L 192 24/07/1990 p 10; Commission Directive 88/301/EEC of May 16, 1988 on Competition in the Markets in Telecommunications Terminal Equipment, OJ L 131, 27/05/1988, p 73; 1988: this Directive was challenged by France but upheld by the Court, q.v. ECJ Case C-202/88 *France v Commission* [1991] ECR I 1223; q.v. A.Winckler and R. Subiotto, *European Control of Monopolistic Utilities: France v Commission*, JENRL 212 (1991).

[50] Two subsequent Directives in the telecommunications sector are subject to appeal: Commission Directive 96/2/EC Amending Directive 90/388/EEC with Regard to Mobile and Personal Communications, OJ L 20 26/01/1996, p 59; Commission Directive 96/19/EC of 13/03/1996, OJ L 74, 22/03/1996, p 13.

[51] V. Korah, An Introductory Guide to EC Competition Law and Practice (6th ed.) (Oxford, U.K., Hart Publishing, 1997) p 36 Footnote 74.

implement and to honour by the member states, that the monitoring by the competition authorities and the review by the Court are facilitated.

4. Analysis of Selected ECJ Cases related to the Energy Sector

A duly diligent analysis of the ECJ Cases dealing with exclusive rights regarding generation, transmission, distribution, supply, metering, import or export of electricity and gas should be preceded by an outlook how EC law deals with free circulation of goods pursuant to Art.28,29,30 ECT and how these provisions might be related to Art.31 ECT on the one hand and Art.86(1)-(2) ECT on the other hand so as to facilitate a critical assessment of the energy related decisions.

4.1 Free circulation of goods and the justification of violations

The free movement of goods is a crucial concept for the internal energy market. The internal market has outstanding relevance for the EC which is reflected by its recital in Art.2 and 3(1)lit.c ECT. Both Articles form a basic rule for internal market friendly interpretation of the whole EC law[52]. The legal definition of the internal market in Art.14(2) ECT commences with the free movement of goods. Apart from leges speciales, i.e. Art. 23-27 dealing with the abolition of tariff barriers and Art.32 et seq. regulating trade with agricultural goods, the non tariff barriers provisions of Art.28-30 have nearly universal scope for trade in goods[53]. For legal purposes, Electricity is regarded like a commodity in terms of Art.28 and 29 ECT[54].

[52] ECJ Case [1973] 215, 244; idem Case [1962] 867, 882.
[53] War related products are excluded by Art. 296 (2) EGV.
[54] ECJ Case 6/64 *Costa v ENEL* [1964] ECR 585; P.K. Lyons, EU Energy Policies in the mid-1990s, A Business Intelligence Report, (Surrey, U.K., EC Inform, 1996) p 22; K.Holmes, *European Community Competition Law, State Aids and the Energy Industries*, CEPMLP Conference Proceeding, Competition in European Energy Markets, Threats, Challenges and Opportunities, Sept 24-25, 1997, London, p 2.

As quotas are no longer relevant, the discussion focuses on measures with similar effects which have been defined by the ECJ in its Dassonville Formula[55]: Any measure that directly or indirectly, actually or potentially interferes with free trade is contrary to Art.28 or 29 ECT. Although the early interpretation of the freedom of factors of production concentrated on the principle of equal treatment as expressed in Art.12, Art.30[56], 39(2)[57] and 50(2)[58] ECT, it can be stressed that, for teleological reasons, nowadays measures are included that legally affect like products - with either indigenous or EC origin - in the same pattern: The provisions achieved a status similar to liberty rights. The rationale is that some non discriminative legal requirements impede free trade by undermining its commercial viability as foreigner producers may have to adapt the goods for specific regulations in different EC countries of destination. Discriminating Violations of Art.28 and 29ECT are justifiable under the strict objectives of Art.31 ECT which is narrowed down by an additional proportionality test[59]. Non discriminating violations are either justifiable under Art.31 ECT or under the "Cassis Formula". The latter defends activities heading proportionally for overriding "imperative requirements" that are related to EC competences[60]. The Jurisprudence of the Keck decision[61] excludes non product

[55] ECJ Case 8/74 *Procureur du Roi v Dassonville* [1974] ECR 837, 852.
[56] arg ex "arbitrary discrimination" in Art. 30 ECT for Art. 28 and 29 ECT.
[57] arg ex "abolition of any discrimination based on nationality"
[58] arg ex "under the same conditions as are imposed by that State on its own nationals".
[59] arg. ex "justified by" Art. 30 ECT.
[60] The logic of this bizarre dogmatic structure is that the ECJ wanted to include new policy areas as environment, variety of public media and consumer protection without watering down the limits that Art. 31 imposes on discriminating violations of Art. 28-29.
[61] ECJ C-267/91 C-268/91 *Keck and Mithouard* [1993] ECR I 6097/6131.

related aspects of domestic public economical regulation[62]. Finally, these provisions are deemed to have direct effect[63].

Discriminations concerning the import and export of electricity and gas may fall into the scope of Art.28 and 29 ECT so that their justification under Art.30 ECT might have to be analysed carefully. The alternative option is to regard Art.31 ECT as lex specialis so that its violation might make any consideration of Art.28 et seq. superfluous[64].

4.2 State Monopolies of a commercial character pursuant to Art. 31 ECT

Art.31 ECT deals with state owned or privately owned companies issued with monopolies in order to generate revenues. Due to its wording and its systematic location at the end of the second chapter within the first title of the third part of the ECT, it is very persuasive to argue that its scope is limited to utilities trading with goods[65] and that it forms a lex specialis to Art.28-30 ECT so that solely discriminative abuses of a monopolist are inconsistent with EC Law not necessarily the monopoly as such[66]: Lawful may be exemplified by monopolistic public procurement agencies that are legal as long as they do not discriminate against bids from foreign companies. However, monopolistic import and export rights inherently discriminate

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[62] i.e. non discriminating provisions dealing with mandatory shop opening hours, monopolies of pharmacies for medical drugs are longer deemed as violations of Art. 28 and 29 ECT.

[63] ECJ Case 26/62 *van Gend & Loos v Nederlandse Belastingadministratie* [1963] ECR 1: Direct Effect of primary EC law occurs if the wording is clear, not many exemptions are provided, the norm intends to serve individual interests and an efficient judicial review is available; especially free circulation of goods: ECJ Case 74/76 *Ianelli & Volpi v Meroni SpA* [1977] ECR 557, 576; ECJ Case 83/78 *Pigs Marketing Board v Redmond* [1978] ECR 2347, 2374.

[64] q.v. Ehlermann, C.D., *Book Review: A.Heinemann, Grenzen staatlicher Monopole im EG-Vertrag*, CMLRev 1221 (1998).

[65] However, Art. 86(2) is sometimes deemed to cover both services and goods. This relation is subject of academic discussion. As the energy sector combines goods and services, it should not be regarded as problematic.

[66] Monopolies are not per se an illegal institution although their behaviour is closely measured by Art. 31 and 81 et. seq. and 87 et seq. Thereby, monopolists are under permanent threat to breach EC law especially owing to the complex issue of cross-subsidisation; q.v. L. Hancher and J-L Buendia Sierra, *Cross Subsidisation and EC Law*, CMLRev 903 (1998).

against foreign undertakings and are not justifiable under Art. 31 ECT[67]. Exclusive import and export rights might be justifiable if one either applied Art.30 ECT to breaches of Art.31 - which is not convincing for systematic reasons - or if one even applied the Cassis Formula to discriminating violations[68]. As a matter of fact, the ECJ extended the Cassis Formula once to justify discriminating violations against Art.28 ECT in order to legalise restrictions of waste imports for environmental reasons that are apparently not covered by Art. 30 ECT[69]. Alternatively on could rely on Art.86(2) ECT which was the ECJ's approach in the energy sector[70].

4.3 Undertakings entrusted with services of general economic interest in terms of Art. 86(2)1st Variant ECT

Art.86(1) ECT states that either public undertakings[71], companies with exclusive rights are generally bound by EC Law. It is important to stress that entities in the scope of this article very often combine both elements. In order to separate Art.82 and Art. 86(1) ECT, it is preferable to argue that measures abusing dominant positions in relevant product markets that are imposed by public law shall

[67] ECJ Case 59/75 *Pubbico Ministero v Manghera and others* [1976] ECR 91;
J.P. Slot, *Energy and Competition*, Reader Part III, University of Amsterdam 21 (1996); K. Holmes, *European Community Competition Law, State Aids and the Energy Industries*, CEPMLP Conference Proceeding, Competition in European Energy Markets, Threats, Challenges and Opportunities, Sept 24-25, 1997, London, p 3.

[68] The ECJ virtually resents to apply the Cassis Formula to non discriminative infringements of Art.28: ECJ Case 229/83 *Leclerc v Au Blé Vert* [1985] ECR 1, 35; ECJ Case C-1/90 and C-176/90 *APESA and Publivia v DSSSC* [1991] ECR I, 4151, 4183; R. Streinz, Europarecht (4th ed.) (Heidelberg, Germany, C.F.Müller, 1999) p 270; The latest ruling is ambivalent: ECJ Case C-34/95, C-35/95, C-36/95 *Konsumentombudsmannen v De Agostini and TV-Shop* [1997] ECR I, 3843, 3891.

[69] ECJ Case C-2/90 *Commission v Belgium* [1992] ECR I 4431/4479.

[70] ECJ Case C-157/94 *Commission v Netherlands* [1997] ECR I 5699, ECJ Case C-158/94 *Commission v Italy* [1997] ECR I 5789, ECJ Case C-159/94 *Commission v France* [1997] ECR I 5815, ECJ Case C-160/94 *Commission v Spain* [1997] ECR I 5851.

[71] i.e. public corporations, state owned companies, partly state owned private companies as long as there is significant dependence on public shareholders.

exclusively fall into the scope of Art. 86(1) ECT[72] and be a subject of potential justification under Art.86(2) ECT.

This provision contains a derogation for companies that the state entrusts with specific "services in the general economic interest" and a clear definition of the imposed tasks by the state is highly recommended[73]. Moreover, it is highly probable that the utilities within the scope of Art.86(2) ECT additionally have specific rights and are at least partly influenced by government shareholdings in terms of Art.86(1) ECT. However, the derogation is strictly limited by two explicit criteria: First of all, there must be a kind of causality link between the derogation and the due performance of these services. Secondly, unduly interference with the development of community trade must be avoided pursuant to Art.86(2)2 ECT.

Three further implicit restrictions apply: Firstly, The word "insofar" may be used to apply a strict proportionality test questioning whether the exemption is related to the attainment of the services in the general economic interest, if the exemption is the least interfering means to achieve the target and if no other concepts of EC of higher rank are spoiled[74]. Secondly the general concept of narrow interpretation of derogations applies[75]. Thirdly, the burden of proof is on the member states who entrusts a business unit.

[72] L. Hancher and J-L Buendia Sierra, *Cross Subsidisation and EC Law*, CMLRev 927 (1998); J.P.Slot, *Energy and Competition*, CMLRev 531 (1994).
[73] L.Hancher and P.A. Trepte, *Competition and the Internal Energy Market*, ECLR 154 (1992).
[74] ECJ Case T-260/94 *Air Inter SA v Commission* [1997] ECR II 997.
[75] ECJ Case T-260/94 *Air Inter SA v Commission* [1997] ECR II 997.

4.4 Campus Oil Case

The Campus Oil judgement rules that a national statutory requirement that forces importers of fossil fuels to purchase a specific amount of resources from a national supplier is an infringement of Art.28 2nd Var. ECT. However, it is justified under Art.31(1) ECT on grounds of public security of energy supply if a country has no ambient resources[76]. Thereby, the decision reflects the second oil crisis. Furthermore, it is remarkable that the court prevents the member states from granting exclusive import rights on undertakings that benefit from a derogation under Art. 86 (2) ECT[77]. This approach is antagonistic to other decisions.

4.5 Greek Oil Case

Contrarily, the ECJ held in the Greek Oil Case[78] that public legal obligation of petroleum distributors to acquire specific quotas from public refineries causes a non justifiable violation of Art.28 ECT. This amendment is not convincing from the dogmatic point of view but it seems to reflect the amended situation of the world petroleum market at the end of the 1980s where national security of supply was no longer the prominent issue.

4.6 Corbeau Case and Almelo Case

In the Corbeau Judgement[79], the ECJ emphasised that the infringement of EC law must not be disproportional to honour the public services. It also implicates that serious economic instabilities of the entrusted entity have to be highly probably owing to the fulfilment of general EC law. This approach was even stricter in the

[76] ECJ Case 72/83 *Campus Oil Ltd and others v Minister of Industry and Energy and others* [1984] ECR 2727.
[77] ECJ Case 72/83 *Campus Oil Ltd and others v Minister of Industry and Energy and others* [1984] ECR 2727 recital 2.
[78] ECJ Case C-347/88 *Commission v Hellenic Republic* [1990] ECR I 4747.
[79] ECJ Case C-320/91 *Procureur du Poi v Corbeau* [1993] ECR I-2533: The Case deals with a former post official who delivers mail in highly populated areas threatening the Belgian monopolist.

Almelo case[80] in which the ECJ was asked whether a supply contract between a regional distributor and local distribution companies preventing the latter from importing electricity was consistent with EC law. The ECJ notes that the undertaking has to face serious financial difficulties that may prevent it from offering uniform tariff rates if it is entitled to rely on Art.86(2)[81] so that its viability is in question. Therefore, the threat of cream skimming in the best supply areas could be a prerequisite to invoke Art.86 (2) ECT.

4.7 Art. 226 ECT Proceedings Dealing with Exclusive Import and Export Rights for Electricity and Gas

In 1991, the Commission alleged that nine member states provided utilities with non justifiable exclusive import and export rights for electricity and gas[82]. In order to give an incentive to amend domestic legislation under the treat of a court action, the Commission postponed further actions[83]. Only Denmark took advantage of this deliberate delay in order to modify its energy sector[84]. Finally, a court action was raised against five countries[85]. Apart from the Case against Spain in which the court denied the proof of exclusive rights transferred to Redesa[86], the judgements repeat that exclusive import and export rights for gas and electricity are a violation of Art.31 ECT. Recalling its function as lex specialis, a discussion of Art. 28-30 ECT is regarded

[80] ECJ Case C-393/92 *Gemeente Almelo* v *Energiebedrijf Ijsselmij NV* [1994] I 1477; the Corbeau and Almelo Cases were Art. 234 ECT proceedings so that it was up to the domestic courts to decide the matter.
[81] ECJ Case C-393/92 *Gemeente Almelo* v *Energiebedrijf Ijsselmij NV* [1994] I 1477 paragraph 46-49.
[82] Denmark, France, Greece, Ireland, Italy, The Netherlands, Portugal, Spain, United Kingdom.
[83] This is described as a carrot and stick approach, q.v. P. Cameron, *Towards an Internal Market in Energy - The Carrot and Stick Approach*, E.L.Rev. 1 (1998); P.K. Lyons, EU Energy Policies towards the 21st Century, A Business Intelligence Report, (Surrey, U.K., EC Inform, 1998) p 34.
[84] P. Cameron, *Towards an Internal Market in Energy - The Carrot and Stick Approach*, E.L.Rev. 2 (1998).
[85] ECJ Case C-157/94 *Commission v Netherlands* [1997] ECR I 5699, ECJ Case C-158/94 *Commission v Italy* [1997] ECR I 5789, ECJ Case C-159/94 *Commission v France* [1997] ECR I 5815; ECJ Case C-160/94 *Commission v Spain* [1997] ECR I 5851.
[86] ECJ Case C-160/94 *Commission v Spain* [1997] ECR I 5851, 5860.

as superfluous[87]. In contrast to the Campus Oil Case, Art.86(2) ECT is granted the power to prevail an infringement of Art.31 ECT which is questionable in terms of systematic interpretation and the wording of Art.86(2) that deals with services instead of trade in goods.

The second remarkable issue is that the strict criteria that were developed for the application of Art. 86(2) in the energy sector were relaxed. It was quoted that the exemption should not require that the survival of the undertaking would be under threat[88]. It is sufficient that particular tasks in the general economic interests could not be performed. A third aspect is that the burden of proof was not solely on the member states although Art.86(2) is a derogation but partly on the Commission[89]. These decisions are very defensive but they can be explained by the progress concerning the adoption of the harmonisation directives.

5. Conclusion

This paper has discussed the complex issues that affect the application of EC Competition law on the energy sector. Not only the controversial assessment of competition as a de-central power distributor within the society and its relation to other aspects of economic policy but also various collisions between EC Law and either constitutional or domestic competition legislation hinder the proper application. Additionally, different national opinions about the organisation of the energy sector and the limited scope of Art.86(3)ECT prevented competition directives of the Commission. The long negotiation process of the IEMD and IGMD seemed to have an impact on the application of Art.86(2) regarding the energy sector as the

[87] e.g. ECJ Case C-159/94 *Commission v France* [1997] ECR I 5815, 5831.
[88] e.g. ECJ Case C-159/94 *Commission v France* [1997] ECR I 5815, 5816 and 5835.
[89] ECJ Case C-159/94 *Commission v France* [1997] ECR I 5815, 5816 and 5843-5845.

defensive interpretation can be justified on the grounds of judicial self restraint: the court did not want to interfere with the pending harmonisation Directives recognising that secondary legislation is more appropriate to restructure a complete sector so close to sovereignty than judgements with their limited scope. Another future issue might be the conflict between the essential facilities doctrine and domestic law that does not provide for TPA[90]. Finally, it can be stated that the growing impact of highly efficient, de-central power generation is an important facilitator of the reform of the energy sector.

[90] The German Energy Industry Act of 1998 only addresses TPA for the Electricity sector. TPA might violate with the Constitution as well though an interference without compensation might be justifiable owing to the essential facilities doctrine and because of the access fees if one argues that TPA is a re-definition of property in terms of Art. 14 (1) 2 GG rather than an expropriation in terms of Art. 14 (2) GG.

6. Annexes

6.1 Cost Curves of fossil fuel power plants

[Omitted in the online version, please contact the author]

Source:

S.Hunt and G. Shuttleworth, Competition and Choice in Electricity (1st ed.) (Chichester, U.K., J. Wiley & Sons Ltd, 1996) p 2.

The diagram explains that Combined Cycle Gas Turbine [CCGT] plants introduced both higher flexibility due two lower optimal plant sizes and higher energy efficiency as indicated by lower generation costs. Another advantage of small scale plants is the facilitation of mass production of similar plants that will increase the producers' productive efficiency and will lower the initial capital outlay of investors. Additional small plants alleviate on site generation, co-generation[91] and tri-generation[92] encouraging further advantageous effects on energy efficiency due two effective fuel usage and avoidance of long distance electricity transmission. Therefore, the emergence of CCGT technology can be regarded as a key-facilitator of liberalisation of power generation. A CCGT plant burns hot gases of 500 degrees Celsius to power a turbine in the first cycle. The remaining hot gas is used to vaporise water and the vapour will power a second turbine leading to an energy efficiency of 80%[93].

[91] Cogeneration is generation of electricity and usable heat, q.v. W. Patterson, Transforming Electricity (1st ed.) (London, U.K., Earthscan, 1999) p 183.
[92] Trigeneration additionally includes usable cold, q.v. W. Patterson, Transforming Electricity (1st ed.) (London, U.K., Earthscan, 1999) p 101 and 187.
[93] W. Patterson, Transforming Electricity (1st ed.) (London, U.K., Earthscan, 1999) p73 and 114.

6.2 Heterogeneous Electricity Prices Prior to Liberalisation

[Omitted in the online version, please contact the author]

Source:

Lyons, P.K., EU Energy Policies in the mid-1990s, A Business Intelligence Report, (Surrey, U.K., EC Inform, 1996).