

Energy Transition Enhanced by the European Green Deal – How National Competition Authorities Should Tackle This Challenge in Central and Eastern Europe?

by

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Abstract

The European Green Deal (EGD) provides very ambitious policy goals, particularly related to energy transition and decarbonisation. Competition law also plays a role in the accomplishment of the objectives set in the European Green Deal. While many National Competition Authorities (NCAs) have already issued relevant acts and taken significant actions regarding practices related to the EGD, the NCAs from Central and Eastern Europe (CEE) have not yet instituted any initial actions towards this policy. This article proposes relevant institutional actions which may be used by NCAs in the CEE region given the current situation in their national energy markets, energy mixes as well as existing endeavours.

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Resumé

Le Green Deal européen (GDE) prévoit des objectifs politiques très ambitieux, notamment en matière de transition énergétique et de décarbonisation. Le droit de la concurrence joue également un rôle dans la réalisation des objectifs fixés par le Green Deal européen. Alors que de nombreuses autorités nationales de la concurrence (ANC) ont déjà publié des actes pertinents et pris des mesures importantes concernant les pratiques liées à le GDE, les ANC d'Europe centrale et orientale n'ont pas encore institué de mesures initiales en faveur de cette politique. Cet article propose des actions institutionnelles pertinentes qui peuvent être utilisées par les ANC d'Europe centrale et orientale compte tenu de la situation actuelle de leurs marchés énergétiques nationaux, de leurs mix énergétiques ainsi que des efforts existants.

Key words: European Green Deal; National Competition Authorities; Central and Eastern Europe; sustainability; environmental agreements; guidelines.

JEL: K21, K32

I. Introduction

The European Green Deal initiative (hereinafter: EGD) announced by the European Commission (hereinafter: Commission) in late 2019¹ constitutes an immense challenge for all of the institutions, governments, stakeholders and citizens of Europe. One of the basis of the EGD is its commitment to supply clean, affordable and secure energy. In order to achieve this goal, significant structural changes in current national energy markets need to occur, particularly those related to energy mixes. This would require organisational, financial and political efforts of both European and national authorities. To highlight the scale of the challenges ahead, it is worth acknowledging that according to estimations, in order to achieve the interim greenhouse gas reduction target of 40% by 2030, an additional €260 billion investment would be required per year². In order to enhance the EGD, the European Green Deal Investment

¹ Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, The European Green Deal, (COM/2019/640 final) (hereinafter: EGD Communication); available at: <https://eur-lex.europa.eu/legal-content/en/txt/?uri=celex%3a52019dc0640> (accessed 17.08.2021).

² Press release of the European Parliament, *Europe's one trillion climate finance plan*, available at: <https://www.europarl.europa.eu/news/en/headlines/society/20200109STO69927/europe-s-one-trillion-climate-finance-plan> (accessed 3.07.2021).

Plan aims to provide at least 1 trillion euro to support sustainable investments over the next decade³. Whereas providing financial support for the EGD is essential, the legal framework also has its role to play. While sector specific economic regulations should be considered as the leading instruments to ensure the achievement of the EGD, competition law might also, although to a lesser degree (Dolmans 2020), contribute to this end. In the past, competition law played a crucial role in the liberalisation of energy markets⁴. Nowadays, it has also contributed to the pursuit of facilitating the EGD.

Bearing in mind the variety of possible solutions contributing to the achievement of the EGD (Monti, 2020), it is difficult to provide general comments on the substantive assessment of potential unilateral or coordinated practices related to the EGD from the competition law perspective. Appreciating a significant (Holmes, 2020) and detailed (Buhart and Henry, 2021) academic analysis related to the possible inclusions of the sustainability criterion under Articles 101 and 102 TFEU, or methods to properly calculate the environmental impact of given actions (be it agreements or mergers) (Dolmans, 2020), this article does not intend to contribute to the discussion concerning the substantive assessment of compliance with EU competition law, or possible ways to change the assessment method of agreements and unilateral actions related to environmental or sustainability issues, in particular the EGD. Having recognised the importance of changes stemming from the EGD, this paper considers the institutional set up and focuses on the question of how National Competition Authorities (hereinafter: NCAs) might facilitate future activities of undertakings related to the EGD. Bearing in mind that many NCAs have already taken some steps in this regard, this article focuses on the NCAs from Central and Eastern Europe (hereinafter: CEE). Pursuant to the approach undertaken by the European Commission (Miert, 1998), CEE is composed of 11 countries – Bulgaria, Croatia, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Romania, Slovak Republic and Slovenia.

An analysis of relevant acts related to the EGD is presented. This analysis aims at providing an overview of the principal directions of energy transformation envisaged by the EGD. Undertakings, regardless of their country of origin, need to adapt to the primary ideas and courses set by the EGD. In order to do so, it is essential to take actions which have to comply

³ European Commission, *The European Green Deal Investment Plan and Just Transition Mechanism explained*, available at: https://ec.europa.eu/commission/presscorner/detail/en/qanda_20_24 (accessed 3.07.2021).

⁴ European Commission, Report on energy sector inquiry, SEC(2006) 1724, available at: https://ec.europa.eu/competition/sectors/energy/2005_inquiry/full_report_part1.pdf (accessed 9.04.2021).

with Articles 101 and 102 of the Treaty on the Functioning of the European Union (hereinafter: TFEU). Having identified the primary directions of future actions of companies, attention should be drawn to the current situation of the CEE region. What is the state of CEE energy markets, and how does it correspond to challenges posed by the EGD? In order to address these issues, two premises were taken into account. One is the level of fossil fuels, in particular coal, usage attributed to each CEE member state⁵. The answer to this question provides an indication of how far-reaching the challenges are to decarbonise, limit CO² emission and invest in new technologies. It is assumed that to a varying extent, these new investments would match policy priorities set by the EGD. Since the role and status of nuclear energy is still subject to fervent discussion among member states, it is unknown to what extent this technology and energy source will be used in the future. Notwithstanding the role of nuclear energy, it is safe to say that hydrogen, biomethane and offshore wind farm projects would play a big role in each of the member states undergoing energy transition.

The second premise of CEE energy markets that was taken into account here are the market shares of undertakings present in these sectors. The market share factor, while not the only one, is important from a competition law perspective. Safe harbours, guidelines or any other possible actions considered by NCAs should take into account the characteristics of given markets and properly adapt to them. The market share factor not only provides important information to include in an analysis, but can also deprive some companies of the possibility to exempt their actions from competition law. This hints at the need for NCAs to take action in order to minimise legal uncertainty and to stimulate companies to cooperate or implement unilateral initiatives.

Having identified these features, the next part of the article turns to potential institutional actions which might be taken by NCAs in order to facilitate securing competition law compliance for EGD-related initiatives. In this regard, an analysis of the responses to the consultation procedure organised by the Commission is provided. The opinions of the stakeholders, gathered during this public consultation, allow us to recognise the most pressing needs of the undertakings as well as the approaches of NCAs towards this topic. As far as approaches are concerned, some of the NCAs have already taken significant institutional actions. The actions of some NCAs in particular – the highly appreciated acts issued by the Dutch and Hellenic NCAs – serve as

⁵ H. Szemző, Év. Gerőházi, A. Gertheis, O. Fülöp, L. Magyar, A. Ámon, *The energy transition in Central and Eastern Europe: The business case for higher ambition*, University of Cambridge Institute for Sustainability Leadership, 2019, p. 11, available at: <https://www.corporateleadersgroup.com/reports-evidence-and-insights/publications/publications-pdfs/cee-energy-transition-report.pdf> (accessed 3.07.2021).

a repository of knowledge and inspiration for other NCAs. The analysis of already issued acts enabled the author to draw conclusions which might be relevant for NCAs from CEE.

This article is based primarily on doctrinal methodology, concentrating on relevant legal acts as well as appropriate market reports. It also embraces a comparative look of the approaches already incorporated by different member states. Due to the lack of legislative or administrative initiatives undertaken by NCAs from CEE, at this point in time, the aim of this article is to verify the needs of institutional actions by NCAs from CEE. Should the relevant features indicate the need for such actions, some recommendations for NCAs are provided. These recommendations and analysis are limited to issues related to the abuse of dominance and agreements having the prevention, restriction or distortion of competition as their object or effect. These provisions exist at both EU and national levels and their implementations constitute an important factor in the decision-making process. The institutional approach on state aid at the national level is not considered, since it remains solely in the domain of the Commission. The Commission is the only institution entitled to assess the compliance of state aid granted by member states with the TFEU. Due to significant discrepancies in the merger control system, this aspect of competition law is not further analysed here. Despite these limitations, the author would be more than honoured should any of the presented recommendations, concerning possible institutional responses related to the assessment of the abuse of a dominant position or illegal agreements connected to the EGD or energy transition, be considered, not to mention implemented, by any of the NCAs in CEE.

II. Energy transition foreseen in the EGD

Supplying clean, affordable and secure energy is one of the pillars of the EGD. It might even be called a pursuit of energy transition. This transition is based on the recognised need of decarbonising energy systems. According to the Commission, the production and use of energy across economic sectors account for more than 75% of EU greenhouse gas emissions⁶. It is therefore of crucial importance to significantly change the power sector and, in particular, energy production markets. The EGD proposes the increase of the shares of renewable energy sources in power markets, quickly phasing out coal as well as decarbonising gases. In this regard, the EGD intends to influence the

⁶ The EGD Communication, *op. cit.*

energy mixes of the member states, limiting their choice between different energy sources stipulated in Article 194 TFEU⁷, and wishes to promote the expansion and development of certain energy and power sources. It is feasible to distinguish the most prominent branches and sources of energy promoted by the EGD.

Firstly, it is worth emphasising the shift towards hydrogen. As noted by the Commission, a large-scale and fast paced deployment of clean hydrogen is essential to achieve the ambitions of the EU⁸. Currently, hydrogen accounts for only a marginal share in the energy mixes of the member states. By introducing a hydrogen strategy⁹, the Commission intends to draw a roadmap for hydrogen and sketches out plans and incentives to boost its production and trading. The strategy sets an objective of 40GW of renewables linked to the electrolysis capacity in the EU by 2030. The fact that hydrogen would eventually become a major energy source provides member states and undertakings with both important business opportunities as well as a need to adapt to new trends and strategies. As member states are impatiently expecting a new regulatory environment for hydrogen¹⁰, the challenges posed and possibilities provided by this new fuel are large. NCAs and energy companies in this region need to face this trend as it might result in significant market changes. In the coming years, important projects related to the production, distribution and sale of hydrogen would be subject to market rules and, therefore, competition law, including rules related to prices and access regimes¹¹. Companies involved in the new hydrogen strategy have to live up to the novelty and economic scale of the challenge and, meanwhile, comply with the regulatory framework and existing competition rules.

Similarly, the EGD envisages and supports a rapid development of energy produced by offshore wind¹². As in the case of hydrogen, the Commission

⁷ Consolidated version of the Treaty on the Functioning of the European Union, OJ C 326, 26.10.2012, p. 47–390.

⁸ European Commission, *A Hydrogen Strategy for a climate neutral Europe*, available at: https://ec.europa.eu/commission/presscorner/detail/en/qanda_20_1257 (accessed 2.07.2021).

⁹ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *A hydrogen strategy for a climate-neutral Europe*, (COM(2020) 301 final), (hereinafter: Hydrogen Strategy Communication); available at: https://ec.europa.eu/energy/sites/ener/files/hydrogen_strategy.pdf (accessed 17.08.2021).

¹⁰ Euractiv, *Energy ministers urge for regulatory framework on hydrogen*, available at: <https://www.euractiv.com/section/eu-council-presidency/news/energy-ministers-urge-for-regulatory-framework-on-hydrogen/> (accessed 2.07.2021).

¹¹ Hydrogen Strategy Communication, p. 16.

¹² Press release of the European Commission, *Boosting Offshore Renewable Energy for a Climate Neutral Europe*, available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2096 (accessed 2.07.2021).

proposed a strategy to harness the potential of offshore renewable energy¹³. Currently, existing offshore wind capacity accounts for 12 GW. According to the strategy, there will be 60 GW of installed offshore wind capacity in 2030, and the volume of installed capacity should reach up to 300 GW by 2050. These estimates reveal the high ambitions and level of forthcoming changes in offshore wind. Many of the new projects might take place in the CEE region. Plans outlined by the Commission¹⁴ explicitly refer to the importance of the Baltic Sea to which Poland, Latvia, Lithuania and Estonia have access, the Black Sea available from the territory of Romania, and the Mediterranean Sea linked to Slovenia and Croatia. CEE countries might thus seize the opportunity and embark on a variety of offshore wind projects. In this regard, as shown by multiple projects in Poland¹⁵, cooperation among undertakings might be needed. In order to provide legal certainty for these projects, a clear regulatory framework, as emphasised by the Commission¹⁶, should be provided including competition law rules concerning multilateral cooperation.

Another shift and new business opportunities are created by the decarbonisation of gases. As part of the efforts related to the EGD, the Commission also adopted a strategy related to the reduction of methane emissions¹⁷. Its main goal is to lower the leakage of methane – a powerful greenhouse gas, but it also provides a stimulus for the development of renewable gases such as biogas and biomethane. The production of these gases is anticipated to grow in the coming years. These new energy sources create an opportunity for many developed companies active in the natural gas market¹⁸. The question on the role of undertakings with a significant market position in adjacent markets, such as

¹³ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *An EU Strategy to harness the potential of offshore renewable energy for a climate neutral future*, COM(2020) 741 final, (hereinafter: Offshore Strategy Communication); available at: <https://eur-lex.europa.eu/legal-content/en/txt/?uri=com%3a2020%3a741%3afin> (accessed 17.08.2021).

¹⁴ Offshore Strategy Communication, available at: https://ec.europa.eu/commission/presscorner/detail/en/qanda_20_2095 (accessed 2.07.2021).

¹⁵ Decision of the President of the Polish Office of Competition and Consumer Protection of 8.03.2021, DKK-59/2021 *concerning the creation of joint venture between Polski Koncern Naftowy ORLEN S.A. and NP Baltic Wind B.V.* or decision of the President of the Office of Competition and Consumer Protection of 10.03.2021, DKK-64/2021 *concerning the creation of joint venture between Polska Grupa Energetyczne S.A. and Ørsted Wind Power A/S.*

¹⁶ Offshore Strategy Communication, p. 14–17.

¹⁷ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *on an EU strategy to reduce methane emissions*, COM(2020) 663 final; available at: https://ec.europa.eu/energy/sites/ener/files/eu_methane_strategy.pdf (accessed 17.08.2021).

¹⁸ In 2020, the Polish Oil and Gas Company announced its intentions to include biomethane production in its strategy, available at: <https://en.pgnig.pl/news/-/news-list/id/pgnig-to-make->

natural gas trading or production, in the pursuit of more renewable energy sources, such as biomethane, is yet to be answered. In the process of responding to this query, market thresholds included in certain aspects of competition shall also be taken into account.

The Commission decided to express its detailed intentions related to the EGD by adopting multiple strategies. While these strategies provide useful insights and projections, each company and member state must take into account its market particularities before adapting to the roadmaps sketched out by the Commission for hydrogen, offshore wind and biogases. It is worth reflecting on the common market characteristics of CEE energy markets as they might affect the decisions related to EGD strategies.

III. CEE region endowments in the eve of the realisation of the EGD

Describing the characteristics of energy markets in CEE countries might be too broad of a subject for a book, not to mention an article. As this paper concerns competition law, and even limits itself to certain aspects of this domain only, it is sufficient to search for common traits of CEE energy markets relevant from the perspective of the topic of this article.

The first of the important characteristics, especially with regard to energy transition, is the use of fossil fuels, coal in particular. According to the data, the share of fossil fuels in the gross available energy in 2018¹⁹ was high in each CEE member state. The shares were accordingly: Bulgaria – 68.2%, Croatia – 69.6%, Czechia – 75.1%, Estonia – 84.9%, Hungary – 69.9%, Latvia – 59.6%, Lithuania – 66.4%, Poland – 91%, Romania – 74.1%, Slovakia – 66.8% and Slovenia – 65.2%. In the same year and in most of the CEE countries, coal constituted a significant source of power generation. In Poland, coal amounted to 80% of all power generation, in Czechia – 54%, Bulgaria – 43%, Slovenia – 31%, Romania – 25%, Croatia – 21%, Hungary – 18%, Slovakia – 12%, and Estonia – 4%²⁰. These numbers changed slightly in 2020²¹ with

renewables-part-of-its-strategy/newsGroupId/1910852?changeYear=2020¤tPage=2 (accessed 2.07.2021).

¹⁹ Eurostat, *Energy data 2020*, p. 17, available at: <https://ec.europa.eu/eurostat/documents/3217494/11099022/KS-HB-20-001-EN-N.pdf/bf891880-1e3e-b4ba-0061-19810ebf2c64?t=1594715608000> (accessed 3.07.2021).

²⁰ International Energy Agency, *Coal's share in power generation for selected European countries*, available at: <https://www.iea.org/data-and-statistics/charts/coal-share-in-power-generation-for-selected-european-countries-2018> (accessed 3.07.2021).

²¹ EMBER, *EU Power Sector in 2020*, available at: <https://ember-climate.org/project/eu-power-sector-2020/> (accessed 3.07.2021).

Poland – 70%, Czechia – 40%, Bulgaria – 33% and Slovenia – 26% having the highest shares. Coal was also used for power generation in Romania – 17%, Hungary – 11%, Croatia – 10% and Slovakia – 7%. At the same time, Latvia, Lithuania and Estonia did not use coal at all. Worth noting is the fact that out of the nine EU member states most reliant on lignite (one of the most pollutant sources of energy) for power generation are the following seven CEE countries: Bulgaria, Czechia, Hungary, Poland, the Slovak Republic, Slovenia and Romania (International Energy Agency, 2020). Apart from coal, CEE countries also use natural gas in order to generate electricity. The share of natural gas in electricity production in 2020 was accordingly: Bulgaria – 6%, Croatia – 26%, Czechia – 7%, Estonia – 1%, Hungary – 26%, Latvia – 40%, Lithuania – 38%, Poland – 10%, Romania – 18%, Slovakia – 13% and Slovenia – 4%.

It stems from the presented data that most CEE countries still rely heavily on fossil fuels. Coal is an important source of electricity generation in Poland, Czechia, Bulgaria, Slovenia and Romania. Only the Baltic States do not use coal as a source of power generation. Bearing in mind the necessity to decarbonise, almost all CEE member states face the challenge of substituting coal in their energy mixes. In order to accomplish this task, undertakings active in these countries would be forced to embark on initiatives which comply with the EGD, such as offshore projects. Moreover, each CEE country uses natural gas, be that for electricity production purposes or heating and cooling. Use of this source of energy implies a further need to decarbonise it with biomethane projects, promoted by the EGD as evident candidates for investments.

Competition law assigns certain legal consequences to market shares of undertakings. Primarily, as far as abuse of dominance is concerned, market shares provide a useful first indication of the market structure and of the relative importance of the various undertakings active in the market²². Jurisprudence confirmed that very large market shares are in themselves, other than in exceptional circumstances, evidence of the existence of a dominant position²³. In a situation where a market share of 50% exists, the presumption of dominance has been established²⁴. It is also possible to find a dominant position where an undertaking has a market share lower

²² Communication from the Commission, *Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertaking*, (OJ 2009 C 45, p. 13).

²³ ECJ judgment of 13.02.1979, Case 85/76 *Hoffmann-La Roche & Co. AG v Commission of the European Communities*, ECLI:EU:C:1979:36, par. 41.

²⁴ ECJ judgment of 03.07.1991, Case 62/86 *AKZO Chemie BV v Commission of the European Communities*, ECLI:EU:C:1991:286, par. 60.

than 50%.²⁵ As the market threshold is not in itself enough to establish a dominant position, its role as an ‘indicator’ is prevalent. Once dominance is established, an undertaking is subject to a strict legal regime on abuse of dominance. Secondly, market thresholds serve also as an enabler for the use of exemptions as a shield, a part from hard-core restrictions, and the application of provisions related to anticompetitive cooperation. For example, suppliers or buyers with market shares lower than 30% are subject to group exemptions granted for vertical agreements and cooperation.²⁶ As for horizontal agreements, according to the Commission’s Guidelines²⁷, if the parties have a low combined market share, then a horizontal cooperation agreement is unlikely to give rise to restrictive effects on competition. It goes without saying that the market share indicator plays a very important role in competition law analyses.

The characteristic feature of national energy markets in CEE is the existence of market players with high market shares. This applies to both the production and supply of electricity. The data supporting these findings are provided by National Regulatory Authorities of the CEE member states. As far as production is concerned, one might observe the existence of undertakings with market shares indicating dominance. For example, in Slovakia in 2018, Slovenské elektrárne provided 65.94% of Slovakia’s power generation, covering 62.24% of the country’s electricity demand²⁸. In Latvia, its dominant undertaking produces about 88% of the total generation amount in the country, and is the only company that has a share of more than 5% in the installed available capacity²⁹. In Poland in 2019, the share of electricity fed into the grid of the three largest electricity producers amounted to 66.4%. At the same time, the market share of one undertaking in the electricity generation market exceeded 40%, while others were below 20%³⁰. In

²⁵ ECJ judgment of 14.02.1978, Case 27/76 *United Brands Company and United Brands Continentaal BV v Commission of the European Communities*, ECLI: ECLI:EU:C:1978:22, p. 108.

²⁶ Commission Regulation 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, (OJ 2010 L 102, p. 1–7).

²⁷ Communication from the Commission, *Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreement*, OJ 2011 C 11, p. 1–72, par. 44.

²⁸ Annual Report 2019 of the Regulatory Office for Network Industries of the Slovak Republic, available at: https://www.ceer.eu/documents/104400/6959701/C20_NR_Slovakia_EN.pdf/24e347d1-3e42-efa8-c924-a1c4eede5030 (accessed 3.07.2021).

²⁹ Annual Report 2019 of the Public Utilities Commission of the Republic of Latvia on the National Energy Sector, available at: https://www.ceer.eu/documents/104400/6959701/C20_NR_Latvia_EN-Summary/0f4d8807-bf15-3070-fd87-c5b170db44ed (accessed 03.07.2021).

³⁰ Annual report 2020 of the President of Polish Energy Regulatory Office, available at: https://www.ceer.eu/documents/104400/6959701/C20_NR_Poland_EN/6762a2b2-50e5-1a43-8523-8a70037eed83 (accessed 3.07.2021).

Romania, 3 undertakings generated in 2019 more than 68% of that country's electricity³¹.

The pattern of high market shares held by few undertakings can also be seen in electricity supply markets. In Bulgaria, the three biggest energy traders in 2019 had accordingly 39.68%, 38.26% and 22.81% of the market share³². In Croatia in 2019, the three largest electricity suppliers had a 99% market share in household end-consumer supply and a 95% market share in non-household end-consumer supply³³. Similarly in Hungary, three companies supplied in 2018 more than 98% (in terms of the number of consumers and consumer sites) of retail electricity³⁴. In Lithuania in 2019, the share of 4 of the largest independent electricity suppliers in the supply retail market amounted to 82.4%. At the same time, the market share on the retail market of electricity supply of one undertaking reached a near dominance level exceeding 40%³⁵. In the Czech Republic in 2019, the market share of the three largest electricity suppliers was lower and reached a level of 69.5%³⁶. Slovenia is the exception here where the level of market concentration in the retail supply of electricity market is medium with no company having had a market share exceeding 20% in 2019³⁷.

It is evident from the data, that in most electricity markets in CEE countries, either a single undertaking with significant market power exists, especially at the production level, or just a few undertakings with high market shares. Due to the market share, held individually or jointly, these companies might be

³¹ Annual Report 2019 of the Romanian Energy Regulatory Authority, available at: https://www.ceer.eu/documents/104400/6959701/C20_NR_Romania_EN.pdf/9e0b305a-f920-75bd-6735-d450286e3c3a (accessed 3.07.2021).

³² Annual Report 2020 of the Energy and Water Regulatory Commission Bulgaria, available at: https://www.ceer.eu/documents/104400/6959701/C20_NR_Bulgaria_EN/0f9f173e-0eef-8d69-a20f-fd34c228dfc3 (accessed 3.07.2021).

³³ Annual report 2020 of the Croatian Energy Regulatory Agency, available at: https://www.ceer.eu/documents/104400/6959701/C20_NR_Croatia_EN/d082e7e2-f548-1d91-ee65-c3979556be96 (accessed 3.07.2021).

³⁴ Annual Report 2019 of the Hungarian Electricity and Public Utility Regulatory Authority, available at: http://www.mekh.hu/download/9/01/c0000/hea_annual_report_2018.pdf (accessed 3.07.2021).

³⁵ Annual Report 2020 of the Republic of Lithuania on Electricity and Natural Gas Markets, available at: https://www.ceer.eu/documents/104400/6959701/C20_NR_Lithuania_EN/18c15676-4479-19e2-2d33-03b1df7e519e (accessed 03.07.2021).

³⁶ Annual report 2020 of the Energy Regulatory Office on the Electricity and Gas Industries in the Czech Republic, available at: https://www.ceer.eu/documents/104400/6959701/C20_NR_Czech+Republic_EN.pdf/2fa0edc2-0373-ecb4-e591-dba49ff3a338 (accessed 3.07.2021).

³⁷ Annual report 2019 on the energy sector in Slovenia, available at: https://www.ceer.eu/documents/104400/6959701/C20_NR_Slovenia_EN/9e2e03cb-a9de-7124-f45f-0f125677a6d8 (accessed 3.07.2021).

excluded from the safe harbour provided by group exemption acts. One way of thinking might be that the EGD would enhance the liberalisation of these markets, allowing new companies to brave the market and stimulating more entities to participate in it. In this view, the existing legal framework curtailing the actions allowed for undertakings with high market shares requires no further changes. However, one might also approach the EGD challenge from the functional and teleological perspective. As the EGD requires huge investments and a sharp shift in electricity production, an ‘all hands on deck’ approach should be promoted. Companies with a higher market share, and likely more financial capacity, should be encouraged to actively engage in actions consistent with the EGD, instead of defending the *status quo*. NCAs might help in this regard. While vigilant for potential market foreclosure effects, NCAs should enable undertakings with greater market power to introduce more far-reaching cooperation or unilateral projects related to the EGD.

IV. Possible stimulations provided by NCAs

Regulation 1/2003³⁸ introduced a system of decentralised *ex post* enforcement (Wils, 2013). In this system, Articles 101 and 102 TFEU are enforced by both the Commission and NCAs. According to Article 3 Regulation 1/2003, where NCAs apply national competition law to agreements, decisions by associations of undertakings or concerted practices within the meaning of Article 101 TFEU which may affect trade between Member States, or to any unilateral abuse prohibited by Article 102 TFEU, they shall also apply the relevant provisions of the TFEU. Although some controversies around the obligation to apply EU competition law by NCAs emerged recently (Wils, 2019), the functioning of the European Competition Network is perceived as rather successful. The position of NCAs was boosted by the introduction of the ECN+ Directive³⁹. This act aims to ensure a proper level of independence for NCAs (Wils, 2019), and seeks to harmonise the investigative, procedural and material powers of NCAs in line with those held by the Commission. It also constitutes a step towards increasing convergence between national and EU competition law.

³⁸ Council Regulation 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ 2003 L 1, p. 1–25.

³⁹ Directive 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, OJ 2019 L 11, p. 3–33.

Obviously, there are still many investigations and cases where only national competition law is applied by a relevant NCA. In general, national competition law systems reflect the system of EU competition law (Cseres, 2010). This applies to legal means related to competition law. Member states adopt group exemptions shielding certain forms of agreements or multilateral cooperation from national competition law⁴⁰. These acts have to be adopted in accordance with national legislative procedures. NCAs independently might issue guidelines or guidance papers related to national competition law matters, explaining legal uncertainties or highlighting the intentions or priorities of a given NCA. They might also propose other more unconventional solutions such as sandboxing in response to challenges such as the EGD (OECD, 2020).

Climate change and climate ambitions stimulate the debate on how competition law might contribute to the achievement of climate related goals. This debate takes place on the multinational level with the OECD and the Commission actively engaged in it. The Commission launched a call for contributions related to the topic of competition policy supporting the EGD and organised a conference dedicated to this matter. For the moment, no further legal actions related to the consultation have taken place, but there are expected in coming months. The Commission acknowledges, however, that competition policy is by no means the main tool to reach EGD goals⁴¹. It doesn't preclude possible initiatives in order to ensure that EU competition rules properly respond to the EGD challenge, especially as it comes to the revision of existing guidelines⁴².

Calls for actions, in particular to amend guidelines and exemption regulations, were voiced by stakeholders in response to the call for contributions⁴³. The input provided by NCAs from CEE leaves much to be desired. Only the Bulgarian, Romanian and Polish NCAs submitted their responses. Two of them explicitly admitted having no relevant experience in assessing practices deemed sustainable or environmentally oriented. These opinions are congruent with the overall conclusion that NCAs in the CEE region have not yet deployed relevant institutional actions in order to facilitate market practices related

⁴⁰ Regulation of Council of Ministers of 30 March 2011 on the exemption of certain kinds of vertical agreements from the prohibition of agreements limiting competition, Journal of Laws of 2014, item 1012.

⁴¹ European Commission, *Competition Policy and the Green Deal*, available at: https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/competition-policy-and-green-deal_en (accessed 3.07.2021).

⁴² European Commission, *The Green Deal and competition policy*, available at: https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/green-deal-and-competition-policy_en (accessed 3.07.2021).

⁴³ All opinions submitted to the Commission, available at: https://ec.europa.eu/competition/information/green_deal/index_en.html (accessed 5.07.2021).

to the EGD. The submitted positions provide some hints as to potential forms of reactions. According to the Bulgarian NCA, an institutional reaction should be twofold. It proposes to issue general policy guidelines as well as undertake a case-by-case assessment. The Polish NCA seems to prefer policy guidelines which, in its opinion, should not be too descriptive and should leave some room for interpretation. The Romanian NCA pointed out the possibility to introduce a regulatory act, mirroring major policy consideration, which would shield potential EGD-related endeavours from competition law. No further explanation in this regard was provided.

It is evident that NCAs from CEE have not prepared their final approach towards applying competition law in order to contribute to the EGD. Since at least some of them are supposedly on the eve of introducing formal actions, it is worth recognising the expectations signalled by market actors. As far as possible, where formal actions are concerned, enterprises indicated both the wish to introduce some kind of ‘comfort letter’ method (CEZ) as well as guidelines (SNAM or Hydrogen Europe). Of particular importance is the content of guidelines. It stems from the submitted opinions that the issue of an allowed exchange of information is particularly problematic for market actors. The wish to include an explanation on this matter was widely expressed (*inter alia* Hydrogen Europe, PGNiG). At the same time, complaints about the complexity of existing rules were also brought forward (Norsk Hydro). Moreover, undertakings raised concerns about the market share issue. In their opinion, guidelines shall take into account the situation of enterprises which have high market power but still wish to contribute to the EGD. The recurring theme in many opinions concerned the subject matter of potential projects contributing to the EGD. Many market participants called the Commission to take into account projects related to hydrogen (Eni, Slovenske Elektrarne), while others called for rules related to biomethane projects (SNAM). It clearly shows that undertakings consider deploying actions related to the domain supported by the EGD like hydrogen, offshore wind or biomethane, but struggle to find clear competition rules related to the envisaged cooperation or unilateral actions. Perhaps in this respect, the call for introducing a definition of ‘environmental agreements’ might come in handy (SNAM). Such definition might explicitly include EGD policy priorities and deem hydrogen or offshore projects as ‘sustainable’ or ‘environmental’. Since the presented responses to the Commission’s call for contributions are one of the basis of the recommendations provided above, it suffices to conclude that NCAs’ actions cannot be undertaken in vain and have to address challenges and needs identified by a variety of stakeholders which wish to contribute to the EGD.

While NCAs from CEE have not yet shown any formal reactions, some actions have already been taken by other NCAs within their national

frameworks (OECD, 2020). It seems that those NCAs are leading the way at least in terms of procedural response propositions to the EGD. It has been admitted by the representative of the Dutch NCA, who claimed that one of the main objectives of guidelines published by this NCA, endorsed by the Commission⁴⁴, was to foster international debate on the topic of the correlation between competition law and sustainable development⁴⁵. Based on the already published initiative, two main methods used by NCAs may be distinguished⁴⁶:

- i. Providing more legal clarity by issuing guidelines;
- ii. Seeking for new forms of communication with undertakings.

1. Guidelines

The primary role of guidelines is to provide legal clarity. It represents in a simple and concise manner the state of the law and relevant decisional practice related to the cooperation between undertakings including agreements on matters related to the EGD, like sustainability. The perfect example of such attitude is the guidance issued by the British NCA⁴⁷. This document provides an overview of key legal considerations undertakings ought to be aware of when entering into cooperation agreements concerning sustainability, as well as a summary of more detailed, technical information which undertakings should take into account. In this way, the NCA contributes to the increase of legal clarity for undertakings even if no legal change are provided such as changing hard-core restrictions or bolstering market share thresholds.

In January 2021, the Dutch NCA issued a revised version of its guidelines on sustainability agreements⁴⁸. This act also contains an explanation of the state of the law related to competition law and agreements. What distinguishes

⁴⁴ *The Commission fully supports the need for clear guidance on agreements aiming at reducing greenhouse gas emissions that would be compatible with competition law*, available at: https://ec.europa.eu/competition/ecn/index_en.html (accessed 3.07.2021).

⁴⁵ OECD, *Martijn Snoep describes the Dutch draft guidelines on sustainability agreements*, 2021, available at: <https://www.youtube.com/watch?v=btE0TL08T20> (accessed 3.07.2021).

⁴⁶ OECD, *Climate Change and Competition Law – Note by Simon Holmes*, 2020, available at: [https://one.oecd.org/document/DAF/COMP/WD\(2020\)94/en/pdf](https://one.oecd.org/document/DAF/COMP/WD(2020)94/en/pdf) (accessed 3.07.2021).

⁴⁷ Competition & Markets Authority, *Environmental sustainability agreements and competition law*, available at: <https://www.gov.uk/government/publications/environmental-sustainability-agreements-and-competition-law/sustainability-agreements-and-competition-law> (accessed 3.07.2021).

⁴⁸ Authority for Consumers and Markets, *Guidelines on sustainability agreements – opportunities within competition law*, (hereinafter: Dutch Sustainability Guidelines) available at: <https://www.acm.nl/sites/default/files/documents/second-draft-version-guidelines-on-sustainability-agreements-oppurtunities-within-competition-law.pdf> (accessed 3.07.2021).

it is the fact that it provides explanations on an assessment which might be subject to the efficiency defence stipulated in Article 101(3) TFEU as well as in national law. Such a description might facilitate the self-assessment process and enhance cooperation between undertakings. In accordance with the postulates expressed by the representative of competition law advisers⁴⁹, the analysis provided in the guidelines includes considerations on legitimate goals, effectiveness, necessity and balance of interests. It is also accompanied by a technical report⁵⁰, which provides detailed methods for evaluating environmental aspects of market activities. Whereas substantive consideration on a 'sustainable' competition analysis (Dolmans, 2020) are not covered by this article, it is worth mentioning that this technical report has significant impact on the debate and might be followed by other NCAs both in individual case assessments or in the preparation of own guidelines.

Other than providing legal clarity, specific guidelines might also serve another purpose, that is, reassuring that environmentally relevant actions taken by companies will not be subject to fines if they meet certain conditions. According to the guidelines issued by the Dutch NCA, in regard to sustainability agreements that (i) have been published, and (ii) followed in good faith the guidelines, but which later turn out not to be compatible with national competition law, adjustments to such agreements may be agreed upon in consultation with the Dutch NCA or following its intervention. However, in those cases, the Dutch NCA has obliged itself not to impose any fines⁵¹. Such an attitude is highly needed in the face of the challenges posed by the EGD. This approach provides greater legal certainty and stimulates companies to engage in new areas of cooperation. Obviously the threat of 'green-washing' agreements or practices is imminent and present (Monti, 2020), but not taking such proactive actions by NCAs might only hamper the incentives greatly needed to live up to the challenge posed by the EGD.

In general, the guidelines serve two ends. Firstly, they might provide legal clarity for the type of practices concerned. The term 'sustainability' used by the abovementioned NCAs greatly overlaps with EGD goals. Nevertheless, specific guidelines related to the EGD would be welcomed. Even if they state existing law related, in general, to the assessment of practices, it might be useful for companies engaging in cooperation related to the EGD. Moreover,

⁴⁹ OECD, *Sustainable Competition Law – Note by Maurits Dolmans*, p. 4, 2020, available at: [https://one.oecd.org/document/DAF/COMP/WD\(2020\)69/en/pdf](https://one.oecd.org/document/DAF/COMP/WD(2020)69/en/pdf) (accessed 3.07.2021).

⁵⁰ R. Inderst, R.E. Sartzetakis, A. Xepapadeas, *Technical Report on Sustainability and Competition*, Hellenic Competition Commission and the Dutch Authority for Consumers and Markets, available at: https://www.acm.nl/sites/default/files/documents/technical-report-sustainability-and-competition_0.pdf (accessed 3.07.2021).

⁵¹ Dutch Sustainability Guidelines, p. 72.

as shown by the Dutch NCA, guidelines might also provide legal certainty due to the promise that no fine would be imposed if the guidelines were precisely followed by the undertakings. These twofold objectives of the guidelines should not be limited to agreements only but should also cover unilateral practices leading to the creation of new markets (Holmes, 2020).

2. New forms of communication

The activities of NCAs are not limited to issuing documents such as guidelines. NCAs also engage in the communication with market participants with regard to actions foreseen by these undertakings. This might be seen as an example of making positive statements as to what a business is allowed to do⁵². It also decreases the risk of antitrust non-compliance and makes NCAs behave in a more ‘pro-business’ manner.

The first proposal of new ways of cooperation with NCAs came from the Hellenic Competition Commission⁵³, which proposed to create a ‘sandbox’. A sandbox would allow companies to experiment with new business formats that aim to realise more quickly and efficiently sustainability goals, and which involve cooperation between competitors or even more permanent changes in market structure in order to be accomplished. These experiments would be time limited and supervised by the NCA, which would then balance the possible anticompetitive effects with the need to provide incentives for sustainability investment. Even if such cooperation would result in anticompetitive effects, the NCA would not impose fines if the agreements fulfilled the conditions for the use of the sandbox. In essence, the Hellenic NCA proposed to create a space for innovative cooperation related to sustainability under the supervision of the NCA. The clear benefit of this approach is the elimination of the risk of fines.

The second method is the possibility to engage in conversations with NCAs while preparing potential cooperation between undertakings. The Commission invited companies to contact it in order to discuss agreements related to the EGD which are currently being considered by the undertakings⁵⁴. The Commission promised to ‘give comfort’ in the right cases. A similar approach was taken by the Dutch NCA in its guidelines. In the case of

⁵² OECD, *Climate Change and Competition Law – Note by Simon Holmes*, 2020, available at: [https://one.oecd.org/document/DAF/COMP/WD\(2020\)94/en/pdf](https://one.oecd.org/document/DAF/COMP/WD(2020)94/en/pdf) (accessed 3.07.2021), p. 7.

⁵³ Hellenic Competition Commission, *Staff Discussion Paper on Sustainability Issues and Competition Law*, 2021, available at: https://www.epant.gr/en/enimerosi/competition-law-sustainability/item/download/1896_9b05dc293adbae88a7bb6cce37d1ea60.html (accessed 3.07.2021).

⁵⁴ The EGD Communication.

uncertainties in the self-assessment, undertakings have been invited to contact the Dutch NCA in order to elaborate on an agreement. Moreover, the Dutch NCA announced that it would identify risks related to a given agreement and seek available solutions. Such close cooperation with the NCA definitely mitigates the antitrust risk for environmentally relevant projects and enables them to properly adapt existing ideas for actions to the demands coming from national or EU competition law.

V. Conclusions and recommendations for NCAs from CEE

Bearing in mind the reliance of CEE countries on fossil fuels, it seems to be only a matter of time before their NCAs start reflecting on how they might contribute to the achievement of the EGD in their countries. They should definitely turn to existing initiatives in this regard, especially the aforementioned actions taken by the Dutch NCAs. While taking into account the solutions implemented by other NCAs, competition authorities of CEE should focus primarily on the overarching features of their own energy markets.

According to available data presented above, there are many companies active on CEE energy markets which have a high market share. For that reason, the activities of these companies might either be scrutinised under the rules on the abuse of dominance or might be deprived of the possibility to be exempted from the application of Article 101(1) TFEU or equivalent national provision. These market characteristics should be recognised by NCAs in order to help companies engage in collaborations or initiatives related to EGD goals. This is not to say that the ‘green-washing’ of their market actions should be allowed – NCAs simply should not implement measures in separation from economic realities. The Dutch NCA in its guidelines included a consideration related to a 30% market share threshold for sustainability agreements⁵⁵. NCAs from CEE ought to recognise that it is highly probable that this threshold might be reached by many of the planned agreements in their countries, because of the characteristics of their energy markets. It would be therefore beneficial for legal certainty and for the goal of stimulating EGD-oriented actions if NCAs included in their initiatives persisting market features such as the existence of companies with significant market power. Bearing the primary thesis of this article in mind, it is worth reflecting on what kind of procedural actions NCAs in CEE might take in view of the EGD challenge. Following recommendations stemming from the analysis of ongoing discussions and initiative might be made:

⁵⁵ Dutch Sustainability Guidelines, p. 55.

i. Defining ‘environmental agreements’

Notwithstanding their legal form, a definition of environmental agreements should be introduced. The aim of such definition would not be to clarify the meaning of agreements (which is well-defined in legal acts and jurisprudence), but rather to reflect policy priorities. In this regard, environmental agreements might clearly show the areas where actions and cooperation are preferred. The introduction of such a definition would embody the prioritisation competence granted to NCAs, which should be in compliance with priorities set by other public authorities. Moreover, once introduced, this definition might limit the potential scope of the application of guidelines or the availability of comfort letters. This solution might also allow the departure from the ‘market share criterion, enshrined in multiple exemption regulations, save in the case of market foreclosure objections.

ii. Issuing guidelines on competition law and the EGD

Issuing guidelines would certainly increase the level of legal clarity (Monti, 2020). Such documents might mostly restate the existing state of the law. It is worth considering even issuing guidelines related to specific strategies included in the EGD, for example ‘guidelines on hydrogen-related initiatives’. As initiatives such as the European Clean Hydrogen Alliance⁵⁶ gain momentum, further clarifications issued by NCAs on the application of competition law to sector specific cooperation might enhance the creation of similar initiatives on a regional or national scale. Moreover, referring to the opinions submitted to the Commission, guidelines should provide clear rules for possible exchange of information between undertakings wishing to pursue EGD-related endeavours.

iii. Granting comfort – creating ways for consultation

NCAs should also provide methods to discuss with undertakings whether specific unilateral and multilateral initiatives are in compliance with competition law. Undertakings are reluctant to enter into agreements to achieve greater goals (like sustainability) because they fear that such agreements would infringe competition law (Monti, 2020). It is strongly advised that initiatives like the joint effort to build more offshore wind farms⁵⁷ have an opportunity to enter into a discussion with the relevant NCA. It is up for NCAs to decide whether such

⁵⁶ Information on European Clean Hydrogen Alliance, available at: https://ec.europa.eu/growth/industry/policy/european-clean-hydrogen-alliance_en (accessed 3.07.2021).

⁵⁷ News for investors – ENEA, PGE, Enea and TAURON are planning a joint effort to build more offshore wind farms, available at: <https://ir.enea.pl/en/pr/633944/pge-enea-and-tauron-are-planning-a-joint-effort-to-build-more-offshore-wind-farms> (accessed 3.07.2021).

possibilities should take form of a ‘sandboxing’, comfort letters or more informal communications. In any case, providing such opportunities might be beneficial for companies, stakeholders, institutions and, most importantly, the achievement of the EGD. Bearing in mind that NCAs from CEE have not yet conducted an investigation into environmental agreements affecting their countries (as it was evident from the responses to the call for contributions), providing such an extraordinary possibility should stimulate undertakings to live up to the challenge and commence cooperation related to the EGD.

While calls to include the assessment of the environmental impact as part of the consumer welfare analysis in competition law cases related to the energy sector are heard (Dolmans, 2020), ongoing discussions on the relation between competition law and sustainability, as well as multiple strategies and initiatives related to the EGD gain momentum. It is high time for NCAs from CEE to make contributions on their part. Based on the knowledge regarding their national energy markets’ prominent features, and existing actions of NCAs from other parts of Europe, they should commence institutional actions which might help hydrogen, offshore wind and renewable gas initiatives to flourish in the CEE region.

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