

ENERGY, THE MARKET AND THE LAW: A EUROPEAN DIALOGUE BETWEEN ECONOMISTS AND LAWYERS

***A legal analysis of the EU debate on capacity mechanisms and
cross-border participation***

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Introduction

Assessment of the compatibility of capacity remuneration mechanisms with EU Law:

Check list

✓ Specific sector regulation	Article 194 TFEU, directive 2009/72 'electricity', directive 2005/89 'security of supply', regulation 714/2009...
✓ Free movement principles	Articles related to goods 34,35,36 TFEU, articles related to services 56, 57 TFEU (?)
✓ Competition rules	Articles 101, 102 TFEU, in combination with article 106 TFEU or 4§3 of the Treaty on european Union
✓ State aid rules	Articles 107, 108 TFEU

Part I : Is there an obligation to take into account explicitly cross-border capacities?

I.1. No clear obligation deriving from a specific sector regulation

EU law	Provision linked to CRM	Obligation to take into account cross-border capacities
EU Treaty	Article 194 TFEU	No
Directive 2009/72	Article 8	No
Directive 2005/89	Articles 3 and 4	No
Regulation 714/2009	No	No

Part I : Is there an obligation to take into account explicitly cross-border capacities?

I.1. No clear obligation deriving from a specific sector regulation

Document of the Commission	Obligation to take into account cross border capacities
Guidelines on State aid for environmental protection and energy 2014-2020 (2014/C 200/01)	§232: “The measure should be designed in a way so as to make it possible for any capacity which can effectively contribute to addressing the generation adequacy problem to participate in the measure, in particular, taking into account [...] the participation of operators from other Member States where such participation is physically possible in particular in the regional context, that is to say, where the capacity can be physically provided to the Member State implementing the measure and the obligations set out in the measure can be enforced”.
Staff working document, <i>Generation adequacy in the internal electricity market – guidance on public interventions</i> , SWD(2013)438 final	<p>p. 29 “Therefore, mechanisms should be open to any capacity, including capacity located in other Member States, which can effectively contribute to meeting the required generation adequacy standard and security of supply”.</p> <p>p. 30: “Mechanisms to ensure generation adequacy should be open to all capacity which can effectively contribute to meeting the required generation adequacy standard, including from other Member States”.</p>
Communication from the Commission, <i>Progress towards completing the Internal Energy Market</i> , COM(2014)634 final	p. 14: “ As a minimum requirement, the Commission asks for capacity mechanisms to be open to capacity abroad which can effectively contribute to meeting the required security of supply standards in the Member State concerned”.
Commission’s document, Capacity Mechanisms Working Group, 30 June 2015, <i>Enabling the participation of interconnectors and/or foreign capacity providers in capacity mechanisms</i>	p. 2: “Where physically possible, operators located in other member states should be eligible to participate”.

Part I : Is there an obligation to take into account explicitly cross-border capacities?

1.2. No clear obligation deriving from common market principles (free movement and competition)

- Special emphasis should be put on free movement issues.
- Which set of rules shall apply: free movement of goods (articles 34, 35, 36 TFEU) or free movement of services (articles 56 and 57 TFEU).

Electricity is a good within the meaning of treaty provision: Landmark case C-393/92, §28:.

However, when it comes to CRMs, the Commission points out that : “The aid should remunerate solely the service of pure availability provided by the generator, that is to say, the commitment of being available to deliver electricity and the corresponding compensation for it, for example, in terms of **remuneration per MW of capacity being made available. The aid should not include any remuneration for the sale of electricity, that is to say, remuneration per MWh sold**” (EEAG, §225).

→ Depending on the shape of the scheme, free movement issues arising with CRMs may be dealt with under free movement of services provisions → few implications

Part I : Is there an obligation to take into account explicitly cross-border capacities?

1.2. No clear obligation deriving from common market principles (free movement and competition)

Non participation of the cross-border capacities and free movement of goods: the restrictions aspect

- Breach of article 34 TFEU (“Quantitative “restrictions on imports and all measures having equivalent effect shall be prohibited between Member States”)? **YES**
- Breach of article 35 TFEU (“Quantitative restrictions on exports, and all measures having equivalent effect, shall be prohibited between Member States”)?

The Commission points out that: “Just as the possibility should also exist for capacity located elsewhere to participate in a mechanism, **it should also be possible for capacity to ‘opt out’ of its national scheme, in order to instead participate in a mechanism established elsewhere**” (SWD(2013)438 final).

French decision of the Conseil d'Etat (9/10/2015) and the reference for a preliminary ruling: the question does not cover article 35 issue. According to the *rapporteur public*: « s'il y a entrave c'est en matière d'importation et non d'exportation, RTE ayant expressément indiqué dans le rapport d'accompagnement de sa proposition qui a servi de base à l'arrêté du 22 janvier 2015 qu'une capacité activée dans le cadre du marché, y compris quand elle correspond contractuellement à un export, est bien considérée comme disponible ».

However, article L. 321-16 of the energy Code does not provide for any opt-out option. It states that: « Le gestionnaire de réseau de transport certifie la disponibilité et le caractère effectif des garanties de capacités prévues à l'article L. 335-2. A cet effet, **toute installation de production raccordée au réseau public de transport ou au réseau public de distribution et toute capacité d'effacement de consommation doit faire l'objet, par son exploitant, d'une demande de certification de capacité auprès du gestionnaire du réseau public de transport** ».

Therefore, such an obligation could be seen as a restriction on export.

Part I : Is there an obligation to take into account explicitly cross-border capacities?

1.2. No clear obligation deriving from common market principles (free movement and competition)

Non participation of the cross-border capacities and free movement of goods: the justification aspect

- Article 36 TFEU states that: “The provisions of Articles 34 and 35 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or **public security**; [...]. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States”
- Energy **security of supply** is a key element of public security; landmark case *Campus Oil* (C-72/83 , §34)
- Why refusing cross border capacities participation to CRMs could enhance security of supply? Would the measure be proportionate?
- 1. For the Commission, “Also EU rules require TSOs to resolve network congestions without limiting commercial transactions (including across borders), in emergency situations TSOs can nevertheless curtail nominations. Also relevant is Article 4(3) of the Security of Electricity Supply Directive, which states that ‘Member States shall not discriminate between cross-border contracts and national contracts’. This rule requires system operators to allow market coupling to determine flows, even if this means that in a situation where two coupled markets are both facing scarcity, the result of market coupling could be more severe scarcity in one country because the price of electricity is higher in the neighbouring zone. [...]. **Note in practice however, system operators may have rules that contradict this requirement. This lack of respect for the requirements of the Security of Supply Directive leads to an additional concern for those seeking to include foreign participation in capacity mechanisms, since they may fear that in an emergency situation a foreign system operator could in fact take action to constrain exports to a neighbor, regardless of the presence of a capacity mechanism and its associated contracts and rules**” (*Capacity Mechanisms Working Group*, 30 June 2015, “Enabling the participation of interconnectors and/or foreign capacity providers in capacity mechanisms”, p.3).
- 2. Difficulties to implement participation of the capacities located in an other Member State (close cooperation between TSOs...)
- 3. The *Alands Vindkraft* and *Essent* cases

The restriction on import should be justified. What about the restriction on export?

Part II : Is there an obligation to take into account interconnexion(s)?

II.1. EU Law provisions (primary and secondary)

In the EU context, security of supply cannot really be assessed without taking into account interconnexions

Two set of rules:

- Article 194§1(b) TFEU: “In the context of the establishment and functioning of the internal market and with regard for the need to preserve and improve the environment, Union policy on energy shall aim, in a spirit of solidarity between Member States, to [...] **ensure security of energy supply in the Union**”;
- Article 3 of the Directive 2005/89 ‘security of supply’:
 - “1. Member States shall ensure a high level of security of electricity supply by taking the necessary measures to facilitate a stable investment climate and by defining the roles and responsibilities of competent authorities, including regulatory authorities where relevant, and all relevant market actors and publishing information thereon. The relevant market actors include, inter alia, transmission and distribution system operators, electricity generators, suppliers and final customers.
 2. In implementing the measures referred to in paragraph 1, **Member States shall take account of [...] the internal market and the possibilities for cross-border cooperation in relation to security of electricity supply**”.

For the Commission, “Given this increasing integration of electricity markets and systems across borders it is now increasingly difficult to address the issue of generation adequacy on a purely national basis” (SWD(2013)438 final, p. 6).

ACER also considers that “security of supply (and other related issues) are no longer exclusively a national consideration, but should be addressed as a regional and pan-European issue” (*Capacity remuneration mechanisms and the internal market for electricity*, 30 July 2013).

Part II : Is there an obligation to take into account interconnexion(s)?

II.2. *Implicit or explicit participation of interconnexion(s)*

Implicit participation of interconnexions	Explicit participation of interconnectors
<ul style="list-style-type: none">✓ Total capacity demanded can be adjusted to account for expected imports;✓ How to lower obligations of electricity providers? (homogeneously or not); <p>→ French CRM</p>	<ul style="list-style-type: none">✓ Mechanism opened to interconnectors if they offer equivalent performance to other capacity providers;✓ Principle: Interconnexions are regulated by TSOs (article 2§4 of the Directive 2009/72) → application of the unbundling rules (article 9 of the Directive 2009/72) → exclusion from CRM(?)✓ Exemption: 'Merchants' interconnexions (article 17 of regulation 714/2009) → non application of the unbundling rules → open to participate to CRM(?)

To conclude...

- The lack of EU legislation to deal with this issue creates uncertainty
- *Soft law* cannot be a substitute
- Is it too late to establish rules?

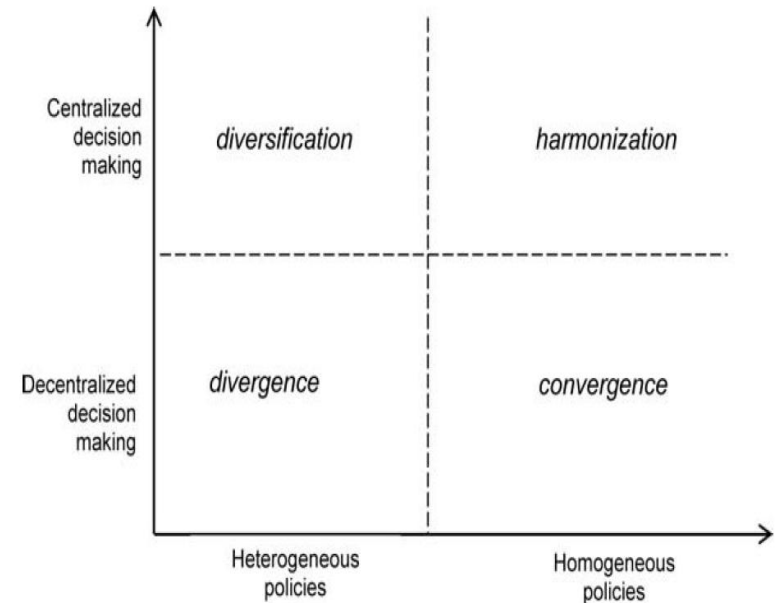


FIGURE 1

Two dimensions of "Europeanization"

Strunz, Gawel and Lehmann, « Towards a general 'Europeanization of EU Member States' energy policies? », *Economics of Energy & Environmental Policy*, vol.4 2015

Thank you for your attention