

**THE EFFECTS OF THE ENERGY LIBERALIZATION PROCESS IN THE EUROPEAN
UNION: AN EVALUATION OF THE EU ENERGY POLICY AND LEGISLATION
TOWARDS ENVIRONMENTAL PROTECTION AND CONSUMER WELFARE.
LITERATURE REVIEW**

Abstract

This paper is a literature review, which explores the liberalization of the EU energy market, with a focus on its impact on consumer welfare, environmental protection, and the role of the Court of Justice of the European Union (hereinafter CJEU) in shaping energy policy. The study examines the historical evolution of energy liberalization, including the significant legal frameworks and policies that have shaped the EU's energy sector. The analysis reveals the complex interplay between market liberalization, environmental sustainability, and competition, highlighting the challenges of balancing these competing objectives. The impact of some CJEU rulings, particularly in the context of competition law and state aid, is explored to illustrate how EU institutions have navigated tensions between cost reduction, market efficiency, and environmental protection. Furthermore, the paper discusses enforcement and compliance issues, noting that while EU competition policy has contributed to market development, there remain significant challenges in ensuring consistent application of environmental standards. The conclusion reflects on the ongoing difficulty of achieving an optimal balance between consumer benefits and environmental goals in an increasingly complex geopolitical and regulatory landscape.

Keywords: EU energy market, Liberalization, Consumer welfare, Environmental protection, Competition, CJEU rulings

Introduction

Energy independence has become a critical issue within the European Union, especially in recent years. According to Craig and De Burca (2020, p.377), the legal recognition of energy policy in Article 194 TFEU, under the Lisbon Treaty, underscores the importance of energy autonomy. They argue that while the EU's external competence in energy policy is not explicitly mentioned, it has nonetheless been implied and shared between the EU and Member States. Further they mention that when Single European Act amended EEC Treaty 'by inserting an environmental policy title, there was provision for external competence in what is now Article 194(4) TFEU. Additionally, the Lisbon Treaty added a focus on combating climate change, further integrating energy policy with environmental objectives. The EU's energy and environmental policies, currently intertwined, fall under the shared competence between the Union and its Member States.

In the late 20th century, the EU began a process of liberalizing the energy sector, with the goal of fostering competition and market efficiency (Jones et al., 2019, p.87). However, Gravey et al. (in Cini, 2022, pp.355-356) highlight the EU's unexpected role as a global leader in environmental protection and sustainable development policy, which has led to a tension between economic liberalization and sustainable development. The integration

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of environmental considerations into energy policy was not instantaneous. In the 1980s, West Germany's advocacy for "ecological modernization" laid the groundwork for policies that reconciled environmental protection with economic growth (Gravey et al., 2022). Over time, the EU's policies evolved, especially with the growing challenges of climate change and energy insecurity, though the process was fraught with challenges, such as concerns over policy dilution when the Climate Action and Energy portfolios were merged by Junker's commission.

The legislative framework developed to address these issues is both complex and multifaceted. As Craig and De Burca (2020) note, the EU's mixed economic system involves the balancing of market forces with state intervention. This balance is evident in key legal provisions, such as Article 14 TFEU, Protocol No. 26 on Services of General Interest, and Article 36 of the Charter of Fundamental Rights, which recognize consumer access to "services of general economic interest provided in national laws and practices". Further, they state that the White Paper of Commission of (2004) addressing this issue explains that this approach promotes European model of society, including it makes sure that 'quality of service ...as well as consumer protection' are reflected as core EU values. However, some scholars, like Baquere Crus (in Craig and De Burca, 2020), argue that some of the legislation on utilities makes it obvious that competition still takes precedence over the broader social goals of consumer protection and service provision.

This paper reviews existing scholarship on the liberalization of the EU's energy sector and its intersection with environmental protection and consumer welfare. By examining key legislative and policy shifts, it seeks to evaluate whether a sustainable and equitable balance has been achieved.

Chapter I – Broad Context of Liberalization of the Energy Market in the EU

Since 1996, the European Union has been liberalizing its energy market to improve the security and adequacy of supply, transparency in the roles of regulators and market participants, as well as increased generation capacity and interconnection (including through developing trans-European networks for transporting electricity and gas) (Ciucci, 2023). This process aimed to ensure a more competitive energy market by eliminating monopolistic structures, promoting consumer rights (via expanding their rights including in the related fields such as safety regulations), and improving environmental protection as well as the market access on fair terms and without discrimination. The legal foundation for this development rests in Articles 114 and 194 of the Treaty on the Functioning of the European Union (TFEU).

Ciucci (2023) reviews five major waves of liberalization in the EU's gas and electricity markets. The first, between 1996 and 1998, introduced two key directives to break up monopolistic national energy markets. The second package, adopted in 2003, allowed both industrial and domestic consumers to select their energy suppliers. The third package (2009) introduced further reforms, such as the unbundling of energy generation and supply from transmission networks and enhanced consumer rights in retail markets. The fourth package (2019) emphasized renewable energy, consumer incentives, and subsidies for power plants. The most recent, the fifth package (2021), aligned energy targets with climate goals and introduced urgent measures on energy-saving and diversification to respond to the geopolitical crisis following Russia's invasion of Ukraine.

As Molle (2006, pp. 189-192) points out, economic development is closely tied to energy, yet energy production and consumption often have negative externalities, such as environmental pollution and social inequality. He identifies three key objectives of EU common energy policy:

1. Increasing the competitiveness through liberalization, restructuring and elaboration of the pan-European regulatory framework in order to ensure the low-cost energy for both consumers and producers; the reason behind is that, traditionally the energy field is heavily regulated on national level, the market is segmented, there are monopolies and therefore, consumers are worse-off;
2. Aversion of supply disruptions by minimizing risks (the aim of diversification of the trade in energy prompted EU to sign a European Energy Charter).
3. Environmental protection, which is part of the energy production efficiency as well as the energy consumption in the context of sustainable development. In this context the EU policy had been structured around the objective of the reduction of pollution and limitation of consumption, first and foremost having on mind the 'energy sources with a high carbon content'.

These objectives guided the EU's energy policy, which sought to balance economic growth with environmental sustainability.

Molle's publication was made before the third package had been adopted. His two case studies based on the industry of oil refining and electricity, – revealed that by that particular period of time the European market for oil products had been relatively competitive, including due to the privatization of the national companies in many countries, which enabled them to diversify their markets by expanding operations abroad. In certain cases the European integration affected the company structures so that it resulted in concentration; however, its share was low and the key tendency was the privatization and its beneficial effects. The oil markets had to go through turbulent times, – as author mentioned; however, they took into consideration the tendencies of the integration of the European market, as a result of which some of them, especially the multinational oil companies modernized the production, refining, transportation and distribution systems.

When it comes to liberalization of the electricity market, which by that time was still heavily regulated and fragmented along the national lines, – it had not been an easy task for the EU to accomplish it successfully, as Molle (2006, pp.198-203) summarized it. Apparently, the Commission was forced to change the regulatory framework, because the corporate consumers were unhappy with high monopolistic prices. Irrespective of the fierce opposition from the national governments, the Directive 96/92/EC had been adopted. It liberalized the electricity sector gradually and in the staged phases, by obliging the industry 'to maintain the separation of production, transmission and distribution' as well as enabling the consumers and the production companies to choose partners without restrictions. As a result the companies demolished the vertical integration, which means that the system of transmission lines and the network of distributors to the final consumers had been separated. The author believes that the introduced system of liberalization did not bring a very high immediate impact. This was mostly due to the flaws with the speedy development in the infrastructure, while he also assumed that the tangible results could only be brought with development of the cross-border trading capacity. Still, as he mentioned, the average decrease of prices became noticeable, but its positive effects had been neutralized by the sharply rising prices on the crude oil during 1996-2003.

Overall, Molle's analysis of the oil refining and electricity sectors illustrates the early stages of transformation, showing that while oil markets became more competitive, electricity markets remained fragmented and heavily regulated.

Keukeleire and Delreux (2022, pp. 247-260) emphasize the external dimension of EU energy policy, which has been a contentious issue since the oil crises of the 1970s. They argue that, while the Lisbon Treaty provided the EU with a clearer legal basis for energy policy (Article 194 (1) TFEU), challenges remain, particularly with the transition to a climate-neutral economy. As the EU reduces its reliance on fossil fuels, it faces the risk of increasing dependence on raw materials sourced from countries like China. Therefore, irrespective of the fact that Article 191 of TFEU ² explicitly empowers EU to fight climate change, still its global environmental leadership and all the related efforts are heavily contested. Despite this, the EU continues to pursue ambitious climate goals, such as the European Green Deal, aimed at decarbonizing the economy and reaching net-zero emissions by 2050, as well as aims at elaborating robust environmental legislation internally and the extension of 'Brussels effect' in the field of environment to third countries via Europeanization.

Hancher and Salerno (pp. 267-402) highlight how the addition of Article 194 TFEU allowed for more robust and ambitious energy policies within the EU. The adoption of the third package, which introduced unbundling and reinforced climate change legislation, demonstrates the EU's growing regulatory power over energy markets, reducing member states' authority in favor of a more integrated EU approach.

Hancher and Salerno (pp. 267-402) in their book chapter on the 'Energy Policy after Lisbon', highlight how the addition of Article 194 TFEU – a the new special provision on energy as one of EU's explicit shared competence,

² Keukeleire and Delreux (Ibid. p. 392) outlined that since the entry into force of Lisbon Treaty, instead of the approximation clause of Article 114 TFEU that had been used before, the Commission started to rely heavily on Article 194 TFEU as a legal basis. They say that the legal basis for enacting environmental legislation to achieve the aim of Article 194 (2) defines its goals as: 'promotion of energy efficiency and energy saving and the development of new and renewable forms of energy.' Further, authors note that Article 192(2) will be applicable (needs unanimous decision in the Council) if a measure will be presented in the field of eco-taxation or in the field of environment in general; however, depending on the procedure chosen and if it will be presented as an energy measure, than they can bypass unanimous decision.

– allowed for more ambitious energy policies in the EU. The adoption of the third package measures (such as unbundling regime against vertically integrated companies as well as the far-reaching in scope and ambitious climate change legislation, – that had been adopted before the Lisbon Treaty), – demonstrates the EU Commission's extensive competences and growing regulatory power over energy markets, reducing member states' authority in favor of a more integrated EU approach.

In the second chapter, I shall refer to the Hancher and Salerno's research results on the interrelation of the 'energy and competition policy' as well as of 'energy and environment' in the pre- and the post-Lisbon era.

Chapter II: Impact of the CJEU on Liberalization of the Energy Market and Its Influence on Environmental Protection and Consumer Welfare: Issues of Enforcement and Compliance

Hancher and Salerno (2022) refer to the CECED decision (p.288, OJ 2000 L 187/47) to illustrate how EU energy policy considerations can justify granting exceptions to restrictive agreements, provided they align with efficiency objectives. In this case, the Commission granted an exemption to manufacturers of washing machines that aimed to phase out high electricity-consuming models. While such an agreement would reduce competition and potentially raise prices for consumers, the Commission ruled that the environmental benefits outweighed the potential harm to competition or the 'efficiency considerations' as they claimed it.

This decision reflects the pre-Lisbon approach, as outlined in the Guidelines on the Application of Article 101 TFEU (formerly Article 81 EC), which allowed energy policy considerations to play a significant role in granting exemptions. However, post-Lisbon discussions raised questions about whether this practice would change, particularly as the Commission focused more on balancing energy policy objectives with competition law. As evidenced by the 2011 Guidelines on applicability of Article 101 to horizontal cooperation agreements, no separate chapter on "environmental agreements" was introduced, signaling that the Commission remained committed to the CECED decision, emphasizing the efficiency gains of environmentally friendly products (Ibid).

While the introduction of Article 194 TFEU in the Lisbon Treaty signified a clearer energy policy framework, Hancher and Salerno argue that it did not automatically justify 'public policy justifications' under Article 101(3) TFEU. The complex nature of these cases means that future rulings will depend on the specifics of each case (Ibid).

The interaction between competition law and state aid is also central to the EU's energy policy. State aid regulations shape how member states manage the transition to a liberalized energy market. Hancher and Salerno discuss tensions arising when national governments subsidize domestic energy companies, particularly when they use national fuels and face challenges in meeting the 15 per cent threshold for state aid outlined in Article 15(4) of Directive 2009/72/EC. These subsidies often distort competition, as they favor inefficient, state-supported companies over more competitive market players.

Despite the broad discretion granted to member states under Article 194(2) TFEU, there has been a notable increase in the Commission's scrutiny of state aid practices. Hancher and Salerno highlight two key cases, C7/2005 (pre-Lisbon) and C178/2010 (post-Lisbon), which demonstrate that while national governments often invoke "service of general economic interest", "public service requirement" or "geostrategic considerations" to justify subsidies, these arguments have become less convincing in light of the EU's commitment to a fully integrated energy market. Only after thorough assessment of proportionality of the measure, the available alternative choices as well as other valid evidence, the court might decide whether there was a state aid or not, and whether the current status of liberalizing in the energy sector of Europe is the prevailing interest, which can possibly trump the national considerations.

An illustrative case is *Federutility* (Case C-265/08, 24 April 2010 cited in Biondi et. al, p. 392 and p.400), where the CJEU ruled on the compatibility of public service obligations with EU competition law. The decision reaffirmed that when national regulators impose price controls (e.g., reference prices for gas), these measures must be carefully scrutinized to ensure they do not distort competition. The Court emphasized that Member States can only impose such restrictions if they are proportionate, time-bound and necessary to meet the objective of protecting consumers, without undermining the liberalized market's principles.

Otherwise, the National Regulatory Authorities (in this case Italian NRA) might be considered to distort the effective competition by imposing 'reference prices' for the sale of gas to certain customers, which is against the idea of fully liberalized market of national gas and besides, which determines the prices by market forces irrespective of this approach. In this case the court concluded that Member States are allowed under the 73/2009 Gas Directive to define the national measures so that 'the price of supply of natural gas to final consumers is maintained at reasonable level.' As we can see, here the court limited its ability to review the justification provided by Member States (*ibid*).

A landmark case, *AB Achema* (C-706/17 in *Barauskaitė*, 2019, pp.352-358), further clarified the CJEU's approach to state aid in the context of renewable energy. In this case, the Court differentiated the state aid from the services of general economic interest (SGEI) and ruled that Lithuanian electricity producers receiving support for generating renewable energy were benefiting from illegal state aid, as they had no legal obligation to produce renewables under national law ('clear common interest objective' was not established) and distorted competition considering the existing interconnections with other two Baltic states.

Barauskaitė notes, that with this decision the Court made it clear that there were no SGEI requirements met: in particular, even if the Public interest Service scheme was covering the electricity service, which was generated from the renewable energy sources, the CJEU decided that the generator companies should not have been compensated (*ibid*). This ruling reinforced the need for a "clear common interest objective," as outlined in the *Altmark* judgment (Case C-280/00). The CJEU's decision highlighted the growing distinction between state aid and services of general economic interest (SGEI), pushing the EU closer toward ensuring that state-supported energy initiatives do not distort competition in the single market.

Regarding enforcement and compliance, *Börzel and Buzogány* (pp.324-331, 2019) discuss the challenges the European Commission faces in promoting compliance with environmental regulations across member states, particularly in the wake of the financial crisis. The crisis delayed the introduction of new legislative measures in several environmental policy subfields, but *Börzel and Buzogány* note that compliance is often influenced by both rational choice theory and the administrative capacity of member states. Understanding the root causes of non-compliance remains a complex issue, as little is known "whether there are structural differences in how member states comply with different types of environmental or environment-related legislation – or whether there are differences in how the Commission guards the Treaty."

When it comes to enforcing the liberalized energy market, *Duso et al.* (pp. 97-120, 2019) point to the positive impact of EU competition policy, particularly the merger regulation, on enhancing competition, investment, and productivity in the energy sector. The introduction of robust competition rules has contributed to the development of the gas and electricity markets, although the enforcement of state aid regulations still varies across member states. This variation underscores the need for continued vigilance by the European Commission to ensure that national measures do not distort the competitive dynamics of the EU's energy market.

Conclusion

The liberalization of the EU energy market, as shaped by the jurisprudence of the CJEU and reinforced by the broader legislative framework of the European Union, stands at the crossroads of competition law, environmental protection, and consumer welfare. Chapter I examined the foundational legal principles that govern the liberalization process, highlighting the pivotal role of market competition in fostering energy efficiency and ensuring fair prices for consumers. It also pointed out that while liberalization is necessary for market integration and innovation, its success hinges on the careful balancing of regulatory oversight and market dynamics, with a particular focus on maintaining the integrity of environmental goals.

In Chapter II, it was explored how the CJEU's rulings, particularly in key cases such as *CECED*, *Federutility*, and *AB Achema*, demonstrate the complexity of reconciling energy policy objectives with the fundamental principles of competition law. The CJEU has evolved over time, refining its approach to integrating environmental considerations within competition policy. In cases like *CECED*, the Court has underscored that efficiency gains, such as those resulting from environmentally friendly products, can sometimes outweigh the restrictive effects on competition. However, this approach is not without controversy, as shown in the *AB Achema* ruling, where the Court's strict interpretation of state aid rules placed limits on the extent to which national governments can

support renewable energy projects without distorting the single market. These cases underscore the tension between fostering energy market liberalization, ensuring environmental sustainability, and safeguarding consumer welfare. The Court's evolving interpretation of state aid, coupled with the implementation of energy-specific regulations, has continued to challenge national governments in finding the right balance between energy security, environmental obligations, and market competition.

The analysis also revealed that while EU law offers a robust framework for addressing these challenges, issues of enforcement and compliance remain significant. As Börzel and Buzogány (2019) noted, while the financial crisis delayed the adoption of crucial environmental policies, compliance remains inconsistent across member states, often influenced by national capacities and political priorities. The Commission's role in monitoring and enforcing these regulations is critical, yet enforcement varies depending on how individual states interpret and implement EU directives. This inconsistency can undermine the overall goals of energy market liberalization, environmental protection, and consumer welfare.

Ultimately, the future of the EU energy market will depend on continued judicial and regulatory evolution. The CJEU's decisions will shape the direction of energy market reforms, but member states must remain vigilant in aligning their national policies with the EU's broader energy and environmental objectives. Moreover, ensuring a fair and competitive market will require enhanced cooperation between the Commission, national regulatory authorities, and stakeholders in the energy sector. With environmental sustainability becoming an increasingly urgent priority, future decisions by the CJEU will likely reflect a greater emphasis on integrating green energy initiatives into market liberalization frameworks while safeguarding the principles of competition and consumer protection.

In conclusion, the balance between liberalization, environmental protection, and consumer welfare remains delicate and requires careful attention from both the EU and national policymakers. While progress has been made, ongoing vigilance, coupled with an adaptive regulatory and judicial approach, will be crucial in realizing the EU's vision of a competitive, sustainable, and consumer-friendly energy market.

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