Second Panel: "The Hidden European Investment
Screening Mechanism Already in Place" – Existing EU
Secondary Legislation on (Discriminatory) Treatment of
Third Country Investments – A Plurality of Regulatory
Approaches

Energy and Water Sector

Energy and Water

- Essential services for a community's function
- Big investments
- Supply disruptions quickly become critical
- Large parts of the supply are characterized by natural monopolies and essential facilities
- Big difference in ownership
- Often, international investments

Difference between energy and water supply

Energy

- Partly contains natural monopolies
- International/European markets
- EU cross border trade
- Huge future investments are needed
- Critical infrastructures –
 Directive 2008/114/EC

Water

- Mostly delivered by natural monopolies
- Local markets
- Little cross border trade

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Control on different levels

- Ownership (partly)
 - Through acquisitions, mergers, takeovers
 - The initial acquisition of equity capital, and also subsequent capital transactions between the foreign investor and domestic and affiliated enterprises including reinvested earnings
- Operator/having a concession
- Material supplies
- Loans

Electricity supply as case

- Cross border trade
- Spot market trade
- Essential supply
- Physical connected cross border
- Data and digitalization
- EU market regulation
- Value chain specific regulation
- Different national ownership structure
 - State, municipalities, consumer owned, national champions
- International investments including FDI

The Energy Charter

- "In order to promote the international flow of investments, the signatories will make every effort to remove all barriers to investment in the energy sector and provide, at national level, for a stable, transparent legal framework for foreign investments, in conformity with the relevant international laws and rules on investment and trade."
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Electricity market directive

- Market instruments
 - Unbundling (different levels)
 - Third party access (TPA)
 - Certification of TSO
- Step by step towards uniform legislation
- Supporting an internal market

2009/72/EC

- General non discrimination within the EU
 - But not regarding third countries
- 2009/72/EC Indirect regulation regarding certification is requested by a transmission system owner or operator (TSO)
- Certification required regarding a TSO art. 10
- But if someone from a third country gains influences art. 11
- Different forms of ownership

Third country influence

Art. 11 in 2009/72/EC (art. 53 in COM(2017) 864)

- The national regulatory authority shall notify the Commission in case of third country control over a TSO
- Commission opinion
- Right to refuse certification especially due to the security of energy supply
- Certification shall be refused if no risk is failed to be *demonstrated*
- Stricter national legislation possible

Part of EU Energy Policy

- Article 194 TFEU Shared competence
- But also
 - Security of supply: Article 122 TFEU
 - Energy networks: Articles 170-172 TFEU
 - Coal: Protocol 37 (the expiry of the ECSC Treaty)
 - Nuclear energy: Euratom Treaty
 - Internal energy market: Article 114 TFEU
 - External energy policy: Articles 216-218 TFEU

Example China

- State-owned enterprises (SOEs) buying infrastructure in EU power sector
- Especially in Portugal
 - In 2011, Portugal's government was required to sell its stake in the country's power grids as part of the terms of its €78 billion bailout programme
 - First privatised, then FDI
- Chinese SOEs already control significant stakes in the Italian power grids and Greece's grid operator
- Buying a parent company in one EU member state, often includes shares in other Memberstates

China and FDI

- Chinese foreign direct investment (FDI) in among others mineral resources (from the early 90'ties?)
 - Huge state owned companies (SOEs)
 - Financed by state owned banks
 - Using Chinese labour
 - Not necessary correct in the power sector
 - Now a 'Go Out' strategy (走出去)
 - One Belt, One Road
- And EU industrial policy are ...?

Chinese outbound investment regulating by Chinese laws

- NDRC, Ministry of Commerce (MOFCOM), and Foreign Exchange Control for all Chinese companies;
- State-owned Assets Supervision and Administration Commission for companies with state ownership involvement;
- China Securities Regulatory Commission and stock exchange for listing companies;
- China Banking Regulatory Commission for bank business;
- China Insurance Regulatory Commission for insurance business

Ownership as a barrier

- Case: Radius (Danish distribution net):
 - Owned by Ørsted, Danish energy company
 - Danish state majority shareholder
 - No limits in the EU procurement rules, selling an energy company
 - No limits in the market directive, since it isn't a TSO
 - However, rules in administrative law and company law (several owners)
- Can the majority shareholder block the company to get the best price?

Buy it!

- 01.08.2018: "Last week it was announced that the German government had instructed KfW, the development bank owned by the German government, to buy a 20 percent stake in 50Hertz in order to thwart the State Grid Corporation of China (SGCC) from acquiring a share."
- https://www.dw.com/en/chinese-takeover-of-leifeld-collapses-ahead-of-expected-german-veto/a-44906055

About Digitalization

- Metering data on many levels in the power sector
- Digitalization ongoing
- Consumer metering getting:
 - More often (now every hour, every 15 minutes, real time)
 - Exposed to hacking (crime, cyber war, foreign espionage including industrial espionage)
 - Exposed to consumer profiling (GDPR)
 - Datenkraken private companies or state control
 - Big brother state

Round Up

- A balance between needed investments and the risk of the same
- Geopolitics
 - Influence
 - Commercial interests
 - Security of supply
- Member states versus Commission competence
 - FDI from BITs to EU prohibitions regulation
 - New Gas Directive proposal

Thank you for your attention

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