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by

Julius Rumpf

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Statutory Transmission Monopolies in EU and EEA Law—Why a European Energy Union cannot Tolerate National Transmission Monopolies

Julius Rumpf

University of Oslo

☞ Electricity markets; Electricity transmission; EU law; Freedom of movement; Member States; Monopolies

Abstract

Integrating the European electricity markets is among the EU's most ambitious regulatory endeavours. Important economic and environmental aims depend for their success on continued progress with electricity market integration. In turn, this requires considerable investment in cross-border interconnectors. Nevertheless, numerous European countries have established statutory monopolies that restrict interconnector investment to a monopolist. The resulting restrictions on third-party investment were a core issue underlying the recent Aquind case. Against this backdrop, it is surprising that these statutory transmission monopolies have so far passed largely under the radar, in terms of both adjudication by the European courts and also discussion in the literature. This article argues that statutory transmission monopolies are overlooked, illegal relics from a pre-liberalised past. Regulators, such as the Commission, as well as affected stakeholders, should challenge statutory transmission monopolies where they impede interconnector investment. Based on the existing case law, free movement law appears as the tool of choice in this context.

Introduction

The Commission has recently proclaimed the achievement of a European “Energy Union”.¹ However, investment conditions for cross-border electricity infrastructure in many Member States still reflect nationalistic notions from a distant past. Since the early 1990s, the main goal of EU energy policy has been the creation of a pan-European internal electricity market, through further interconnection of the

* PhD Candidate in European energy law, Scandinavian Institute of Maritime Law. Email: julius.rumpf@jus.uio.no. This article is part of my PhD project under the supervision of Henrik Bjørnebye, partner at the BAHN law firm in Oslo and Professor Ola Mestad at the University of Oslo, whom I thank for valuable feedback and discussions. Likewise, I thank Professor Finn Arnesen at the University of Oslo and Professor Leigh Hancher at Tilburg University and the European University Institute for inspiring input and discussions. Furthermore, I am grateful for the helpful comments received during the review process. The findings informing this article were presented before the Norwegian Energy Law Association (*Norsk forening for energirett*), and I thank the other panellists and participants for valuable comments. Any remaining shortcomings in the article are my own responsibility. The research for this article received financial support from the Research Council of Norway, grant 270500 (*Omregulering av kraftmarkedet*).

¹ Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee, the Committee of the Regions and the European Investment Bank: Fourth Report on the State of the Energy Union COM(2019) 175 final, p.1.

European electricity grids.² At present, this mostly concerns the highest-voltage transmission grids.³ The Agency for the Cooperation of Energy Regulators (ACER) considers further market integration as the most important measure for overcoming the current energy price crisis, which illustrates the immediate relevance of this goal.⁴ Nevertheless, numerous Member States make the ownership of cross-border interconnectors subject to exclusive rights. This article refers to these exclusive rights as statutory transmission monopolies (STMs). Whereas statutory monopolies are in general an important subject of focus in EU law scholarship, an analysis dedicated to STMs and their effect on interconnector investment is lacking. There is also a notable scarcity of case law. This is surprising, since a restriction on interconnector investment intuitively clashes with the EU's market integration efforts and the need for more interconnection.

This article aims to close this gap and show why STMs breach EU law without plausible justification. It argues that the resulting restrictions on third-party interconnector investment lead to market foreclosure and distort competition in the electricity transmission market. At the same time, vital economic, environmental and even strategic security aims nonetheless hinge on a considerable augmentation of cross-border connections. Hence, the article calls upon regulators, especially the Commission, as well as affected stakeholders, to take action against STMs where they negatively affect interconnector investment. It argues that free movement law provides a strong legal base for proceeding against STMs—provided the Member States' margin of discretion is delineated sensibly.

Interconnectors—needed but not always wanted

What are interconnectors? The Electricity Regulation defines them as

“a transmission line which crosses or spans a border between Member States and which connects the national transmission systems of the Member States”.⁵

These cross-border lines act as “bridges” between the national grids and enable electricity exchanges between neighbouring states. Without interconnectors, the EU's energy policy aims simply cannot be realised. In addition to creating an internal electricity market, these aims are to ensure effective competition, as well as a secure and sustainable electricity supply.⁶ By facilitating a cross-border pooling of transmission and generation resources, interconnectors offer significant economies of scale and improve the integration of renewables.⁷ Yet at the same time, integrating previously separate electricity markets changes the prevailing price structure, which often causes resistance at national level against interconnector investment.

Norway provides a good example: due to its vast CO₂-free and controllable hydropower resources, many consider Norway as Europe's “green battery”.⁸ Building additional interconnectors to continental

² C.f. Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C326/47 TFEU arts 26(2) and 194(1). The parallel integration process in the European gas sector is outside the scope of this article.

³ See Directive 2019/944 on common rules for the internal market for electricity [2019] OJ L158/125 art.2(34).

⁴ ACER, “Final Assessment of the EU Wholesale Electricity Market Design” (2022), 74.

⁵ Regulation 2019/943 on the internal market for electricity [2019] OJ L158/54 art.2(1). Note that Directive 2019/944 art.2(39) defines the term more widely as “equipment used to link electricity systems”. The relationship between these diverging definitions will not be discussed here.

⁶ TFEU art.194(1).

⁷ C.f. *Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 2020 Report on the State of the Energy Union Pursuant to Regulation 2018/1999 on Governance of the Energy Union and Climate Action* COM(2020) 950 final Annex 1: Internal Energy Market 10.

⁸ For details, see K. Kroepelien, “EU Law and Norwegian Hydropower Legislation—A Challenging Interface” in M. Roggenkamp and C. Banet (eds), *European Energy Law Report* (Cambridge: Intersentia, 2020), Vol.XIII, pp.129–130.

Europe could help to secure electricity supply there in times of low solar and wind production, without additional CO₂ emissions. In times of excess production from renewables on the continent, Norway could import cheap electricity and conserve its water reservoirs. However, increasing the number of Norwegian interconnections would require costly investment in the transmission system and so raise power prices in Norway. These factors render further interconnector investment politically unacceptable in Norway, especially against the background of the current energy price crisis.

Scope of analysis

The main scope of this analysis is free movement law, with additional comments on the effects of sectoral secondary legislation. It will only briefly comment on competition law, which is a riskier route for proceeding against STMs. Questions of national law are excluded. However, reference will be made to the STMs adopted in France, Spain and Norway for illustration purposes. These countries follow different approaches for ensuring that only a designated monopolist may invest in electricity interconnectors.⁹ The French and Spanish STMs have been selected because they have been addressed in litigations at EU level. The French STM was at issue in the recent *Aquind* case before the General Court (GC). Moreover, the European Court of Justice (ECJ) scrutinised a predecessor of the current Spanish STM in one of its seminal *Energy Monopoly* cases.¹⁰ The STMs in both countries were also targeted by the Commission in recent infringement proceedings.¹¹ The Norwegian STM is included because its recent (re-)introduction¹² underscores the practical relevance and urgency of this analysis, while the Norwegian debate provides a rare insight into the motivations for adopting STMs.¹³

Norway is not a Member State of the EU, but is a contracting party to the EEA (European Economic Area) Agreement.¹⁴ However, for the purpose of this discussion, the situation under EEA law corresponds to that in the EU. The relevant rules in the EEA Agreement mirror those in the EU treaties and must be interpreted in the same way under the homogeneity principle.¹⁵ Moreover, the effects of secondary legislation are essentially identical for the matter at hand. Even though the EU's newest set of electricity legislation, the "Clean Energy Package", adopted in 2019,¹⁶ has not yet been incorporated into EEA law, a study of its predecessor, the Third Energy Package, yields the same results.¹⁷ Therefore, unless mentioned otherwise, all conclusions under EU law also apply in Norway under EEA law. For reasons of readability, the following

⁹ For details, see below.

¹⁰ *Commission of the European Communities v Spain* (C-160/94) EU:C:1997:502.

¹¹ Infringement procedures 2014/2186 (Spain) and 2014/2269 (France).

¹² The Norwegian prohibition of third-party investment was first introduced in 2013, removed in 2016, only to be reintroduced in 2021, see <https://www.europower.no/nett/enighet-om-utenlandskabler-striden-tar-en-annen-retning/2-1-1012720>.

¹³ See the preparatory legislative documents Prop. 160L (2020–2021); Innst. 220 S (2019–2020); Prop. 5 L (2017–2018); Innst. 175 L (2017–2018); Prop. 113 L (2012–2013).

¹⁴ Agreement on the European Economic Area [1994] OJ L1/3. In this article, the term "Member State" also refers to Norway for reasons of readability.

¹⁵ See EEA arts 1(1), 6. For further details, see the discussion by P. Wennerås in F. Arnesen et al (eds), *Agreement on the European Economic Area: A Commentary*, 1st edn (Baden-Baden: Nomos; CH Beck/Hart Publishing, 2018), pp.209–248 and F. Arnesen et al, *Oversikt over EØS-retten* (Oslo: Universitetsforlaget, 2022), s.3.2.

¹⁶ For further information, see https://energy.ec.europa.eu/topics/energy-strategy/clean-energy-all-europeans-package_en.

¹⁷ The relevant acts of the Third Energy Package for this article are Directive 2009/72 concerning common rules for the internal market in electricity [2009] OJ L211/55; Regulation 714/2009 on conditions for access to the network for cross-border exchanges in electricity [2009] OJ L211/15; Regulation 2015/1222 establishing a guideline on capacity allocation and congestion management [2015] OJ L197/24; and Directive 2006/123 on Services in the Internal Market [2006] OJ L376/36. See Annex IV, points 20 and 22 and 49 as well as Annex X point 1 to the EEA Agreement.

analysis will refer to the relevant provisions under EU law; the corresponding provisions under EEA law can be found in the correlation table at the end of the article.

Secondary law—inconclusive, but still important

While ultimately inconclusive on the legality of STMs under EU law, secondary legislation is important for the argument presented here insofar as it establishes general investment conditions for interconnectors, which help us understand the impact of STMs.

No exhaustive harmonisation, but harmonised interconnection goals

To begin with, secondary law does not stand in the way of a scrutiny under the rules of primary law. The ECJ has recently reiterated in *Elektrozapredelenie Yug* that the electricity sector—and transmission system operation in particular—is not subject to exhaustive harmonisation at EU level.¹⁸ Thus, the EU treaties remain applicable alongside the sectoral legal framework. At the same time, this framework does establish harmonised minimum interconnection goals. According to the Governance Regulation, Member States should achieve an interconnection rate of 10 per cent by 2020 and 15 per cent by 2030, measured in relation to their maximum electricity production capacity.¹⁹ Would achieving these aims give Member States complete leeway concerning interconnector investment, potentially legalising STMs? This is highly unlikely.

These aims existed for years before their codification in the Governance Regulation.²⁰ However, they do not seem to have acquired legal force in the process. In contrast to most other targets established in the Governance Regulation, the interconnection target is not labelled as binding; moreover, the European Parliament and the Council may alter these targets, underlining their indicative nature.²¹ This notwithstanding, it is not entirely clear to what extent the interconnection targets are achieved. Whereas the Commission reported in 2020 that almost a third of the Member States missed the 10 per cent interconnection target for that year,²² it states in a more recent report that “[m]ost of Member States have already achieved the 2030 interconnectivity level of 15 %”.²³ However, this appears largely as a change in rhetoric, as most Member States falling short of the 10 per cent target have not commissioned any interconnectors in the meantime. This discussion does not concern Norway: the Governance Regulation is not yet transposed into EEA law, and Norway’s interconnection rate exceeds 15 per cent by a considerable margin.

Most importantly, it is clear that a rigid “one-size-fits-all” target is not suitable for achieving the EU’s energy policy aims. The plans to achieve a comprehensive electrification of the European economy and society and related decarbonisation goals under the European Green Deal and the “Fit for 55” package require additional interconnector investment—the concrete amount depending on the individual characteristics of the connected electricity grids and markets.²⁴ Likewise, the planned massive deployment

¹⁸ See *Elektrozapredelenie Yug* (C-31/18) EU:C:2019:868 at [50].

¹⁹ Regulation 2018/1999 on the Governance of the Energy Union and Climate Action [2019] OJ L328/1 arts 2(11), 4(d)(1) and point 2.4.1. of Part 1 of Annex I.

²⁰ Regulation 2018/1999 Recital (17).

²¹ See Regulation 2018/1999 art.2(11).

²² *Report on the State of the Energy Union Pursuant to Regulation 2018/1999 on Governance of the Energy Union and Climate Action* COM(2020) 950 final, p.7.

²³ *Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee, the Committee of the Regions and the European Investment Bank: State of the Energy Union 2021—Contributing to the European Green Deal and the Union’s Recovery* COM(2021) 950 final, p.18.

²⁴ See G. Brunekreeft and R. Meyer, “Cross-Border Electricity Interconnectors in the EU: The Status Quo” in E. Gawel et al (eds), *The European Dimension of Germany’s Energy Transition: Opportunities and Conflicts* (Birkhäuser

of renewable offshore electricity production will only provide reliable electricity supply if the new generation capacities are bundled across borders.²⁵ To provide some numbers, the latest European ten-year network development plan identifies a need for an additional 50 GW of cross-border transmission capacity by 2030, more than half as much again when compared to the EU-wide total of 80 GW in 2020.²⁶ The success of the efforts to reduce dependence on imported gas, expedited by Russia's invasion of Ukraine, depends on further interconnection between the Member States.²⁷ Substituting imported gas with domestic renewable production capacity is only one side of the coin and will only be fully effective if this production is pooled across borders. Accordingly, in its section on European interconnection and infrastructure needs, the Commission's recent REPowerEU Plan states that "an additional EUR 29 billion of additional investments [sic] are needed in the power grid by 2030".²⁸

The existence of harmonised interconnection targets thus underscores the general need for further investment in interconnectors, yet achieving those targets does not imply that such investment has become unnecessary. They should instead be treated as indicative milestones on the way to a truly interconnected European electricity system.

Investment models for interconnectors under EU law

In a liberalised market, interconnector investment is not carried out by the Member States themselves, but by private parties—in particular the incumbent operators of the highest voltage grids, the so-called transmission system operators (TSOs).²⁹ Since electricity is a network industry, the TSOs play a central role in the EU's energy policy efforts. Most TSOs are organised as private companies, which are state-owned in many Member States. Currently, most interconnectors in Europe are in TSO ownership. However, there is a growing number of third-party interconnectors belonging to independent investors, with numerous projects being planned.³⁰

EU energy law pursues investment in interconnectors through two models, subject to control by the regulatory authorities of the involved Member States: the "regulated" and the "merchant" investment scheme. A feature that both models have in common is that the owner(s) of the interconnector receive payments whenever an interconnector is used for cross-border trade ("congestion income").³¹ However, under the so-called regulated scheme, congestion income is strictly earmarked and may only be used for purposes that ensure cost recovery or benefit the network users. These purposes include guaranteeing the availability of interconnector capacity, covering expenses for reinforcing the network, or lowering the

Verlag AG: Springer International Publishing, 2019). On the Green Deal and the Fit for 55 package, see <https://www.consilium.europa.eu/en/policies/green-deal/fit-for-55-the-eu-plan-for-a-green-transition/>.

²⁵ See 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.

²⁶ See <https://tyndp.entsoe.eu/>. This plan is developed according to Regulation 2019/943 art.48.

²⁷ See Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, "Security of Supply and Affordable Energy Prices: Options for Immediate Measures and Preparing for Next Winter" COM(2022) 138 final; and "Short-Term Energy Market Interventions and Long Term Improvements to the Electricity Market Design — a Course for Action" COM(2022) 236 final.

²⁸ Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, "REPowerEU Plan" COM(2022) 230 final pp.12–16.

²⁹ The TSOs' investment obligation follows from Directive 2019/944 arts 2(35), 40(1)(a). For details, see J. Rumpf and H. Bjørnebye, "Just How Much Is Enough? EU Regulation of Capacity and Reliability Margins on Electricity Interconnectors" (2019) 37 *Journal of Energy & Natural Resources Law* 67, s.3.2.2.1.

³⁰ The 10-year network development plan referred to in <https://tyndp.entsoe.eu/> provides an overview of planned third-party interconnectors.

³¹ Defined in Regulation 2015/1222 art.2(16) as "the revenues received as a result of capacity allocation".

network tariffs.³² The regulated scheme, which is available to the incumbent TSOs as well as to third-party investors, has not proven to ensure sufficient investment.³³ In particular, the slow cost recovery under this scheme may make an interconnector project appear too risky, given both the very high expenditures, as well as economic, political and regulatory uncertainties.³⁴

Therefore, EU energy law aims to promote interconnector investment by third parties in order to close remaining investment gaps. Third-party investors can request a so-called merchant exemption. These exemptions are not available to incumbent TSOs. Nevertheless, a merchant exemption is no prerequisite for third-party investment either, as the investor may choose the regulated scheme instead.³⁵ However, a merchant exemption is attractive, as it may relieve the investor for a limited time from being subject to the rules on earmarking, allowing them temporarily to retain congestion income as revenues. The reason for merchant exemptions is to accelerate cost recovery and incentivise investment in interconnectors that would otherwise not take place.³⁶ Such exemptions are subject to a restrictive assessment, with a view to the level of risk they are exposed to, as well as their contribution to competition and market integration.

The recent *Aquind* case involving ACER exemplifies how STMs restrict third-party investment. The background to this case was an (unsuccessful) request for a merchant exemption by Aquind Ltd, a third-party investor planning to build an interconnector between France and the UK. The reason for Aquind's request was the claim by the French regulator (*Commission de Régulation de l'Énergie*—the CRE) that because of the STM, third-party interconnector investment in France was only possible with a merchant exemption.³⁷ Since the French and British regulators could not agree on whether to grant the exemption, they asked ACER to decide on the request. Based on an extensive technical and economic assessment, ACER concluded that the risks to which the project was exposed to did not justify the granting of a merchant exemption.³⁸ In principle, Aquind could still have considered an investment under the regulated scheme, but the French STM blocked this route.

³² Regulation 2019/943 art.19(2), (3).

³³ Brunekreeft and Meyer, “Cross-Border Electricity Interconnectors in the EU: The Status Quo” in *The European Dimension of Germany's Energy Transition: Opportunities and Conflicts* (2019); P. Beato and N. Vasilakos, “Identifying and Promoting Missing EU Power Interconnectors” (2018) 7 *European Energy Journal* 30, <https://cadmus.eui.eu/handle/1814/51664>.

³⁴ See J. Rumpf and L. Hancher, “Baltic Cable AB v Energimarknadsinspektionen (C-454/18): The CJEU Decides on Congestion Income Regulation of Single Electricity Interconnector Companies and Applies Classic Remedies for Modern Issues” (2021) 46 *E.L. Rev.* 242, 245–246.

³⁵ On challenges of third-party interconnectors operating without an exemption, C.f. *Baltic Cable AB v Energimarknadsinspektionen* (C-454/18) EU:C:2020:189.

³⁶ Regulation 2019/943 art.63. On the benefits of merchant investment, see A. Gautier, “Merchant Interconnectors in Europe: Merits and Value Drivers” (2020), <https://cadmus.eui.eu/handle/1814/66184>. See further A. de Hauteclouque and V. Rious, “Reconsidering the European Regulation of Merchant Transmission Investment in Light of the Third Energy Package: The Role of Dominant Generators” (2011) 39 *Energy Policy* 7068. An overview over existing exemption decisions is available at https://energy.ec.europa.eu/system/files/2023-01/exemption_decisions2022_updated%20links%20jan%202023%20v2_0.pdf.

³⁷ CRE, Deliberation of the French Energy Regulatory Commission dated 30 September 2010 on the Application of Article 7 of Regulation 1228/2003 and on Conditions for Access to the French Electricity Transmission Grid for New Exempt Interconnectors 2; Communication of the French Energy Regulatory Commission of 29 March 2012 on the application of Article 17 of Regulation 714/2009. See also the Internal Minutes of the Hearing of 26 September 2018 in Case A-001-2018 (AQUIND) before ACER's Board of Appeal at [6] and [8]–[10].

³⁸ ACER, Decision 05/2018 on the Exemption Request for the AQUIND Interconnector https://www.acer.europa.eu/Official_documents/Acts_of_the_Agency/Individual%20decisions/ACER%20Decision%2005-2018%20on%20AQUIND.pdf. For a discussion, see M. Mulder, “Merchant Investments in Interconnections in the European Electricity Market: the AQUIND Case” (2018) University of Groningen Centre for Energy Economics Research (CEER) Policy Paper No.4. Note that the decision was successfully appealed on other grounds, c.f. *Aquind Ltd v ACER* (T-735/18) EU:T:2020:542.

Interconnector investment and the natural monopoly paradigm

As in other infrastructure sectors, the natural monopoly paradigm is a cornerstone of electricity regulation. In particular, transmission systems are considered as being natural monopolies, meaning that only one transmission system should exist in any given area for economic reasons³⁹—but what are the legal effects of this paradigm? Do they overlap with the legal effects of STMs? That would stop this analysis in its tracks; however, there is no such overlap.

To begin with, EU energy law establishes certain restrictions on transmission investment following on from the natural monopoly paradigm. The Electricity Directive defines a TSO as being the entity,

“responsible for operating, ensuring the maintenance of and, if necessary, developing *the* transmission system in a given area and, where applicable, its interconnections with other systems”.⁴⁰

The use of the definite article (emphasised in the quote) implies that there can be only one transmission system in any given area—giving the natural monopoly paradigm legal force as far as meshed “national” grids are concerned.⁴¹

By contrast, the “merchant” investment scheme shows that EU energy law does not treat interconnector investment as a natural monopoly activity. After all, this scheme is only available to third parties. At the same time, this does not settle the illegality of STMs. The fact that EU law does not monopolise interconnector ownership and generally endorses third-party investment in interconnectors cannot be construed as a prohibition on stipulating otherwise at national level. EU energy law merely establishes harmonised conditions in cases where third-party interconnector investment takes place, but it remains silent on the question of whether Member States may prohibit such investment altogether.

The 2014 infringement proceedings: a bold advance and a silent retreat

Instead of secondary law, the legality of STMs must therefore be determined according to the fundamental Treaty rules, especially free movement law. This can be illustrated by the infringement proceedings that the Commission initiated against Spain, France and Belgium in 2014 for maintaining STMs.⁴² The Commission argued that the STMs breached secondary law, in particular the unbundling and certification provisions established in the Electricity Directive,⁴³ when read in conjunction with the Treaty rules on the free movement of capital and freedom of establishment.⁴⁴

However, the Commission silently dropped the proceedings after sending reasoned opinions to the affected Member States, with the result that the Commission’s argumentation concerning STMs was never

³⁹ Ma. Ventosa, P. Linares and I.J. Pérez-Arriaga, “Power System Economics” in I.J. Pérez-Arriaga (ed.), *Regulation of the Power Sector* (London: Springer, 2013), pp.58–61; P.L. Joskow, “Regulation of Natural Monopoly” in A.M. Polinsky and S. Shavell (eds), *Handbook of Law and Economics* (Amsterdam: North-Holland 2007), Vol.2, pp.1229, 1232.

⁴⁰ Directive 2019/944 art.2(35) (emphasis added).

⁴¹ Note that nothing in EU law prevents Member States from splitting the electricity grid into different “control areas”, each operated by a different TSO, c.f. Regulation 2019/943 art.2(67). Germany, Austria and Finland are examples of Member States with different regional electricity transmission grids. STMs impede such a splitting, the effects of which are however outside the scope of this article.

⁴² Based on art.258 TFEU. See the procedures 2014/2186 (Spain) and 2014/2269 (France) and the infringement procedure 2014/2189 against Belgium.

⁴³ Directive 2019/944 art.52(2).

⁴⁴ TFEU arts 49 and 63. On the delimitation of both freedoms, consult C. Barnard, *The Substantive Law of the EU: The Four Freedoms*, 6th edn (Oxford: Oxford University Press, 2019), p.528.

scrutinised by the ECJ.⁴⁵ Hence, it seems moot to discuss the merits of the Commission's decision to build its case on the unbundling provisions. Clearly, the Commission itself was uncertain as to whether secondary law would suffice to establish the illegality of STMs, unless seen in conjunction with the free movement rules. A more promising approach would have been to argue an infringement of free movement law and use secondary EU energy legislation for further substantiation, as the remainder of the discussion will show.

The interface between secondary and primary law

To conclude the discussion of secondary law, it is important to remember that secondary legislation may impact the application of the free movement rules. The ECJ has acknowledged in *PreussenElektra* that the current state of secondary legislation concerning the electricity market may have repercussions on the application of free movement law.⁴⁶ Similarly, when discussing the possible justification of Dutch measures restricting the ownership of electricity grid infrastructure under free movement law in *Essent*, the Court considered it a mitigating factor that the measures at issue were aligned with sector-specific aims, expressed in secondary law.⁴⁷ The Court appears to rely on the sector-specific considerations inherent in EU energy law to achieve a more sensible application of the free movement rules in the context of the electricity sector. The discussion of free movement law in the following section will take this into account.

Breaches of primary law

STMs constitute obstacles to the market for cross-border electricity transmission and potentially contribute to maintaining an investment gap in electricity interconnectors. Therefore, neither regulators nor stakeholders should tolerate STMs. This section will explain why actions against STMs should preferably be based on the free movement principles. It also comments briefly on procedural challenges under competition law. To clarify, it is not the aim of this study to review the legality of any national STM in particular. The French, Spanish and Norwegian STMs are used here strictly for illustration purposes. However, the common traits of these STMs allow for the making of some general statements on the compatibility of STMs with primary law.

Specific monopoly rules take no precedence

To begin with and perhaps surprisingly, the specific Treaty rules on state monopolies do not apply to STMs. To be sure, statutory monopolies are, to quote Buendía Sierra, “without doubt the archetypal ‘State monopolies of a commercial character’”.⁴⁸ Nevertheless, the prevailing view is that these provisions apply only to monopolies concerning the trade in goods.⁴⁹ Whereas electricity clearly constitutes a good,⁵⁰ the

⁴⁵ The procedure against Belgium was referred to the ECJ, however without the charges against the Belgian STM—still in force at the time of writing, c.f. the Belgian Electricity Act (Wet betreffende de organisatie van de elektriciteitsmarkt) art.8. See *European Commission v Belgium* (C-767/19) EU:C:2020:984.

⁴⁶ C.f. *PreussenElektra AG v Schleswag AG* (C-379/98) EU:C:2001:160; [2001] 2 C.M.L.R. 36 at [81], where the Court held that “in the current state of [EU] law concerning the electricity market,” the measure concerned was not incompatible with what is now art.34 TFEU.

⁴⁷ *Staat der Nederlanden v Essent* (C-105/12-C-107/12) EU:C:2013:677 at [60]–[65].

⁴⁸ TFEU art.37(1); citation from J.L. Buendía Sierra, *Exclusive Rights and State Monopolies under EC Law: Article 86 (Formerly Article 90) of the EC Treaty* (Oxford: Oxford University Press, 1999), p.85.

⁴⁹ TFEU arts 34 and 35. See *Gemeente Almelo v Energiebedrijf IJsselmij NV* (C-393/92) EU:C:1994:171 at [27]; *Italy v Sacchi* (155/73) EU:C:1974:40; [1974] 2 C.M.L.R. 177 at [10].

⁵⁰ *Commission of the European Communities v Netherlands* (C-157/94) EU:C:1997:499; [1998] 2 C.M.L.R. 373 at [17]; *Gemeente Almelo* (C-393/92) EU:C:1994:171 at [28]; *Costa v Ente Nazionale per l'Energia Elettrica (ENEL)* (6/64) EU:C:1964:66; [1964] C.M.L.R. 425.

ECJ has qualified the transmission of electricity as a service.⁵¹ Furthermore, while Buendía Sierra convincingly argues in favour of also applying the monopoly rules to service monopolies if these “substantially affect the import of products”,⁵² STMs do not have this effect unless additional conditions are fulfilled.

First, transmission capacity on the affected border must be insufficient. As stated before, this question cannot be resolved based on rigid “one size fits all” values, but must be determined in each case.⁵³ When push comes to shove, proving the insufficiency of interconnector capacity against the resistance of the concerned Member State, would require a complex technical and economic assessment.⁵⁴ Second, there must be a causal link between the STM and the failure of the monopolist to invest in sufficient cross-border capacity. Only under these circumstances would the import (or export, for that matter) of electricity be affected substantially.⁵⁵ The resulting burden of proof appears almost insurmountable, and the Treaties’ specific monopoly rules do not offer a promising way to proceed against STMs. Instead, the case against STMs should be built on free movement law.

Access to the electricity transmission market is impeded

The ECJ assumes a breach of free movement law if a national measure constitutes an obstacle to the concerned market.⁵⁶ Because electricity transmission capacity is provided against remuneration, there is clearly a market for electricity transmission.⁵⁷ Given the natural monopoly status of transmission systems, conditions for access to this market may be atypical—and yet it can in principle be accessed by anyone who invests in an interconnector. It is true that with their expertise, outstanding credit rating and privileged access to investment capital, the incumbent TSOs will usually have an advantage over third-party investors. However, there is a place for third-party investment, for example where the incumbent TSO fails to invest altogether, or where an interconnector investment is too risky to be executed under the regulated remuneration scheme. By restricting this kind of investment, STMs impede entry to the electricity transmission market—contrary to the aims and rules of EU law for the electricity sector.⁵⁸

To illustrate this point, France, Spain and Norway organise the operation of the transmission system as the exclusive right (and obligation) of the incumbent TSO. These monopolies extend to interconnectors

⁵¹ See *Commission of the European Communities v Italian Republic* (C-158/94) EU:C:1997:500 at [18]. On electricity distribution at lower voltage levels: *Gemeente Almelo* (C-393/92) EU:C:1994:171 at [46]–[51].

⁵² Buendía Sierra, *Exclusive Rights and State Monopolies under EC Law: Article 86 (Formerly Article 90) of the EC Treaty* (1999), pp.87–88.

⁵³ See above.

⁵⁴ C.f. *Acquind Ltd* (T-735/18) EU:T:2020:542 at [43]–[44].

⁵⁵ *Criminal Proceedings against Keck* (C-267/91 and C-268/91) EU:C:1993:905; [1995] 1 C.M.L.R. 101 at [17]. See also Commission Decision relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union and Article 54 of the EEA Agreement (COMP/39351—*Swedish Interconnectors*) [2010] OJ C142/28 at [42]–[43].

⁵⁶ For an overview over the relevant cases, see Barnard, *The Substantive Law of the EU: The Four Freedoms* (2019), p.217–220. For further examples and a critical account, see J. Snell, “The Notion of Market Access: A Concept or a Slogan?” (2010) 47 C.M.L. Rev. 437.

⁵⁷ While the ECJ has not yet issued a statement to this effect, the Commission has consistently presumed the existence of a market for electricity transmission in competition law proceedings. However, the Commission seems to have decided against a distinction between a “domestic market” and a “cross-border market” for electricity transmission. It will therefore be presumed that each transmission grid (including any interconnections) constitutes one market for electricity transmission. See in particular (COMP/39351—*Swedish Interconnectors*) [2010] OJ C142/28 at [16]–[20]; Commission Decision relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union and Article 54 of the EEA Agreement (COMP/AT.40461—*DE/DK Interconnector*) C(2018) 8132 final at [43]–[48].

⁵⁸ TFEU art.194(1)(d), Regulation 2019/943 art.63.

in different ways. France and Spain respectively define interconnectors as a task for the monopolist⁵⁹ or as part of the national transmission system.⁶⁰ In Norway, only the monopolist may obtain concessions for operating interconnectors.⁶¹ All the countries mentioned thus assign interconnector investment to a monopolist, restricting third-party investment and, accordingly, access to the transmission market.

These restrictions are sufficiently severe so as not to be considered negligible.⁶² In principle, STMs exclude third-party investment in interconnectors altogether. This affects both sides of the border, even if the neighbouring Member State allows third-party investment. Where exceptions exist, they are narrow in scope—anything else would defeat the purpose of the STM concerned. In Norway, there is an exception for so-called hybrid projects, i.e. interconnectors that simultaneously connect offshore wind farms.⁶³ However, hybrid assets have a completely different business case and hence cannot be considered as a substitute for regular interconnectors.⁶⁴

It is unclear whether merchant exemptions function as implicit exceptions to STMs, as argued by the French regulator. The CRE has not revealed the legal reasoning behind this statement. Nevertheless, it is irrelevant whether this is a specific feature of French transmission investment regulation, or instead represents a general supposition.⁶⁵ Even making the assumption that merchant exemptions may “beat” STMs, it should still be recalled that these exemptions are subject to a restrictive assessment and thus very difficult to obtain—as illustrated by the *Aquind* case. Therefore, STMs restrict third-party interconnector investment substantially, even when taking the CRE’s view into account.

Affected freedoms: capital, establishment and services

These impediments to market access make it straightforward to establish that STMs breach several of the free movement principles. First, the investment restrictions clash with the free movement of capital or the freedom of establishment, depending on whether such investment takes place as a direct investment or through the creation of an undertaking intended to operate an interconnector.⁶⁶ Second, STMs encroach upon the free movement of services whenever they impede the provision of transmission capacity across

⁵⁹ See the French Energy Act (Code de l’énergie) arts L111-3 and L321-6: “Seule une société [...] peut être agréée en tant que gestionnaire d’un réseau de transport d’électricité [...]” — “Le gestionnaire du réseau public de transport exploite et entretient le réseau public de transport d’électricité. Il est responsable de son développement afin de permettre [...] l’interconnexion avec les réseaux des autres pays européens.”

⁶⁰ See the Spanish Electricity Act (Ley del Sector Eléctrico.) arts 30.1, 34.1 and 34.2: “[...] El operador del sistema será el gestor de la red de transporte. [...]” — “[...] La red de transporte primario está constituida por [...] instalaciones de interconexión internacional [...]” — “[...] Red Eléctrica de España, S.A., actuará como transportista único desarrollando la actividad en régimen de exclusividad [...]”.

⁶¹ The Norwegian Energy Act (Energiloven) establishes in s.6-1 that a single entity is responsible for the transmission system (“den systemansvarlige”); emphasis added. Furthermore, Energiloven s.4-2 prescribes: “Konsesjon [til eierskap eller drift av utenlandsforbindelser] kan bare gis til [den systemansvarlige] eller til foretak hvor denne har bestemmende innflytelse”.

⁶² On the requirement for a certain severity in the restriction, see I. Antonaki, “Keck in Capital? Redefining ‘Restrictions’ in the ‘Golden Shares’ Case Law” (2016) 9 *Erasmus Law Review* 177.

⁶³ See European Commission, “Hybrid Projects: How to Reduce Costs and Space of Offshore Developments” (2018).

⁶⁴ On the only existing hybrid project to date, see <https://www.50hertz.com/en/Grid/Griddevelopment/Concludedprojects/CombinedGridSolution>. For a discussion of legal and economic challenges related to hybrid assets, see C. Nieuwenhout, “Dividing the Sea into Small Bidding Zones? The Legal Challenges of Connecting Offshore Wind Farms to Multiple Countries” (2022) 40 *Journal of Energy & Natural Resources Law* 315.

⁶⁵ STMs explicitly excluding third-party interconnector investment—as in Spain or Norway—can at any rate most probably not be overcome with a merchant exemption.

⁶⁶ C.f. *Essent* (C-105/12-C-107/12) EU:C:2013:677 at [41]–[42]; *EFTA Surveillance Authority v Norway* (E-2/06) 26 June 2007 (*Hjemfall*) at [64]–[68]. See also the Commission’s reasoning in the infringement procedures 2014/2186 (Spain) and 2014/2269 (France).

a border.⁶⁷ This is the case where a single entity owns the interconnector infrastructure on both sides of the border—the typical situation of third-party interconnectors.⁶⁸ Hence, under the Court’s “*Gebhard* formula”, STMs constitute “national measures liable to hinder or make less attractive the exercise of” the freedom of capital, establishment and services.⁶⁹

A remaining question is whether the Services Directive displaces or modifies some of the free movement rules.⁷⁰ While this directive covers measures related to the freedom of establishment and the free movement of services, it does not seem to apply to STMs. For one, the Services Directive “does not deal with the abolition of monopolies providing services”.⁷¹ While the legal effect of this limitation is unclear,⁷² it suggests that the issue of STMs has to be resolved under the Treaty provisions. Furthermore, the Services Directive contains several restrictions with regard to services of general economic interest (SGEIs). Given the importance of access to electricity, it appears evident that electricity transmission constitutes an SGEI.⁷³ The Services Directive explicitly excludes SGEIs in the electricity sector performed in another Member State from its core provisions on services—i.e. the standard situation of third-party interconnectors.⁷⁴ As a result, the rules in the Treaties on the free movement of services take precedence over the Services Directive.⁷⁵ With regard to the freedom of establishment, the situation is somewhat opaque.⁷⁶ This is however irrelevant, since the main difference between the Treaty’s rules on the freedom of establishment and the Services Directive is that the latter also applies in purely internal situations.⁷⁷ Litigation concerning interconnectors inevitably entails a cross-border element, so that applying the Services Directive would not make any difference.

Competition law as a riskier alternative

Competition law provides an alternative avenue for challenging STMs. It is well-established that the Member States must refrain from adopting or maintaining in force measures that impede the effectiveness of competition law.⁷⁸ This applies to STMs. Since EU law only recognises the meshed domestic grid as a natural monopoly, competition on the electricity transmission market is possible as far as interconnectors

⁶⁷ Protected by TFEU art.56.

⁶⁸ C.f. *Ambulanz Glöckner v Landkreis Südwestpfalz* (C-475/99) EU:C:2001:577; [2002] 4 C.M.L.R. 21 at [49]. The Baltic Cable, ElecLink, and the planned Aquind interconnector provide examples.

⁶⁹ *Gebhard v Consiglio dell’Ordine degli Avvocati e Procuratori di Milano* (C-55/94) EU:C:1995:411; [1996] 1 C.M.L.R. 603 at [37].

⁷⁰ Directive 2006/123, see also fn.17. For an extensive discussion, consult C. Barnard, “Unravelling the Services Directive” (2008) 45 C.M.L. Rev. 323.

⁷¹ Directive 2006/123 art.1(3).

⁷² Barnard, “Unravelling the Services Directive” (2008) 45 C.M.L. Rev. 344.

⁷³ In *Gemeente Almelo* (C-393/92) EU:C:1994:171 at [47]–[50], the ECJ considered the supply of electricity to be an SGEI. In turn, a functioning transmission system—including interconnectors—is a prerequisite for electricity supply. Note that there is no general definition of SGEIs, either in EU law or by the Court, C.f. L. Zhu, *Services of General Economic Interest in EU Competition Law: Striking a Balance between Non-Economic Values and Market Competition* (London: Blackwells, 2020), pp.9–10.

⁷⁴ Directive 2006/123 arts 17(1)(b), 16.

⁷⁵ Barnard, “Unravelling the Services Directive” (2008) 45 C.M.L. Rev. 370.

⁷⁶ While Directive 2006/123 Recital (17) expressly states that “[SGEIs] are services that are performed for an economic consideration and therefore do fall within the scope of this Directive”, Directive 2006/123 art.1(3) establishes that the directive does not “affect the freedom of Member States to define, in conformity with [EU] law, what they consider to be [SGEIs or] how those services should be organised [...]”.

⁷⁷ Barnard, “Unravelling the Services Directive” (2008) 45 C.M.L. Rev. 358.

⁷⁸ *GB-INNO-BM NV v Vereniging van de Kleinhandelaars in Tabak* (13/77) EU:C:1977:185; [1978] 1 C.M.L.R. 283 at [31]–[32].

are concerned.⁷⁹ STMs evidently restrict such competition by granting the incumbent TSO an exclusive right to invest in cross-border lines.⁸⁰ However, proceeding under the competition rules poses additional procedural risks. The ECJ has repeatedly held that the mere granting of a statutory monopoly does not constitute as such a breach of the competition rules, unless the beneficiary is led to abuse the resulting dominant position.⁸¹ Arguing that there is a potential restriction to market access under free movement law is easier than showing that an exclusive right inevitably leads to an abuse of a dominant position.⁸² This makes free movement law a more promising option than competition law. To keep the present discussion concise, a fully-fledged discussion of competition law remains outside the scope of this article.

Justification

Given the far-reaching protection offered by free movement law, the focus in the Court's case law rests on the question of justification.⁸³ Reasons for justifying the restrictions resulting from STMs are conceivable—if for the most part unconvincing, as this section will show. This notwithstanding, the Member States' margin of discretion has considerable impact on the outcome of a potential litigation. While this margin generally appears to be large where energy policy is concerned, the Member States' discretion is insufficient to justify the severe restrictions caused by STMs, especially given the importance of the policy aims at stake.

A single justification approach

When assessing measures that impede market access, the Court follows a “rule of reason” approach based on the *Gebhard* formula.⁸⁴ The ECJ applies similar criteria to all four freedoms, resulting in a single justification approach.⁸⁵ Justification under this approach presupposes the pursuit of a legitimate aim (e.g. “overriding reasons in the general interest”⁸⁶), as well as proportionality between the restrictions caused by the measure and the contribution to this legitimate aim.⁸⁷ The intensity of the proportionality review depends on the Member States' margin of appreciation.

⁷⁹ On competition between different interconnector projects, see ACER, Decision 05/2018 on the Exemption Request for the AQUIND Interconnector at [177]–[181]. With regard to the domestic transmission grid, it is worth reiterating Buendía Sierra's argument that a natural monopoly does not exclude competition—it just makes competition undesirable, see Buendía Sierra, *Exclusive Rights and State Monopolies under EC Law: Article 86 (Formerly Article 90) of the EC Treaty* (1999), pp.339–340. However, my analysis is restricted to interconnectors.

⁸⁰ TFEU art.106.

⁸¹ Prohibited under TFEU art.102. See *European Commission v Dimosia Epicheirisi Ilektrismou AE (DEI)* (C-553/12 P) EU:C:2014:2083; [2014] 5 C.M.L.R. 19 at [45] and [59] and the case law referenced there.

⁸² For an illustrative example, refer to the judgments of the GC and the ECJ in the DEI cases. See *Dimosia Epicheirisi Ilektrismou AE (DEI) v European Commission* (T-169/08) EU:T:2012:448; [2012] 5 C.M.L.R. 21; *European Commission v Dimosia Epicheirisi Ilektrismou AE (DEI)* (C-553/12 P) EU:C:2014:2083 and *Dimosia Epicheirisi Ilektrismou AE (DEI) v European Commission* (T-169/08 RENV) EU:T:2016:733; [2018] 4 C.M.L.R. 26.

⁸³ J. Zginski, “The Rise of Deference: The Margin of Appreciation and Decentralized Judicial Review in EU Free Movement Law” (2018) 55 C.M.L. Rev. 1341, 1342–1343.

⁸⁴ *Gebhard* (C-55/94) EU:C:1995:411 at [37]. C.f. also *Kraus v Land Baden-Württemberg* (C-19/92) EU:C:1993:125 at [32].

⁸⁵ Barnard, *The Substantive Law of the EU: The Four Freedoms* (2019), p.503.

⁸⁶ The Court's terminology is not consistent, C.f. *Gebhard* (C-55/94) EU:C:1995:411 at [37]; *Säger v Dennemeyer & Co Ltd* (C-76/90) EU:C:1991:331; [1993] 3 C.M.L.R. 639 at [15]; *Ålands Vindkraft AB v Energimyndigheten* (C-573/12) EU:C:2014:2037; [2015] 1 C.M.L.R. 10 at [76]; *Essent* (C-105/12-C-107/12) EU:C:2013:677 at [50].

⁸⁷ See *Ålands Vindkraft AB* (C-573/12) EU:C:2014:2037 at [76]; T.-I. Harbo, “The Function of the Proportionality Principle in EU Law” (2010) 16 E.L.J. 158, 165.

The reasons for adopting STMs are seldom made explicit in the relevant legislation or policy documents. Therefore, a review of the key points informing the discussion around the (re-)introduction of an STM in Norway offers a valuable structure for the following analysis of several potential grounds for justification.

Economic considerations

First, explicit or concealed economic considerations motivate the adoption of STMs. These may include stabilising local power prices to avoid uproar among customers or a decline of the domestic industry, as well as protecting local network users from paying for grid reinforcements that mainly benefit third-party investors.⁸⁸ In short, the concern is that “the merchant takes it all”, i.e. that the third-party investor reaps the socioeconomic benefits arising from the new interconnector while externalising most costs.⁸⁹

As Arrowsmith points out, although the ECJ consistently states that economic considerations cannot justify free movement restrictions, in reality the Court’s scrutiny of economic aims is less one-sided, as the ECJ distinguishes between genuinely protectionist measures and only partially or incidentally economic motivations.⁹⁰ The statements by the Court in *Essent* illustrate that a measure remains justifiable if it is “dictated by reasons of an economic nature in the pursuit of an objective in the public interest”.⁹¹ In the *Essent* case, these “legitimising objectives” overlapped with sector-specific EU policy aims: ensuring transparency, security of supply and undistorted competition in the energy markets, as well as sufficient investment in grids.⁹²

By contrast, the economic aims for adopting STMs outlined above are essentially protectionist, shielding domestic actors from the effects of market integration. The ECJ would thus most probably reject these aims, as it has recently in its *Hidroelectrica* judgment. This judgment concerned Romanian measures that restricted the cross-border trade in electricity by prohibiting direct exports, obliging electricity producers to sell their entire production via the central national marketplace for electricity. Romania sought to justify the measure as contributing to the security of energy supply, a potentially legitimate aim that the next section will discuss. However, the ECJ refused this argumentation, which it considered to be a mere pretext for pursuing protectionist aims.⁹³ Thus, although an equitable distribution of the costs and benefits of market integration morally constitutes an honourable endeavour, it is not a legally acceptable justification for banning third-party investment.

⁸⁸ Beato and Vasilakos, “Identifying and Promoting Missing EU Power Interconnectors” (2018) 7 *European Energy Journal* 30.

⁸⁹ Quote from C. Gerbaulet and A. Weber, “When Regulators Do Not Agree: Are Merchant Interconnectors an Option? Insights from an Analysis of Options for Network Expansion in the Baltic Sea Region” (2018) 117 *Energy Policy* 228.

⁹⁰ See S. Arrowsmith, “Rethinking the Approach to Economic Justifications under the EU’s Free Movement Rules” (2015) 68 *Current Legal Problems* 307; G. Straetmans, “Case C-124/97, Läära, Judgment of the Court of 21 September 1999 and Case C-67/98, Zenatti, Judgment of the Court of 21 October 1999. Nyr. Full Court” (2000) 37 C.M.L. Rev. 991, 1003.

⁹¹ C.f. *Essent* (C-105/12-C-107/12) EU:C:2013:677 at [52]; *Campus Oil Ltd v Minister for Industry and Energy* (72/83) EU:C:1984:256; [1984] 3 C.M.L.R. 544 at [35]–[36]. Referred to as the “further purpose doctrine” by Arrowsmith, “Rethinking the Approach to Economic Justifications under the EU’s Free Movement Rules” (2015) 68 *Current Legal Problems* 320.

⁹² *Essent* (C-105/12-C-107/12) EU:C:2013:677 at [58]–[59].

⁹³ C.f. *Autoritatea nationala de reglementare in domeniul energiei (ANRE) v Societatea de Producere a Energiei Electrice in Hidrocentrale Hidroelectrica SA* (C-648/18) EU:C:2020:723; [2021] 1 C.M.L.R. 26 at [43]. See also *Commission of the European Communities v Greece* (C-398/98) EU:C:2001:565; [2001] 3 C.M.L.R. 6 at [30].

Security of supply

STMs seem to build on the notion that a single TSO is in a better position to ensure security of electricity supply. This is a weighty argument, since security of supply is a central concern of national and EU energy policy and the single most important consideration in transmission system operation.⁹⁴ The ECJ considers sufficient energy supply decisive for the very survival of the state and even qualifies it as a matter of public security.⁹⁵ This point has gained grim importance following the Russian invasion of Ukraine. This notwithstanding, referring to security of supply does not relieve the concerned Member State of its burden of proof.⁹⁶ It still has to show how the concerned measure contributes to this aim and give reasons for the proportionality—taking into account that energy security has gradually become a European concern.⁹⁷ This is the Achilles heel of relying on security of supply for justification: it is simply implausible that STMs contribute to security of electricity supply. What is more, blindly pursuing national security of supply would weaken European security of supply, lowering the overall level of energy security, both from an operational and a strategic perspective.

As a starting point, EU energy law defines security of supply in an electricity context as

“the ability of an electricity system to guarantee the supply of electricity to customers with a clearly established level of performance, as determined by the Member States concerned.”⁹⁸

On the one hand, this definition underscores the Member States’ margin of appreciation in the field of security of supply.⁹⁹ Even more importantly, it provides a frame of reference for showing why STMs do not plausibly contribute to security of supply. First, it is unconvincing that a monopolist TSO is in a better position to guarantee the operation of the electricity system—the first criterion in the definition just cited. Ultimately, this argumentation would imply that a single European TSO would be ideal for security of supply, a result that Member States implementing STMs would surely oppose.

Secondly, concerning the level of performance—the second criterion—there is no indication that third-party interconnectors constitute a risk that warrants their prohibition. Such interconnectors have to coordinate with their neighbouring TSOs. These TSOs must in any case coordinate the operation of their interconnected transmission grids between themselves for technical reasons, thus achieving very high levels of operational security.¹⁰⁰ There is no evidence that third-party interconnectors cause operational risks. On the contrary: numerous power systems worldwide include third-party interconnectors, with no evidence of lower operational security.¹⁰¹

Finally, from a strategic security perspective, interconnectors are generally advantageous, since they provide access to foreign generation capacity and thus enhance security of supply in times of domestic

⁹⁴ For details, see Rumpf and Bjørnebye, “Just How Much Is Enough? EU Regulation of Capacity and Reliability Margins on Electricity Interconnectors” (2019) 37 *Journal of Energy & Natural Resources Law* 67.

⁹⁵ See *Campus Oil* (72/83) EU:C:1984:256 at [34]–[35]. On electricity: *Hidroelectrica SA* (C-648/18) EU:C:2020:723 at [36].

⁹⁶ See Barnard, *The Substantive Law of the EU: The Four Freedoms* (2019), p.512.

⁹⁷ C.f. *Hidroelectrica SA* (C-648/18) EU:C:2020:723 at [38]–[43].

⁹⁸ Regulation 2019/941 on risk-preparedness in the electricity sector [2019] OJ L158/1 art.2(1); emphasis added. This regulation is not transposed into EEA Law. However, the definition compiles established indicators for security of supply; C.f. Rumpf and Bjørnebye, “Just How Much Is Enough? EU Regulation of Capacity and Reliability Margins on Electricity Interconnectors” (2019) 37 *Journal of Energy & Natural Resources Law* 75–76.

⁹⁹ C.f. Straetmans, “Case C-124/97, Läämä, Judgment of the Court of 21 September 1999 and Case C-67/98, Zenatti, Judgment of the Court of 21 October 1999. Nyr. Full Court” (2000) 37 C.M.L. Rev. 991, 1002.

¹⁰⁰ For a comparison of recent European, US and Australian figures, see Clean Energy Wire, “Germany’s Electricity Grid Stable amid Energy Transition” (2021) *cleanenergywire.org*, <https://www.cleanenergywire.org/factsheets/germanys-electricity-grid-stable-amid-energy-transition>.

¹⁰¹ In Europe, c.f. the Baltic Cable between Sweden and Germany or NEMO Link between Belgium and the UK. Internationally, Australia and the US provide examples.

energy scarcity—regardless of the ownership structure of the concerned interconnector.¹⁰² This also facilitates the cross-border exchange of balancing services, which allows TSOs to balance the grid more reliably and at lower cost.¹⁰³ A Member State seeking to improve its security of energy supply should thus promote required interconnector investment, not restrict it.

Hence, security of supply concerns generally seem incapable of justifying STMs. Only in exceptional situations could an STM be suitable for furthering security of supply. This might be the case in Norway, where the recent commissioning of new interconnectors to Germany and the UK has increased interconnection capacity by 50 per cent within a single year. An increase of cross-border flows of this magnitude puts the domestic transmission grid under considerable strain, so that further interconnection could jeopardise security of supply and tight control over investment in interconnections is therefore required until the TSO has adapted its network to the new situation.¹⁰⁴ Yet even under such exceptional circumstances, STMs will fall short of the necessity test, because the Member States already dispose of another, less onerous but equally effective measure: the permit procedure preceding all interconnector investment.¹⁰⁵ As long as new interconnectors plausibly endanger security of supply, the Member State is free to deny investment requests to avert security risks—equally without an STM.

Environmental aims

The Norwegian debate on the STM produced two main environmental reasons in favour of adopting an STM. First, that increased cross-border trade will increase electricity prices, so that producers will move to other countries with lower prices and more CO₂-intensive electricity generation (“carbon leakage”). Second, that higher export capacities will lead to investment in new transmission infrastructure and additional power generation, which negatively affects the environment. Environmental concerns can, in principle, also justify restrictions of the four freedoms.¹⁰⁶ However, the referenced argumentations fail to convince. With regard to carbon leakage, the EU’s emissions trading system already accounts for this risk in a coordinated way.¹⁰⁷ Concerning questions of land use, STMs do not help to avoid the construction of redundant transmission lines, since the necessary amount of transmission infrastructure—and the associated environmental impact—depends on economic and technical factors, not on the question of which entity owns cross-border electricity infrastructure. In fact, interconnectors are generally considered to contribute to decarbonisation by improving the integration of renewables and helping to phase out fossil fuel electricity generation. Therefore, STMs do not appear suitable for furthering environmental aims.

Services of general economic interest

Another potential avenue for justifying STMs is provided by the specific Treaty rules on SGEIs.¹⁰⁸ Yet while Member States routinely invoke the SGEI rules in proceedings concerning the energy sector,¹⁰⁹ the

¹⁰² See Regulation 2018/1999 Recital (38).

¹⁰³ ACER and CEER, *Annual Report on the Results of Monitoring the Internal Electricity and Natural Gas Markets in 2019—Electricity Wholesale Markets Volume* (2020), p.64.

¹⁰⁴ C.f. Statnett.no, <https://www.statnett.no/en/about-statnett/news-and-press-releases/news-archive-2020/restrictions-on-international-interconnector-capacity-until-the-western-corridor-in-place/>.

¹⁰⁵ C.f. *Hjemfall* (E-2/06) 26 June 2007 at [83].

¹⁰⁶ *Ålands Vindkraft AB* (C-573/12) EU:C:2014:2037 at [77]; *Commission of the European Communities v Belgium* (C-2/90) EU:C:1992:310; [1993] 1 C.M.L.R. 365 at [29]–[32].

¹⁰⁷ See European Commission, https://climate.ec.europa.eu/eu-action/eu-emissions-trading-system-eu-ets/free-allocation/carbon-leakage_de.

¹⁰⁸ TFEU art.106(2). See also the reference in Directive 2019/944 art.9(2). C.f. *Federutility v Autorità per l’energia elettrica e il gas* (C-265/08) EU:C:2010:205 at [26].

¹⁰⁹ C.f. the Commission’s Reasoned Opinion sent to Spain in infringement procedure 2014/2186.

interpretation of these rules by the Court ultimately excludes using them to justify STMs.¹¹⁰ The key point is whether the grant of an exclusive right—such as an STM—is necessary for providing the concerned SGEI under economically acceptable conditions.¹¹¹ However, the financial viability of transmission system operation is ensured by the sector-specific legal framework. The Electricity Directive generally prescribes that TSOs must operate “*under economic conditions*”.¹¹² Furthermore, according to the rules on transmission tariff regulation, these tariffs—paid by the users of the domestic electricity network to the TSOs—ought to provide full cost recovery and an appropriate profit.¹¹³ As explained above, the rules on congestion income serve a similar purpose.¹¹⁴ Thus, the harmonised rules on tariff regulation and congestion income in secondary law ensure the financial viability of the TSOs’ core business without the need for additional exclusive rights.

Public ownership

Finally, STMs can also be seen as measures to organise the system of property ownership in the implementing Member State—provided that the monopolist is state-owned, as is often the case.¹¹⁵ For example, the *Essent* case concerned the question of public ownership of electricity infrastructure. There, the Court stated that the reasons for prescribing public ownership of the Dutch electricity network operators may constitute overriding reasons in the public interest, potentially capable of justifying free movement restrictions.¹¹⁶ The Treaty prerogatives concerning public ownership offer a very promising route to Member States seeking to justify STMs, as they grant them a large margin of discretion.¹¹⁷ At the same time, it is clear that these prerogatives do not constitute a *carte blanche*. The Court has repeatedly stated that national measures intended to ensure the public ownership of certain undertakings must still satisfy the fundamental rules of the Treaties, in particular the principle of proportionality.¹¹⁸

In this context, the ECJ seems to apply an especially strict suitability check. In *Essent*, the Court ruled that only “*an absolute prohibition of privatisation*” qualifies as a measure for ensuring public ownership.¹¹⁹ The EFTA Court adopted a similar stance in the *Hjemfall* case when examining rules regulating the

¹¹⁰ For this reason, it is not necessary to take a stand in the general debate on whether TFEU art.106(2) can be invoked to justify breaches of the free movement provisions. C.f. the contrasting views in Buendía Sierra, *Exclusive Rights and State Monopolies under EC Law: Article 86 (Formerly Article 90) of the EC Treaty* (1999), pp.292–299 and T. Bekkedal, “Article 106 TFEU Is Dead. Long Live Article 106 TFEU!” in E. Szyszczak et al (eds), *Developments in Services of General Interest* (The Hague: TMC Asser Press, 2011).

¹¹¹ *Criminal Proceedings against Corbeau* (C-320/91) EU:C:1993:198; [1995] 4 C.M.L.R. 621 at [16]; *Gemeente Almelo* (C-393/92) EU:C:1994:171 at [49]; *Sacchi* (155/73) EU:C:1974:40 at [15]. See Zhu, *Services of General Economic Interest in EU Competition Law: Striking a Balance between Non-Economic Values and Market Competition* (2020), pp. 95–101 for a comprehensive discussion.

¹¹² Quote from Regulation 2019/943 art.40(1)(a); interpreted by the ECJ as “financially acceptable conditions” in *Baltic Cable* (C-454/18) EU:C:2020:189 at [76]–[78].

¹¹³ Regulation 2019/943 art.18(1); Directive 2019/944 art.59(7)(a). C.f. *Baltic Cable* (C-454/18) EU:C:2020:189 at [67].

¹¹⁴ See above.

¹¹⁵ TFEU art.345.

¹¹⁶ *Essent* (C-105/12-C-107/12) EU:C:2013:677 at [53]–[55]; the ECJ left the final decision on this issue to the referring national court.

¹¹⁷ K. Haraldsdóttir, “The Nature of Neutrality in EU Law: Article 345 TFEU” (2020) 45 E.L. Rev. 3, 23–24. See also B. Akkermans and E. Ramaekers, “Article 345 TFEU (Ex Article 295 EC), Its Meanings and Interpretations” (2010) 16 E.L.J. 292.

¹¹⁸ *Essent* (C-105/12-C-107/12) EU:C:2013:677 at [36]; *Hjemfall* (E-2/06) 26 June 2007 at [62], each with reference to additional case law. The Court already ruled in *Costa* (6/64) EU:C:1964:66 that the predecessor to TFEU art.345 did not exclude a scrutiny of measures related to the nationalisation of the Italian electricity sector under the freedom of establishment and the specific provisions on state monopolies.

¹¹⁹ *Essent* (C-105/12-C-107/12) EU:C:2013:677 at [54].

ownership and use of Norwegian hydropower resources.¹²⁰ Consequently, the key question is whether STMs satisfy this high threshold by establishing a stringent system of property ownership, or whether STMs merely ensure a certain level of public control over electricity transmission infrastructure. This has to be determined on a case-by-case basis. The STMs discussed here seem to leave limited space for cross-border merchant investment, whether based on explicit exceptions, as in Norway, or possibly through merchant exemptions, as argued by the French regulator. However, as mentioned, these exceptions leave very little room for third-party investment, making it seem probable that the Court would generally accept the suitability of STMs to ensure public ownership of interconnectors.

Also with regard to necessity, the public ownership rules provide the most plausible arguments for justifying STMs. The only safe option for a Member State wishing to guarantee public ownership is to prescribe public ownership without exception. This is also necessary to satisfy the strict suitability check performed by the ECJ: less restrictive measures would not be equally effective in guaranteeing public ownership with the required certainty. In this situation, the question is whether the Court would perform a designated scrutiny of the proportionality *stricto sensu*, taking into account other aims motivating the adoption of the STM, as well as the concerned Member States' margin of appreciation.¹²¹

Margin of appreciation

It is widely assumed that the ECJ performs a more lenient proportionality check in cases involving delicate matters, such as energy policy.¹²² Findings by Zgliniski, based on an extensive empirical study of ECJ case law, confirm this assumption—with the Court being particularly generous in cases concerning public policy or national security.¹²³ Thus, the recognition of energy security of supply as a matter of public security speaks, *prima facie*, for a large margin of appreciation on the side of the Member State and a less strict proportionality review.¹²⁴ Although STMs do not plausibly contribute to security of supply, qualifying them as measures of national energy security policy may be their saving grace.¹²⁵ Similar considerations apply when Member States invoke the Treaty rules on public ownership.

However, Zgliniski's study also shows that the matter of the margin of appreciation is not an exact science. Even where the same policy issues are concerned, the Court does not always recognise the Member States' margin of appreciation and seems to decide for or against a detailed proportionality check on a case-by-case basis.¹²⁶ As the ECJ put it:

“[...] requirements of public security [...] must be interpreted strictly, so that their scope cannot be determined unilaterally by each Member State without any control by the [EU] institutions. Thus, public security may be relied on only if there is a genuine and sufficiently serious threat to a fundamental interest of society.”¹²⁷

¹²⁰ *Hjemfall* (E-2/06) 26 June 2007 at [73]–[77].

¹²¹ The ECJ only exceptionally examines a measure's proportionality *stricto sensu*; c.f. Harbo, “The Function of the Proportionality Principle in EU Law” (2010) 16 E.L.J. 172.

¹²² Barnard, *The Substantive Law of the EU: The Four Freedoms* (2019), pp.304–305; Harbo, “The Function of the Proportionality Principle in EU Law” (2010) 16 E.L.J. 172.

¹²³ Zgliniski, “The Rise of Deference: The Margin of Appreciation and Decentralized Judicial Review in EU Free Movement Law” (2018) 55 C.M.L. Rev. 1357–1359.

¹²⁴ *Campus Oil* (72/83) EU:C:1984:256 at [34]–[35]; *Hidroelectrica SA* (C-648/18) EU:C:2020:723 at [36].

¹²⁵ See above.

¹²⁶ Zgliniski, “The Rise of Deference: The Margin of Appreciation and Decentralized Judicial Review in EU Free Movement Law” (2018) 55 C.M.L. Rev. 1344–1347.

¹²⁷ *Commission of the European Communities v Belgium* (C-503/99) EU:C:2002:328; [2002] 2 C.M.L.R. 50 at [47]; note that at [27], the ECJ had denoted security of electricity supply only as an “*overriding requirement of the general interest*”.

Therefore, cases where the reasoning at the basis of the measure is manifestly unfounded provide a clear boundary to the Member States' discretion.¹²⁸ Simply alleging that STMs are capable of safeguarding some legitimate aim would most probably not be sufficient in case of judicial review.¹²⁹ As just discussed, this can be asserted for most of the aims behind STMs. The most plausible avenue for justifying STMs would be to regard them as measures to ensure public ownership of critical infrastructure—depending on whether one considers the resulting investment restrictions as proportional. As of yet, authoritative statements on this question are lacking.¹³⁰

The remaining doubts on the proportionality of STMs can only be resolved through proceedings before the Court. STMs should thus be challenged where they interfere with interconnector investment. On the one hand, this call is directed at affected stakeholders. However, stakeholders' options to contribute to legal certainty in the context of a preliminary ruling are limited.¹³¹ Given its traditional reluctance to interfere with the Member States' energy policies, it seems probable that the Court would remit the question of proportionality to the referring court, at most providing guidelines for the assessment.¹³² By contrast, in the context of infringement proceedings, the ECJ would be forced to take up a stance on the legality of STMs. Therefore, the call is most of all directed at the Commission, which should pick up where it left off with its 2014 proceedings and renew its efforts against STMs.¹³³

Regardless of the choice of procedure, one question remains: how should the Court decide? Whereas any discussion on this matter remains speculative for now, there is ample reason for the Court to forego its traditional reluctance and declare the incompatibility of STMs with fundamental principles of EU law. Doing otherwise would amount to giving a green light to measures that impede several of the fundamental freedoms, entail market foreclosure, distort competition and potentially hamper much-needed interconnector investment. Whereas formally, the Treaties emphasise the Member States' prerogative to retain control over their energy supply,¹³⁴ this prerogative would need to take a step back in order to safeguard the European integration process in the field of electricity.¹³⁵ Indeed, in several recent instances the Court has overruled domestic energy policy choices on such delicate topics as the organisation of the domestic electricity wholesale market¹³⁶ or grid tariff regulation.¹³⁷ Another recent development that illustrates the

¹²⁸ Straetmans, "Case C-124/97, Läära, Judgment of the Court of 21 September 1999 and Case C-67/98, Zenatti, Judgment of the Court of 21 October 1999. Nyr. Full Court" (2000) 37 C.M.L. Rev. 991, 1001.

¹²⁹ C.f. *Hidroelectrica SA* (C-648/18) EU:C:2020:723 at [43]; *Hjemfall* (E-2/06) 26 June 2007 at [83]; *European Commission v Republic of Austria* (C-187/16) EU:C:2018:194 at [78]–[80]; *Proceedings brought by Lindman* (C-42/02) EU:C:2003:613; [2004] 1 C.M.L.R. 38 at [25].

¹³⁰ The European Courts have not yet made any explicit statements on the proportionality of statutory monopolies in the electricity sector. The Court's only dedicated discussion of an STM to date in *Commission of the European Communities v Spain* (C-160/94) EU:C:1997:502 did not encompass questions of justification. In *Essent* (C-105/12-C-107/12) EU:C:2013:677, the ECJ explicitly left the proportionality assessment to the referring court, whereas in *Hjemfall* (E-2/06) 26 June 2007, the EFTA Court already dismissed the suitability of the measures in question. Finally, in *Acquind Ltd* (T-735/18) EU:T:2020:542, the GC did not address the legality of the French STM.

¹³¹ TFEU art.267.

¹³² Straetmans, "Case C-124/97, Läära, Judgment of the Court of 21 September 1999 and Case C-67/98, Zenatti, Judgment of the Court of 21 October 1999. Nyr. Full Court" (2000) 37 C.M.L. Rev. 991, 1001. For details, see Zgliniski, "The Rise of Deference: The Margin of Appreciation and Decentralized Judicial Review in EU Free Movement Law" (2018) 55 C.M.L. Rev. 5. *Fondul Proprietatea SA v Guvernul României* (C-179/20) EU:C:2022:58 provides a recent example.

¹³³ See the procedures 2014/2186 (Spain) and 2014/2269 (France) and 2014/2189 against Belgium. In the EEA, the EFTA Surveillance Authority (ESA) is competent to initiate infringement proceedings.

¹³⁴ TFEU art.194(2). See also *Austria v European Commission* (C-594/18 P) EU:C:2020:742; [2021] 1 C.M.L.R. 37 at [48]–[49].

¹³⁵ C.f. K. Haraldsdóttir, "The Limits of EU Competence to Regulate Conditions for Exploitation of Energy Resources: Analysis of Article 194(2) TFEU" (2014) 23 *European Energy and Environmental Law Review* 208 s.3.2.

¹³⁶ *Hidroelectrica SA* (C-648/18) EU:C:2020:723.

¹³⁷ *European Commission v Germany* (C-718/18) EU:C:2021:662.

ECJ's willingness to no longer treat national energy policy as a "sacred cow" is the Court's recognition of energy solidarity as a legally enforceable principle of EU law, binding the EU institutions as well as the Member States—notably in the context of an exemption decision for a third-party (gas) interconnector.¹³⁸

Conclusion

This article has examined statutory transmission monopolies (STMs) from the viewpoint of EU and EEA law. The analysis has shown that STMs restrict third-party investment in interconnectors, which is the default way of accessing the market for electricity transmission. Thus, STMs breach several of the free movement rules by imposing artificial barriers to the market for electricity transmission and impeding competition in the same market. STMs thus hamper progress towards the main goal of European energy policy: the internal electricity market, which requires further interconnection of the national electricity grids.

Further investment in interconnectors is indispensable for vital policy aims at European level—most notably, to achieve a cleaner energy supply at lower cost by improving the utilisation of renewables. Likewise, greater market integration is the only option for reducing European dependence on energy imports without giving up on efficiency and security of supply. By contrast, the only conceivable grounds for justifying STMs are shaky at best. While the outcome depends on the circumstances in each case, STMs generally do not appear as suitable or necessary for attaining any of the (potentially) legitimate aims studied above. If STMs can be justified at all, this would require rather exceptional circumstances or the granting of a far-reaching or even excessive margin of discretion to the Member States.

These considerations notwithstanding, STMs are an established element of electricity regulation in many Member States. Some countries even adopt new legislation to impede third-party interconnector investment. This is evidenced by the examples of France, Spain and Norway. Whereas interconnectors are pivotal to attaining important policy objectives at EU level, many Member States clearly aim to avoid "too much" interconnection—based however on their own preferences and not on the optimal level for efficient market integration. Since cross-border trade influences power prices, it is an open secret that many Member States strive for a firm grip on domestic price levels by restraining interconnection levels. Such protectionist motivations are certainly not in line with the EU's energy policy aims. As the ECJ stated so pointedly in its recent *Hidroelectrica* judgment:

"Securing the supply of electricity does not mean securing the supply of electricity at the best price. [...] If [purely economic and commercial] considerations were able to justify a prohibition on direct export of electricity, the very principle of the internal market would be undermined."¹³⁹

Nevertheless, there is a notable absence of judicial scrutiny of STMs at European level. STMs potentially breach fundamental EU and EEA law—yet no one seems to care. Regulators, in particular the Commission, as well as affected stakeholders, should not accept this situation. This article calls on them to proceed against STMs where they hamper interconnector investment. Third-party interconnector investment may still only be a small part of the puzzle, but the restrictions imposed by STMs are tangible, as the *Aquind* case illustrates. This article does not promote third-party interconnector investment as such. However, tackling the grave environmental and security issues currently afflicting the electricity sector requires extensive and expeditious investment in interconnectors—which the regulated investment model centred on the incumbent "national" TSO has not proven to yield. Therefore, continuing to turn a blind eye to STMs means squandering a valuable chance to close an investment gap that could jeopardise vital European policy aims.

¹³⁸ *Germany v Poland* (C-848/19 P) EU:C:2021:598; [2022] 1 C.M.L.R. 20.

¹³⁹ *Hidroelectrica SA* (C-648/18) EU:C:2020:723 at [43].

Table 1: correlation table EU—EEA law

<i>Primary Law</i>	
<i>TFEU</i>	<i>EEA Agreement</i>
—	Article 1(1)
—	Article 6
Article 26(2)	—
Article 34	Article 10
Article 35	Article 12
Article 37(1)	Article 16(1)
Article 49	Article 31
Article 56	Article 36
Article 63	Article 40
Article 102	Article 54
Article 106	Article 59
Article 194	—
Article 345	Article 125
<i>Secondary Law</i>	
<i>Directive 2019/944</i>	<i>Directive 2009/72</i>
Article 2(34)	Article 2(3)
Article 2(35)	Article 2(4)
Article 2(39)	Article 2(13)
Article 6	Article 32
Article 9(2)	Article 3(2)
Article 40(1)(a)	Article 12(1)(a)
Article 52(2)	Article 10(2)
<i>Regulation 2019/943</i>	<i>Regulation 714/2009</i>
Article 2(1)	Article 2(1)
Article 19(2), (3)	Article 16(6)
Article 63	Article 17
<i>Regulation 2019/941</i>	—
<i>Regulation 2018/1999</i>	—
<i>Regulation 2015/1222¹⁴⁰</i>	<i>Regulation 2015/1222</i>
<i>Directive 2006/123</i>	<i>Directive 2006/123</i>

¹⁴⁰ Regulation 2015/1222 was amended by Regulation 2021/280 [2021] OJ L62/24. The corresponding changes have not yet been incorporated into EEA Law; however, they do not affect any of the conclusions in this article.