

Energy Topic: Report on the Results of the Working Group Sessions

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Ladies and Gentlemen,

I wish to thank the organisers, especially Julia Laffranque, for giving me the role of General Rapporteur for the Energy Topic. I enjoyed the role very much and was delighted that we had more than a hundred and twenty participants in the working group sessions. They were active participants and – happily - I was only called David once during the entire proceedings.

Here is my report on the results of the discussions we had in the six working group sessions which covered five distinct topics:

1. The first session addressed Energy Law and Policy in the EU, and particularly the new Energy Chapter - Article 194 - in the Treaty on the Functioning of the European Union (TFEU). The Moderator for this session was Professor Koen Laenarts, also a judge at the Court of Justice of the European Union. Apart from the General Rapporteur, the other panellist was Dr Marion Simm, a member of the Legal Service of the Council of the European Union, who acted in all of these sessions as the Institutional Rapporteur for the EU.

The working group examined the context of the new energy Chapter, which sets out the constitutional framework for

energy in the Union – the primary law. This set the stage for the topics that followed.

The group noted how the new Article codified existing Union competences in this area but also noting that the wording of the Article had links to some of the broader ideas of speakers at the opening of the FIDE Conference. The legitimacy paradigm has relevance here. Of its three aspects relating to the European Union - project, process and product - energy is primarily about the last two, and it is the Union that takes care of issues that cannot be delivered at the national level.

However, the new energy chapter contains a commitment to Solidarity and there lies a commitment to a Big Idea, like Democracy and Human Rights. The wording also orients energy policy towards values such as that sustainable development of energy resources should involve those resources that are the least burdensome on the environment. Both security and environment are probably values that go beyond the nation states of the EU.

For these states, interdependence is a fact of life in the EU and is particularly evident in the energy markets. Measures of one country often impact upon another. A choice in favour of nuclear power was of course a vivid example of this. So, how much autonomy should the Member States continue to enjoy in the development of their resources? How much can the EU direct Member states as to forms of energy to achieve security, for example?

The energy chapter is an attempt to integrate security, environment and liberalisation of markets. Other conclusions from the group's discussion included the following:

- This topic is not a pure competition one but crosses in a horizontal manner into the topics of 'internal market', and 'environment', as well as 'competition'.
- The national reports have a strong theme of what might be called vulnerability – whether because of the small size, island status or isolation from energy networks or dependence upon energy supplies from a larger, non-EU neighbouring state. This gave relevance to the Energy Chapter's emphasis upon "a spirit of solidarity between Member States".
- The meaning of several key words in this new Article would be influenced by the judicial process, although it was too early to predict what those interpretations might result in. A robust engagement appeared likely however.
- Nevertheless, the new article codifies existing Union competences but also sets limits. The choice between different energy sources is left to the individual Member State, but it is one made by them *as Member States of the EU*. In that sense the Article is a refinement of responsibilities and not of power. It entails a coordination role for the Union in this area.

2. The second session built upon these ideas about the constitutional framework when it addressed the topic of Energy Security. Professor Laenarts was again the Moderator.

The discussion emphasised the developmental character of energy security in the Union with interconnections being laid down at a rapid rate and ending the relative isolation of certain parts of the European region. The scope for independent action by Member States was being affected by the establishment of cross-border links, enhancing energy security and promoting solidarity among Member States. This created a new framework for Member States' in making their own choices. The new Article emphasised that the general structure of energy supply was a matter for the Member State but once again the EU competence could be significant in the event of an emergency or crisis that required cooperation in the interests of solidarity.

Member States were still able to set limits to liberalisation in the name of protecting services of general economic interest but even there as the case of *Federutility* shows, the Court will ensure that such action is subject to certain tests.

Ultimately, the new Article confers competences but also delimits those competences and in the coming years the interpretation of its wording by the Courts will be revealing.

3. The third topic – on Friday morning – concerned the interaction between Regulation and Competition Policy. Both have been used as ways of achieving liberalisation while at the same time protecting the values of security and a sustainable environment. This area was closest to the aspects of energy policy as process and product.

The topic was separated into two sub-sessions and the Moderator was Professor Giorgio Monti from the European University Institute. Like myself, he has a family name which is shared by one of the EU's Prime Ministers, but happily he was never confused with the Prime Minister of Italy!

There was an introductory presentation by Prof Ginter, which contributed significantly to starting the discussion.

The issues were divided into (1) institutional issues and (2) substantive ones. In the first session the focus was upon the new institutional framework: an energy regulatory agency established to coordinate the actors in the liberalised electricity and gas markets; the various energy networks set up to coordinate the detail of the new system, and the related issues of process and accountability.

This is a new system that is still bedding down and the discussion reflected this. Many assessments of it had to be provisional. There were concerns about the open-ness of the processes that had been set up.

The discussion on the more substantive aspects of competition law was positive about the outcomes or the product in this area, viewing it as having had a can-opener or nut-cracker effect in the previously cartelised energy markets. It was noted how an activist role had opened the market by forcing certain large utilities into unbundling or separation of functions which they had been reluctant to do within the framework of secondary legislation.

It was felt by some that a more robust use of commitments, Article 9 remedies and so on could have been evident, and discussion in the group dwelled upon the distinction between Punishment versus Administrative roles of competition policy.

4. Both the fourth and the fifth topics addressed environmental issues. The first was concerned with the Promotion and Subsidy of Renewable Energy. The Moderator was Judge Miro Prek from the General Court of the European Union.

The working group was positive about the value of promoting renewable energy in the European Union. It noted that there had been two Directives on this subject and that a third one might be expected in the medium term at least. The legislation was part of a process of promoting the value in the Treaty of sustainable development of the European Union's energy resources and the current legislation could not be seen as having the last word on this subject.

Judge Prek noted how the national reports contained a large measure of optimism which surprised him since in a time of crisis there was a risk of the objectives not being achieved.

Investment was an issue for the development of renewable energy and the working group recognized the need to provide clear signals for investors in this area. However, it was noted that the sources of funding for renewable energy were often highly diverse and some concerns were registered about the need for transparency in the identification of funding.

Another concern was the capacity of some Member States to regulate properly in this area.

With respect to State aid for support schemes, it was generally felt that this was being satisfactorily addressed in renewable energy, although the size of aid in this area was a cause for some concern.

In the discussion of the mechanics of the current RE regime, it was noted that national targets could have been higher and doors could have been closed whereby a Member State may identify ways of share the burden with others and not meet its RE national target. These can be seen as weaknesses, but the group concluded that they were also evidence of the role of choice left to member States. Some discretion as to how a Member State structured its energy mix was left under Article 194. Moreover, there was recognition that at the present time some States may have particular difficulties in meeting their targets and that flexibility in the operation of the RE regime reflected the value of solidarity.

5. The final topic – also concerned with environment - was **Climate Change**. Perhaps a little less fashionable now than it has been over the past few years. The Moderator role for this topic was taken by Professor Anita Ronne from the University of Copenhagen.

The discussion turned on the relationship between the instruments of emissions trading and taxation which both the Union and the Member States have used to affect behaviour so

as to reduce the amount of emissions produced from inside the EU.

Professor Ronne introduced the topic and provided a panorama of the history of EU actions in a global setting. The question of market based versus traditional regulation was posed to the group. The group reviewed the various steps taken by Member States, noting how many Member States had used taxation instruments of various kinds over a long period. The EU Institutional Rapporteur explained a developing initiative on energy efficiency that was being taken at the present time.

- The taxation instrument was recognized as a frequently chosen one by Member States but one which States like Spain and the UK had fought hard to resist at the Union level. Even if taxation was a rather negative and blunt instrument, it was still capable of delivering results.
- It was suggested that we might learn from the tough penalties regime in the emissions trading scheme and adopt it for the RE regime. This enforcement regime – if transplanted - could lead Member States to be more vigorous in meeting their RE targets.
- There was some concern in the group over the continued efficacy of market-based instruments to achieve climate change goals. The emissions trading instrument which had taken the Union many years to put in place, yet which had still failed to deliver perceptible benefits in Co2 reduction, and was not attractive to countries outside the Union which were much larger polluters than the Union. Some members of the group felt it was time to review this flagship instrument, even if it appeared to be having some success with respect to emissions

from the aviation industry. Member States that wished could be encouraged to explore the alternative methods with the Union institutions perhaps acting in a coordinating role. Indeed, the Union's current proposal on energy efficiency appeared to return to a more traditional approach to environmental protection.

- However, it was noted that at the present time some Member States had other more pressing priorities than addressing climate change.

So, ladies and gentlemen, in conclusion, the interface between competition and environment and security was underscored in the review of the new Treaty provisions and a strong consensus appeared to emerge that solidarity was a value that – in line with Article 194 - was likely to assume considerable significance in energy cases and policy in future in the EU.

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