# FIDE 2012 General Report

## The Interface between Energy, Environment and Competition Rules of the European Union

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## A. Introduction

The subject of this General Report acquires its significance because of its association with two sweeping processes in the recent history of the European Union. The first of these was the energy market liberalisation process which began in the late 1980s and led to the creation of a distinct body of pro-market EU legislation for the energy sector, culminating in the inclusion of a new chapter in the Treaty on the Functioning of the European Union (TFEU) specifically addressing Energy. This was an acrimonious and lengthy process in which long established principles of EU competition law were comprehensively applied to this

previously excluded sector for the first time[1]. It saw the birth of new regulatory agencies in all of the Member States, a battery of directives and regulations, and significant attempts by EU institutions to encourage coordination among the new agencies and the existing competition authorities. A second process is the introduction of legal measures to promote and hasten the transition from a fossil fuel based European economy to one characterised by a low use of carbon: a *green* economy. Apart from the establishment of a CO2 emissions trading scheme, this process has involved the setting of mandatory legal targets for renewable energy for the Member States. Of the two processes, the former is now well established and the latter is at a fairly advanced stage.

The ambition behind these processes is as remarkable as the determination of the EU institutions and a large group of Member States to press on with programmes that have entailed dramatic changes in law, policy and institutional frameworks[2]. In spite of a recession context in recent years, and a growing resistance among certain Member States to the EU project itself, these two processes have largely maintained their momentum.

The national reports[3] which have been submitted to this conference reveal much about the status of these processes in the EU today, and the extensive legal consequences that they have had and are likely to trigger in the foreseeable future. They furnish answers to fourteen quite specific questions on this theme which were circulated in the FIDE Questionnaire in 2011. At the same time they permit us to distinguish four key features of these processes that the 'consumers' and enforcers of this new body of law have to understand and wrestle with.

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[1] There were some early judgments by the Court that removed some of the political roadblocks to deregulation of sectors and markets that were formerly subject to state ownership and control, including the energy sector: for example, Case C-393/92, *Almelo* [1994] ECR I-1477.

[2] Of course, there are other areas in which the interactions between energy, environment and competition rules are evident or emerging, but not all of them have reached a stage of development in which the interaction is to some extent in balance. In the past two years, for example, new rules have been proposed to increase safeguards against offshore pollution from petroleum installations (*Regulation on safety of offshore oil and gas prospection, exploration and production activities* (COM (2011) 688 final). In this proposal the interface between energy and environmental rules is clear enough even at this stage but the implications for competition law and policy are as yet minor.

[3] The national reports which form the basis for this General Report and which are referred to in it are those from: Austria, Bulgaria, Croatia, Czech Republic, Denmark, Estonia, Finland, Germany, Greece, Hungary, Italy, Malta, The Netherlands, Poland, Portugal, Slovenia, Spain, Sweden, Switzerland and the United Kingdom. There is also an institutional report provided for the EU, making 21 reports in total.

In this General Report I shall provide an introduction to each of the topics and then examine some of the national responses in the light of these four features.

The first feature might be called the *vertical* aspect of the new relationships. This refers to the positive interaction and potential conflicts between primary and secondary legislation, judicial decisions by the various courts and ongoing political action as these processes of market opening and market 'greening' take place. Legislation and implementing structures have been put in place, but how will this hierarchy of legal, institutional and regulatory authority function? That it will require repeated intervention by judicial actors, regulators and EU authorities seems almost certain. Do we have any early indicators of this and how conflicts may be resolved from the national reports?

The second feature which we may distinguish is the *horizontal* set of relationships created by the two processes of liberalisation and low carbon transition. The adoption of an EU wide framework of regulation has led to the creation of regulatory authorities in each Member State and a dedicated EU agency. At the same time, the competencies of competition authorities have been more or less enhanced by the higher priority given to competition in energy markets. How do these bodies co-exist with respect to energy issues? Do they or are they likely to cooperate or compete? And how do such institutions promote market-oriented rules when they and other agencies are required to discriminate positively towards certain forms of energy, given special status as 'renewable sources'?

The third feature is primarily concerned with *legal* issues. Traditionally, enforcement of the four freedoms and the competition rules has been assigned to the EU institutions: the Commission, the Court of Justice ('the Court') and the national courts and competition authorities. How will this work or be modified by the new system of multiple layers of decision-making by regulatory agencies and competition authorities? If there are competing objectives and priorities built into the new Treaty chapter and the secondary legislation, how should these authorities approach them? Several of our national rapporteurs have already had experience of these issues and have opinions on them.

The fourth and final feature is *ideological*: in a general way, we may ask how political choices should be translated into legislative texts? What kind of legislation is needed to achieve economic and social goals in complex markets? This is a question about governance

and this theme allows us to approach its subject matter as a case study in the problems of governance. However, there is also a judicial dimension to this which was amply illustrated by the *Preussenelektra* case[4], where conflicts between competing objectives played a key role. In this subject area we are considering mainly objectives such as security and continuity of supply, protection of the environment, promotion of renewable energy sources and competitiveness (which has often replaced the term 'competition' in the literature on policy issues). In *Commission v France*[5] the judgment emphasised that there are limits to the extent to which the Court can be expected to make social and economic choices and to compensate for political and legislative inaction. That hardly fits the context of today, but neither perhaps does the judgment in *Preussenelektra* accord with a context in which Member States have agreed upon an Energy Chapter in the most recent version of the Treaty, or have debated at considerable length on the detail of legislation for market opening and renewable energy promotion. Several national rapporteurs address this issue in their reports.

## B. Regulation and Competition Policy

The EU Third Energy Package, which included a Directive and a Regulation aiming at completion of the single electricity market, is currently attracting a great deal of attention, not least because of the establishment of ACER, the first EU energy regulatory agency. For different reasons, the new Renewable Energy Directive, which is largely aimed at promoting the use of one particular set of sources of electricity (RES-E), is also attracting attention. Both the internal energy market legislation and the RES-E legislation strive to combine energy policy aspirations with legally binding obligations upon EU Member States. Although each of these initiatives was originally conceived within one DG of the European Commission, they have been shaped by different people, at different times. Their implementation moves in parallel, yet with few signs of coordination.

In the background, there is a continuing tension between the competition law and sector-specific energy legislation, evident at EU and national levels and in their interaction. There is

[4] Case C-379/98, *Preussenelektra AG and Schleswag AG* [2001] ECR I-2099.
[5] Case 159/94, *Commission v France* [1997] ECR I-5815.

also a new Energy Chapter in the Treaty on the Functioning of the EU, which underscores the importance that energy policy now has in the EU and in its agenda-setting. For the national and EU courts, all of the above will raise new issues in the near future. This questionnaire is designed to permit rapporteurs a broad scope to address the above issues, drawing upon their knowledge of national contexts and their wider effects, and particularly how these tensions are being addressed (to the extent that they are being recognised at all so far).

The Third Energy Package is perhaps optimistically described in the EU report as "the last stage in the process of liberalising the power (and gas) market in the Union". However, she makes an important qualification to this by noting the existence of sector specific rules on renewable source of energy in the RES 2009 Directive, adopted some time before the Third Package. The latter "has not had the effect of harmonising the market for renewable power to the same extent as the electricity market in general". Potential for confusion has been set up.

This body of law has been enforced by a variety of agencies. Firstly, specialist energy regulators have been established with a minimum set of powers in EU law. They exist in every Member State and are part of a new regulatory culture that has accompanied the liberalisation process in energy and other industries in recent years. Secondly, the competition authorities in the Member States and the Commission itself have been active in ensuring that energy is not treated as having exceptional status (as it was de facto for many years). The Commission too has been active in encouraging cooperation between the national authorities and in ensuring a peaceful co-existence with the specialist regulators with which there is sometimes overlapping competence. Thirdly, there are the national courts, the CFI and the Court. The judgment of the Court in the Dutch interconnector case was an important one in deciding against the preferential treatment of electricity generating firms under pre-liberalisation or legacy contracts[6].

1. *Will the limited powers of ACER and the responsibilities placed upon ENTSO-E and ENTSO-G require greater cooperation between national regulatory authorities (NRAs)*

[6] Case C-17/03 *Vereniging voor Energie, Milieu en Water, Amsterdam Power Exchange Spotmarket BV, Eneco NV v Directeur van de Dienst uitvoering en toezicht energie* [2005] ECR I-4983.

> *inter se and with the EU to open up the European power and gas sectors to greater cross-border competition, at least at the wholesale supply level?*

None of the national reports appear to see a vertical line from the new energy agency, ACER, downwards to NRAs except perhaps in a limited formal sense. If greater cooperation is required than ACER's powers can promote, it will be sourced in other mechanisms. That said, several rapporteurs emphasise that it is early days to be forming an opinion upon ACER's role in the new institutional structure.

There is awareness that horizontal cooperation among the sector-specific regulators is desirable and likely, probably through existing limited 'partnerships' such as are evident in NW Europe and through the energy regulators' body, the CEER. The UK rapporteur notes cooperation between the British and Belgian NRAs in connection with an undersea electricity interconnector. Cooperation issues are also evident from other reports (Austria, Germany, Switzerland, Greece).

Two examples of horizontal cooperation have been identified by a number of rapporteurs, and merit mention. Firstly, cross-border issues such as those arising from interconnections and congestion problems relating thereto are seen by several rapporteurs as constituting a litmus test of cooperation. In Spain and Portugal and Sweden and Norway there are instances of such cross-border cooperation that is emerging in the first case and already highly developed in the second.

Many energy issues cannot be comprehended or tackled from within the borders of a Member State; indeed, this is a real European dimension to the question of cooperation. Cooperation among the NRAs will be essential but currently their powers to do so beyond national borders are very limited or non-existent. That said, the NRAs are required by the Third Energy Package measures to cooperate with a view to integrating their national markets at one or more regional levels as a first step towards a fully liberalised internal market. Moreover, some cooperation is required with non-EU states, as rapporteurs from Central Europe were quick to note.

A second example of such cooperation is noted by the Swedish rapporteur. In the Nordic countries the cooperation has been initiated not by the NRAs but by the TSOs. It relied upon voluntary cooperation rather than upon competition law enforcement.

The EU institutional report notes another dimension. The Third Energy Package has institutionalised cooperation of the TSOs, which operate the cross-border networks. This horizontal cooperation is supplemented by a vertical relationship as ACER has an oversight responsibility over the development of network codes by the TSOs.

2. *Or will increased competition turn out to be mainly a task for the competition authorities to ensure progress in dismantling predominantly national markets, for example by stopping discriminatory congestion management practices of transmission system operators, as in the Svenska Kraftnett case?*

Several rapporteurs are clearly convinced that the driver for increased competition will be the competition authorities rather than the sector-specific bodies, either nationally or through ACER. In this context, the *Svenska Kraftnett* case was cited as evidence, demonstrating, as the Polish rapporteur states, "that participation of competition protection authorities is necessary for building competition in the energy market". Many other Commission cases were noted by rapporteurs however, in which Article 9 of Regulation (EC) 1/2003 was used to achieve market liberalisation in many instances. The Portuguese rapporteur cited the absence of a single EU regulatory body with 'effective decision-making' powers as the main reason. By contrast, the horizontal or Europe-wide reach of the Commission as the core competition enforcement body was generally acknowledged. As a qualification to this, the Spanish and EU rapporteurs note how competition rules have a specific, ad hoc character which makes them inappropriate for the remedy of market failures that have a structural character. Indeed, if the Third Energy Package of measures proves successful, the need for antitrust enforcement by the Commission may decline significantly.

3. *In this context, what is the position of your Member State with respect to enforcement of Competition Law (EU and national) in the energy sector, whether by sector-specific NRAs, by NCAs or a combination of the two?*

Several rapporteurs discuss the approaches to demarcation of competences between competition and regulatory authorities (Finland, The Netherlands, Spain and UK, for example). Official guidance is available in some cases (Finland, UK) emphasising how cooperation can provide more effective enforcement. However, the Finnish rapporteur notes that companies involved in a case “usually negotiate separately with each competent authority the details of application of the Electricity and Natural Gas Market Acts and the Competition Act”.

The Spanish rapporteur notes how even with some demarcation of competences, conflicts about enforcement can arise between NRAs and NCAs. It may be expected that conflicts of values can translate into institutional conflict (RES promotion versus internal market priorities, for example).

4. *With respect to NRA roles, powers and duties, are there any peculiarities or difficulties in the position of your Member State (for example, limiting or promoting cooperation with other Member States’ NRAs or with respect to the EU Network of Competition Authorities)?*

The UK rapporteur notes a regional element to its design of a NRA, with Northern Ireland having a separate regulator. This arrangement has facilitated cooperation not only with the rest of Britain but also integration on the island of Ireland.

The Polish rapporteur is keen to note a difficulty that affects all Member States, more or less: the limited political independence of both the NRAs and the NCAs, since they are not partners of political authorities but are controlled by them. This also figured in The Netherlands report, although in that case it was a matter of seeking greater clarity. In practice, this vertical relationship means that the agencies’ independence may be compromised. An example of an issue in which such a conflict may arise lies in the interpretation of priorities accorded to RE objectives in relation to competition/internal

market ones. If the NRA or indeed the NCA differ from the Government of the Member State, will the NRA or NCA be able to sustain its differing approach? Unlikely it seems.

An interesting distinction was evident in the response of small and peripheral states to the coordinating role of ACER and cooperation with it. For a Member State like Estonia, for example, an EU-wide coordinator was seen as a very positive development.

5. *Considering that exemptions from the regulatory regimes for gas and electricity are permitted, what safeguards are in place at the Member State level for protecting 'process' rights such as the right to be heard and access to justice, and which national bodies are responsible in ensuring that these rights are respected?*

Several rapporteurs have noted that the actions of regulatory agencies fit into a structure of administrative law within which their actions may be reviewed by a hierarchy of courts. In some cases (Portugal and UK) such actions are also subject to a separate legal framework that provides safeguards for process rights in energy or competition matters.

It may also be noted that some Member States have not yet transposed the Third Energy Package so that procedures applicable to exemptions from the new regimes for gas and electricity are not yet in place. The Czech rapporteur found the proceedings on third party access exemptions "problematic" since the applicant is not a party to the proceedings before the European Commission and has the risk of being unable to protect its rights as a result.

6. *Are the latest proposals (COM(2010) 726) on market abuse in the energy sector likely to present challenges for the NRAs whether in their sole capacity or as a hybrid with national financial regulatory bodies at Member State and/or EU level?*

Several rapporteurs see these rules as requiring special expertise in their enforcement that NRAs in their countries are unlikely to have (Malta, for example); indeed, given current pressures on national budgets are unlikely to be able to develop or to acquire in the near term (Czech Republic was an example). The need to develop working relationships with other state bodies responsible for financial supervision was noted. Joint enforcement action

was also thought to be a challenge for more than one NRA. However, the Regulatory Council of the Iberian Electricity Market was cited as an example of such cooperation between NRAs and financial authorities.

Legal difficulties may well arise when an NRA attempts to establish an energy-specific meaning of insider information or market manipulation. For a number of Member States the lack of capacity to interpret or enforce such prohibitions appears likely to prove challenging.

## C. Promotion and Subsidy of Renewable Energy

Ensuring that environmental goals are compatible with internal market ones is not a new challenge. During the period when the EU has been making efforts to establish an internal market in energy, environmental policy has been strongly influenced by the EU's commitments to achieve substantial reductions in carbon emissions and increase the share of renewable energy. The result has been the design and adoption of measures that have actual and potential impacts upon the opening of electricity and gas markets to competition, but are intended to be consistent with such opening. In particular, these are the measures to promote the use of renewable sources of energy under Directive 2009/28/EC (the Renewables Directive)[7], the Directive establishing the European Emissions Trading System[8] and the taxation of energy uses[9].

The design of these environmental measures has been made with an eye to their compatibility with the Community's commitment to competition and to the goal of developing an internal market in energy. Indeed, the authors of the environmental measures could hardly have been unaware of the high price paid in the past by the perceived negative implications of proposals for competitiveness[10]. The Community's failure

[7] Directive (EC) 2009/28/EC on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC, OJ L140/16.
[8] Directive (EC) 2009/29/EC amending Directive 2003/87/EC so as to improve and extend the greenhouse gas emission allowance trading scheme of the Community, OJ L140/63.
[9] Elements of Directive (EC) 2004/8 on the promotion of cogeneration based on a useful heat demand in the internal energy market [2004] OJ L52/50 may also be noted in this respect: 'the development of cogeneration contributes to enhancing competition'; '[i]t is therefore necessary to take measures to ensure that the potential is better exploited within the framework of the internal energy market' (Recitals 2 and 1 respectively).
[10] This subject is discussed by Tarasofsky, RG and Cosbey, A, 'Trade, Competitiveness and Climate Change: Exploring the Issues', Chatham House/IISD paper, December 2005, <http://www.chathamhouse.org.uk/sustainabledevelopment>.

to secure an EU energy tax in the 1990s was only one example of this. As a result, the recent environmental measures have shown a high degree of market sensitivity in both design and implementation. The emissions trading scheme (ETS) is a particularly vivid illustration of this. While in the past the overall environmental aims of the EU might have been seen as a source of constraint upon the development of an internal energy market, the declared aim now is to create opportunities for synergy. Nonetheless, their potential for market distortion remains.

The Treaty competition rules apply with respect to public support schemes. The Guidelines on State Aid for Environmental Protection are applicable to such support[11]. Its decisions appear to have been driven by the consideration that the use of renewables is a priority in the Community and that the beneficial effects of such support schemes are greater than their distorting effects on competition. In practice, a plethora of mechanisms to support renewable energy sources have been adopted among the Member States. They include green certificates, investment aid, tax exemptions or reductions, tax refunds or direct price support, and have the effect of creating advantages for renewable sources in energy markets.

In the *Preussenelektra* case, the Court held that the German feed-in tariff was compatible with the EU state aid rules and the rules on the free movement of goods. However, as the EU institutional report notes, it "was far from giving Member States a blank check on national support schemes". Indeed, it noted that the limited character of the scheme meant that is was "capable, at least potentially, of hindering intra-Community trade". The Court's approach was to examine the justification of this barrier to trade without taking into account the discriminatory nature of the German scheme. Its approach has proved controversial and is thought to be an unreliable guide to future decision-making by the Court. In addition, the Court found the German scheme not incompatible with the free movement of goods "in the current state of Community law concerning the electricity market". The adoption of the RES 2009 Directive included a response to the ruling in this case, particularly with respect to the justification of similar national schemes. Both the RES 2009 Directive and the Third Energy Package of measures constitute an evolution of EU law on electricity generated from renewable sources.

[11] European Commission, Community Guidelines on State Aid for Environmental Protection, OJ C82/1.

7. *Are Directive 2009/28/EC and the purely national subsidy schemes and national RS consumption targets it perpetuates fully compatible with principles and rights established in the Treaty, as interpreted by the Court? For example, does the preclusion of the exchange of instruments evidencing renewable power output between suppliers and generators in different Member States, as a means of proving compliance with minimum renewable electricity consumption quotas or earning feed-in tariffs, interfere with internal trade and distort competition in the electricity market?*

Most rapporteurs seemed to incline to a negative response. There was evident concern about the conflicts between RE goals and those of the internal market, noting that the Court would probably not allow itself to interfere with the political choices of the legislator in this area: so far, those choices have involved a positive discrimination in favour of RE. A different view was expressed by The Netherlands report, arguing that the RES Directive was (and is) compatible with the free movement of goods, and noting that EU institutions have a measure of discretion when exercising their legislative powers that might conflict with the free movement of goods.

8. *More specifically, would the Court's decision in the case of Preussenelektra still be valid in 2012, given both the substantial expansion of wind and solar power generation output, and the maturing of the EU liberalised markets in power and gas, in the meantime?*

Answers on this question were generally agreed that while changes had taken place since that time, the outcome today is unlikely to differ. Certain legal and factual developments had occurred since then (the increased scale of RE in the EU making national support schemes more of a hindrance to intra-EU trade; the new RES Directive of 2009 was also drafted with this judgment in mind, further evolving EU law in this area). However, the attainment of mandatory national targets in the RE Directive 2009 required national support schemes; protection of the environment remains a mandatory requirement that may limit the application of Article 34 and the benefits of support schemes are likely to outweigh any restrictive effects on cross-border trade.

9. *Are there notable features of your Member State's implementation of the RES 2009 Directive that present challenges and difficulties with respect to cross-border cooperation, if they are provided for at all (joint projects, for example, whether between governments and their authorities or between private parties, and statistical transfers under the Directive)?*

Implementation appeared to be an issue. The Czech Republic had not yet implemented the RES Directive. Estonia was one of several Member States that appears not to have implemented some provisions of the RES Directive, such as the voluntary mechanisms in Articles 6-11. To date, statistical transfers, joint projects and joint support schemes are not reflected in the national legislative instruments, which instead prefer to provide a general legal framework for such matters. The Netherlands has implemented the legislation but in a manner that is 'minimalist', that is, omitting the provisions on international cooperation.

The Croatian rapporteur notes that Croatian law currently lacks any provisions relating to joint support schemes within the meaning of Article 11 of the RES Directive nor joint projects. Such cooperation with neighbours does not appear to be a priority in the near future.

## D. Climate Change

One of the most important instruments for achieving significant emissions reductions is the emissions trading scheme. It is the EU's most ambitious effort yet to give companies incentives to invest in low carbon electricity generation and measures to save electricity. In 2003 a Directive was adopted which establishes a Community scheme for greenhouse gas emission allowance trading within the Community.[12] It was based on Article 175(1) EC, as the appropriate legal basis for actions with an environmental aim under Article 174. Its declared goal is to promote reductions of greenhouse gas emissions in a cost-effective and economically efficient manner.[13] In contrast to the Kyoto Protocol, however, it concerns itself with only one of these gases: carbon dioxide or CO2 (carbon), partly because it is the

[12] Directive (EC) 2003/87 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive (EC) 96/61 [2003] OJ L275/32.
[13] ibid, Art 1.

most harmful and partly because it is easy to monitor. In practice, a number of Member States had already begun such initiatives on an individual basis (for example, the UK, the Netherlands and Denmark), but a Europe-wide scheme was justified on the grounds that it could accommodate a level playing field and provide a uniform price for allowances traded in the EU. The measure is relevant to the energy sector, and particularly electricity markets, although it is directed at a wide range of non-energy industries. It has implications for both competition and energy policies, with respect to state aid and market distortion issues, and proposals for its amendment and extension are well underway.

Some say we have a new energy paradigm in which the goal of carbon mitigation will dominate all other priorities and shape energy policy for decades to come[14]. At its heart is the EU commitment to achieve at least a 20% reduction of greenhouse gas emissions by 2020 compared to 1990 as its contribution to a global and comprehensive post-2012 agreement. The aim of this is to build upon and broaden the Kyoto Protocol architecture.

10. *To what extent has the choice of the emissions trading scheme (the EU ETS) to deliver climate change targets had the final word vis-à-vis alternative methods such as carbon and energy taxation?*

A number of rapporteurs expressed support for systems of energy and carbon taxation, emphasising that their national regimes offered examples of energy taxation and sometimes carbon taxes. The Italian rapporteur noted that the two approaches were not incompatible and that carbon taxation had enjoyed a long history in Italy. Carbon leakage was noted as a shortcoming of the ETS in its present form.

11. *Have differences in viewpoints on the above been reflected in legal measures in your Member State and how have they been resolved?*

Among the candid accounts provided on this subject, the Spanish rapporteur noted Spain's long-standing dislike of carbon/energy taxation as an instrument and Estonia's rapporteur noted that there had been little interest in this debate. The Netherlands report notes the

[14] Helm, D, The New Energy Paradigm, OUP, 2007.

'opt-out possibility under Article 27 of the ETS Directive, and that it is in the process of 'opting-out' its horticultural sector.

## E. Security

Security issues have risen rapidly up the energy policy agenda. The long period of low oil prices from the mid-1980s through to the 1990s muted concerns about import dependence for fossil fuels. During this period, two important developments occurred in the security of EU energy supplies, which have reversed this complacency.

First, there was a rapid increase in the use of gas for power generation instead of coal and, to a lesser extent, oil. Gas appeared clean and abundant. For several Member States, most notably Germany, this led to a significant increase in its dependence on Russian supplies of gas, which remains an important feature of the EU energy mix today. This trend has appeared less sensible when transit states have interrupted the supply of gas in the context of disputes with Russia. Much more importantly, it has come to appear a risky option given the trend in recent years towards an authoritarian state in Russia itself. Both the transit risk—which may prove temporary as new pipelines are constructed to the north and south which will bypass these states—and the political risk expose the difficulty the EU has in developing an external policy to the East. Until very recently, the EU has preferred to deal with its neighbour suppliers, especially Russia, on a bilateral basis, with governments supporting their national champions. Occasionally, and with very limited success, it has relied upon the Energy Charter Treaty in its diplomacy. The resulting sense of vulnerability is reflected in the wording of the TFEU's Energy Chapter, which refers to Member States attempting to achieve their energy policy goals 'in a spirit of solidarity'.[15] This new emphasis on solidarity reflects a view that the era of bilateral, government-to-government deals has limits in the modern EU and reflects the influence of new Member States in Central Europe, which have tended to be the losers from such bilateral deals with Russia.

A second development that occurred during the 1990s, and has continued since, is the liberalisation of the EU electricity markets. When a number of more or less severe

[15] Art 194(1) TFEU.

interruptions to electricity supply occurred in 2003–2004—one of them led to a black-out of the entire electricity supply in Italy, caused initially by an accident in Switzerland—the question was raised whether this was a consequence of energy market liberalisation introduced through the EU internal market programme. In the era of state monopolies, the obligation to ensure an uninterrupted supply of electricity had been part of the deal whereby the incumbents obtained exclusive or special rights from the state. In the more complex environment of liberalised markets, the responsibility for various security tasks has to be explicitly fixed on certain parties or they will not act for 'social' ends.

There is indeed an issue here, and it is one familiar to the UK as the laboratory of energy market liberalisation since the 1980s. In the period before liberalisation, large-scale investment was carried out either directly through the state or indirectly through national monopolies in most countries in the EU. The legacy of this period was a very extensive infrastructure that provided the foundation for market opening in the 1990s and after. However, the trend was to squeeze as much value out of existing infrastructure as possible—sometimes called 'asset sweating'. It has become clear in recent years that ageing networks need to be expanded and sometimes replaced entirely. Left to market forces, there are few companies which are likely to invest in spare or redundant capacity in the interests of providing some slack for the network as a whole, for use during an emergency that may never occur. This kind of problem has led to a Directive on Electricity Supply Security and other support measures in the internal energy market legislation.[16] However, the long-term solution has to lie in greater coordination of electricity networks across the EU, perhaps initially on a regional basis. A number of transmission system operators and regulators have already taken steps in this direction. The same point applies, although with less emphasis, for gas pipeline networks. So, an outcome of this situation is a growing awareness of inter-dependence among EU Member States, some more than others. An addition to the Energy Chapter of the Lisbon Treaty text was therefore agreed upon: a new point (d) of Article 194(1) TFEU was included on the interconnection of energy networks.

[16] Directive 2005/89 concerning measures to safeguard security of electricity supply and infrastructure investment [2006] OJ L33/22.

12. *To what extent has your Member State implemented EU legislative measures on energy security in ways that seek to ensure the functioning of the internal market but which also promote measures of solidarity with other Member States?*

The Hungarian rapporteur makes an important point by stating that “Hungary cannot guarantee its energy security alone”. This statement points to the importance of improving infrastructure connections in electricity and gas, and cooperation among TSOs and NRAs. A bilateral agreement with Croatia has been signed to promote such cooperation. Similar responses to energy dependence have sparked regional (horizontal) cooperation among Member States among Portugal, Spain and France, at both regulatory and network levels, with a view to creating regional electricity and gas markets, thereby enhancing energy security.

13. *Has this had any significant impact upon the distribution of domestic institutional responsibilities for such matters (both within the government and public sector and as between public and private)?*

The principal impact in certain Member States has been in the fixing of responsibilities where such roles and responsibilities were not already clear. Nonetheless, in Hungary for example there are plans to make further changes. Other Member States, like Denmark, report that the relevant EU legislation on electricity and gas security has not caused any problems of implementation since a division of competences between the national authorities and the TSO was already in place. Typically, the leading role would appear to be given to the NRA and the operational responsibility given to the TSO.

## F. The Treaty

The introduction of a distinct energy chapter into the TFEU has given a signal that energy matters have at last received the attention they deserved by Community institutions. Not that the Member States have ever taken a light view of the sector’s importance. Quite the opposite has been the case since the inception of the EU. However, the perception that

many issues can be and should be addressed at the EU level to the benefit of the Member States is of recent origin.

The chapter on energy in the Treaty of Lisbon might be seen then as an innovation but in fact the idea that energy should have express recognition in the fundamental legislation of the EU has a long history. Looking back to the Single European Act of 1986 or the Treaty on European Union, it is notable that there is no reference to an energy policy or other energy provision in spite of the fact that there were proposals for their inclusion - they were made and they were rejected. This underlined the Member States' wish to retain their competence over energy. Article 3 of the Maastricht Treaty had introduced a specific competence, albeit in rather vague terms: 'the activities of the Community shall include … measures in the spheres of energy, civil protection and tourism'. Subsequently, the Commission carried out its task according to Declaration No 1 of the Maastricht Treaty, producing a proposal for an energy chapter which would either have consolidated the provisions of the three Treaties or have introduced a new chapter pursuing the completion of the single market, environmental protection, and measures to improve security of supply.[17] Although the proposal was noted by the Council of Ministers in May 1996, no action was taken or encouraged. Two months prior to the Amsterdam Inter-Governmental Conference, the Commission issued a further document.[18] It also had no effect.

An alternative approach adopted by the Commission was to advocate a greater co-ordination of existing EU competencies.[19] The impetus to both of these initiatives was the absence of a clear competence on energy matters which led to a dependence upon a number of EU competencies that have a bearing upon energy policy: for example, the single market rules including technical and tax harmonization and public procurement; environment, regional, and competition policy; and the trans-European networks policy. However, it is very questionable whether these competences are so inadequate that a new Treaty chapter is required. At a later date, during the discussions on the Treaty of Nice text, the Portuguese Presidency noted that an 'issue to be addressed' was whether the repeated use of Article 308 in areas such as energy, external competence, and the establishment of

[17] COM (1996) 496 final, 3 April 1996. There was an earlier report by the Commission for the Reflection Group chaired by Carlos Westendorp in May 1995 prior to the EC Inter-Governmental Conference in 1996.
[18] European Commission, *An Overall View of Energy Policy and Actions*, COM (1997) 167, 23 April 1997.
[19] *Towards an EU Energy Policy*, COM (1995) 682 final, 13 December 1995 (the White Paper).

decentralized agencies justified the creation in the EC Treaty of a specific legal basis requiring a qualified majority.[20] However, the proposal was dropped.

The draft Constitution took a bolder step in this direction, and declared that energy is a 'shared competence' between the Union and the Member States. This meant that under Article I-12(2) the Union and the Member States may legislate and adopt legally binding acts in that area. The Member States were to exercise their competence to the extent that the Union had not exercised or had decided to cease exercising its competence. The relevant provision in Section 10, Article III-256 fell within Chapter III concerned with 'Policies in Other Areas' (than say economic or monetary policy). Although the Constitution initiative failed, the text on energy was repeated in almost identical form in the Treaty of Lisbon text.

The short provision would make energy a 'policy' alongside existing policies such as 'environment', 'social policy', 'agriculture and fisheries' and 'trans-European networks'. There would be a shared competence between the Union and Member States[21]. It would give formal recognition to a situation that has already emerged in practice, with the adoption of a comprehensive sector-specific energy law regime and specialist regulatory institutions for electricity and gas. However, in dealing with the long-standing question of competence, it would also place energy into a horizontal zone of policies in which no clear priority exists, and in dealing with any particular issue a balancing of policy priorities is required: a situation that has already occurred with respect to competition and environmental policies.

Throughout the Community's history, three priorities have had a recurring but varying degree of importance in its deliberations on law-making and policy formation in the energy sector.[22] These priorities have been expressed differently in Community documents over the years but in substance have showed a remarkable degree of continuity over the years: the pursuit of economic efficiency, in particular by the promotion of competition within the framework of an internal market; the achievement of energy security, usually interpreted to mean availability of energy supplies and their regular delivery at reasonable prices, and

[20] Conference of the Representatives of the Governments of the Member States, 22 February 2000, CONFER 4711/00.
[21] Article 2C(2)(i).
[22] By the 'energy sector', I understand the part of the European economy that involves the management and utilisation of coal, oil, gas, renewable sources such as wind, wave and solar power, and nuclear power.

finally the development of energy laws and policies that are compatible with the Community's environmental sustainability goals. The environmental goal was the latest to join in this triumvirate but since the 1990s has figured prominently. In different ways, these priorities all figure in the three main Community Treaties that have evolved over the past fifty years: the Coal and Steel Community Treaty (now expired); the Euratom Treaty and the Treaty establishing the European Community. They have figured too in the now defunct Constitution and in the energy chapter of the TFEU.

The three priorities are evident in the EU's Energy Policy for Europe (EPE), an integrated climate and energy policy with the strategic objective of limiting the global average temperature increase to not more than 2 degrees Centigrade above pre-industrial levels. Energy production and use are the main sources of greenhouse gas emissions so an integrated approach is thought essential.

This is a triangular structure, with the three elements – security, competitiveness, and sustainability - sometimes referred to by Commission officials without apparent irony by place names: respectively, Moscow, Lisbon and Kyoto. The green light was given to the Commission to bring forward proposals for legislation in a number of these areas. This is the first time the EU has developed something like a common energy policy and importantly it is one that is expressly linked to an environmental policy.

14. *How is your Member State actually or likely to be affected by Article 194 of the Treaty on the Functioning of the European Union (the Energy Chapter) which offers opportunities but also imposes constraints with respect to the choice of energy sources and natural resources, and energy and environmental legal bases?*

The actual impact of the new Chapter upon energy policies at the Member State level is viewed with some scepticism by several rapporteurs. The Czech rapporteur notes the continued reliance upon non-EU sources of energy for the foreseeable future and the scope which the drafting gives to Member States for their own choices. The Chapter defines clear borders between national and EU competences in Article 194(2), balancing the constraints in Article 194(2).

The Danish rapporteur points to a theme which is taken up sometimes implicitly by the reports from Central and East European Member States. The introduction of the principle of solidarity is likely to prove influential. Although somewhat ideological in character at this stage, partly political and partly analogous to a principle of good conduct by Member States, it may be interpreted dynamically by the Court in the future.

The EU Institutional Report suggests that ideological preferences will continue to play an important role and that complex legal issues remain to be clarified. Those measures which affect the energy mix in Member States “are likely to trigger debates, in particular on the delimitation between the legal bases for environment and energy policies”.