Institutional report

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

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The past years have seen intensive legislative activity in the field of energy. Since 2009, the European Parliament and the Council have adopted 16 regulations and directives related to an array of aspects of energy policy[2]. And there are no signs of a slowdown. At the time of writing, four proposals in this field are under negotiation[3].

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[1] The views expressed in this report are those of the author and in no way reflect the views of the Council. In spite of its denomination as Institutional Report, it cannot be understood as presenting an official position of the institutions. The structure of this report follows the Questionnaire, prepared by Professor D Cameron, CEPMLP, and addressed to national rapporteurs, to the extent that it is relevant from the perspective of the Union's institutions.

[2] Directive 2009/28/EC on the promotion of the use of energy from renewable sources, OJ L 140 of 5.6.2009, p. 16; Regulation (EC) No 663/2009 establishing a programme to aid economic recovery by granting Community financial assistance to projects in the field of energy, OJ L 200 of 31.7.2009, p. 31, as amended by Regulation (EU) No 1233/2010, OJ L 346 of 30.12.2010, p. 5; Regulation (EC) No 713/2009 establishing an Agency for the Cooperation of Energy Regulators, OJ L 211 of 14.8.2009, p. 1; Regulation (EC) No 714/2009 on conditions for access to the network for cross-border exchanges in electricity, OJ L 211 of 14.8.2009, p. 15; Regulation (EC) No 715/2009 on conditions for access to the natural gas transmission networks, OJ L 211 of 14.8.2009, p. 36; Directive 2009/72/EC concerning common rules for the internal market in electricity, OJ L 211 of 14.8.2009, p. 55; Directive 2009/73/EC concerning common rules for the internal market in natural gas, OJ L 211 of 14.8.2009, p. 94; Directive 2009/119/EC imposing an obligation on Member States to maintain minimum stocks of crude oil and/or petroleum products, OJ L 265 of 9.10.2009, p. 9; Directive 2009/125/EC establishing a framework for the setting of ecodesign requirements for energy-related products, OJ L 285 of 31.10.2009, p. 10; Regulation (EC) No 1222/2009 on the labelling of tyres with respect to fuel efficiency and other essential parameters, OJ L 342 of 22.12.2009, p. 46; Directive 2010/30/EU on the indication by labelling and standard product information of the consumption of energy and other resources by energy-related products, OJ L 153 of 18.6.2010, p. 1; Directive 2010/31/EU on the energy performance of buildings, OJ L 153 of 18.6.2010, p. 13; Regulation (EU) No 617/2010 concerning the notification to the Commission of investment projects in energy infrastructure, OJ L 180 of 15.7.2010, p. 7; Regulation (EU) No 994/2010 concerning measures to safeguard security of gas supply, OJ L 295 of 12.11.2010, p. 1; Regulation (EU) No 1227/2011 on wholesale energy market integrity and transparency (REMIT); OJ L 326 of 8.12.2011, p. 1.

[3] Proposals of the Commission for a Directive on energy efficiency (COM(2011) 370 final of 22.6.2011); Decision setting up an information exchange mechanism with regard to intergovernmental agreements between Member States and third countries in the field of energy (COM(2011) 540 final of 7.9.2011); Regulation on guidelines for trans-European energy infrastructure (COM(2011) 658 final of 19.10.2011); Regulation on safety of offshore oil and gas prospection, exploration and production activities (COM(2011) 688 final of 27.10.2011).

These figures amply demonstrate the growing importance attributed to the Union policy on energy[4]. They may also serve to witness the general perception that the dimension and the nature of the challenges in the field of energy call for a common response at European level. Broadly speaking, the Union policy on energy is expected to deliver a well functioning, competitive market which ensures choice and security of supply, as well as a contribution to the Union's objectives related to environmental sustainability, a carbon free economy and competitiveness.

This report analyses, in Part A, the role of regulation and competition policy in completing the process of liberalising the European energy markets. Part B discusses certain legal aspects of promoting renewable forms of energy. Finally, Part C examines the new Treaty legal basis for a Union policy on energy.

A. Regulation and Competition Policy

A.1. Introduction

On 4 February 2011, the European Council confirmed the Union's need for a fully functioning, interconnected and integrated internal energy market. It identified the year 2014 as the new target date for the completion of the internal energy market, which should allow gas and electricity to flow freely. The European Council called on Member States to speedily and fully implement the relevant legislation. In its view, the completion of the internal energy market requires *"that in cooperation with ACER national regulators and transmission system operators step up their work on market coupling and guidelines and on network codes applicable across European networks"*[5].

On the one hand, these conclusions are recognition of the work achieved so far to liberalise the European energy markets. The completion of this process is no longer a long-term objective, but is envisaged within a relatively short timeframe. This is the fruit of several rounds of legislative and regulatory efforts in the past 30 years to introduce fundamental changes in the structure of the European energy markets. These markets were traditionally characterised by national monopoly structures built under State auspices and equipped with

[4] The conclusions of the Presidency of the European Council of 8/9 March 2007 envisaged an *"Energy Policy for Europe"* (see Council document 7224/1/07, points 36 to 39 and Annex I).

[5] European Council doc. EUCO 2/1/11 of 8 March 2011, points 3 and 4.

special rights. Cross-border connections of transmission systems were rare[6]. The Union legislator undertook to fundamentally transform this landscape into a liberalised single market which allows for competition across the borders. The cornerstones of this regulatory intervention were rules on the unbundling of network and supply activities, a regime for third party access to essential energy infrastructures and protection mechanisms against discrimination by vertically integrated companies. These legislative efforts have culminated in the adoption in 2009 of a package of five legislative acts commonly known as the Third Energy Package[7].

The Third Energy Package is one of the responses to findings made by the Commission on the basis of its inquiry into the European gas and electricity sectors ('Energy Sector Inquiry') which, in a nutshell, concluded that the previous regulatory framework had failed to achieve the opening of the gas and electricity markets[8]. The Commission proposed to address some of the remaining shortcomings by strengthening the regulatory framework to create a pro-competition environment. Apart from reinforcing the rules on unbundling and non-discriminatory access, the Third Energy Package established new and reinforced existing authorities and cooperation structures whose mission is to foster the integration of the energy market. Most recently, the Regulation on wholesale energy market integrity and transparency ('REMIT') has completed this last wave of energy market legislation[9]. Other market failures were remedied on a case-by-case basis by enforcing the competitions rules in the energy sector.

On the other hand, the European Council conclusions point the direction in which further work is critical to complete the liberalisation process. The focus visibly shifts from further

[6] For electricity, interconnections were mainly established to allow an emergency back-up power supply. In the gas field, export pipelines existed to allow countries like the Netherlands and Norway to export gas; see *de Moel* and *Melchior*, Cooperation between TSOs: Background, organisation and netcodes, in: Roggenkamp and Hammer (ed.), European Energy Law Report VIII, intersentia 2011, pp. 21, 22.

[7] Regulation (EC) No 713/2009 establishing an Agency for the Cooperation of Energy Regulators, Regulation (EC) No 714/2009 on conditions for access to the network for cross-border exchanges in electricity, Regulation (EC) No 715/2009 on conditions for access to the natural gas transmission networks, Directive 2009/72/EC concerning common rules for the internal market in electricity, Directive 2009/73/EC concerning common rules for the internal market in natural gas; published in OJ L 211 of 14.8.2009, pp. 1, 15, 36, 55 and 94 respectively.

[8] Communication from the Commission of 10 January 2007, Inquiry pursuant to Article 17 of Regulation (EC) No 1/2003 into the European gas and electricity sectors (Final Report), COM(2006) 851 final.

[9] Regulation (EU) No 1227/2011, OJ L 326 of 8.12.2011, p. 1.

legislative intervention to implementation. One main strand of this implementation focus is the cooperation between and amongst Union and national regulatory players. The potential of this cooperation for achieving the further opening of the energy markets and its limits will be examined below in Part A.2. Part A.3 will look at the role of the enforcement of competition law in the gas and power markets.

A.2. Regulatory cooperation in relation to energy markets

One of the key findings of the Commission's Energy Sector Inquiry was that *"Europe needs a substantial strengthening of the powers of regulators and enhanced European coordination"*[10]. The Third Energy Package follows up on this conclusion and institutionalises cooperation of the national regulatory authorities ('NRAs') and the transmission system operators ('TSOs'). The efficiency of these cooperation mechanisms, in particular with respect to cross-border issues, and their ability to support the implementation of the common rules for the internal market will be an important factor for the ability of the Third Energy Package to deliver on the objectives of opening up real choice for consumers, new business opportunities and more cross-border trade[11].

A.2.1. A new player: ACER

With the Agency for the Cooperation of Energy Regulators ('ACER'), the Third Package has created a new regulatory player to foster the cooperation of NRAs on both electricity and gas at the European level. While NRAs have cooperated widely in the past to discuss common interests and provide regulatory advice to the Commission[12], ACER has centralised and institutionalised that cooperation[13].

The bulk of ACER's tasks are advisory or monitoring in nature. It issues opinions, recommendations and guidelines on a wide range of issues, mostly related to cross-border matters and from a Union-wide perspective, and it monitors the implementation of network codes. Furthermore, REMIT entrusts ACER with a central role in monitoring the trading

[10] Cited above in footnote 8, point 57.

[11] Recital 1 of Directive 2009/72/EC (electricity) and recital 1 of Directive 2009/73/EC (gas).

[12] See *Haverbeke, Naesens* and *Vandorpe*, European Energy Markets and the New Agency for Cooperation of Energy Regulators, Journal of Energy & Natural Resources Law 2010, pp. 403, 412 to 414.

[13] ACER became formally operational on 3 March 2011, see ACER's 2012 Work Programme, available on http://www.acer.europa.eu/portal/page/portal/ACER_HOME/The_Agency/Work_programme.

activity in wholesale energy markets[14]. In addition, and as opposed to its voluntary predecessors[15], ACER has the power to take binding decisions[16]. This includes, in particular, decisions on cross-border congestion management and third party access exemptions at the joint request of the concerned NRAs or where these fail to reach an agreement.

While the NRAs continue to bear the main responsibility for monitoring compliance with internal market rules by TSOs on their territories, ACER will assume part of this role in relation to cross-border issues by way of its influence over the newly-created European networks of TSOs.

The Third Energy Package has also institutionalised the cooperation of TSOs[17]. As TSOs operate the cross-border connections, their close cooperation is a precondition for establishing the internal market. The legislator instructed the TSOs to set up two pan-European networks (ENTSO-E and ENTSO-G) and obliged them to cooperate within these new structures[18]. The main task of ENTSO-E and ENTSO-G is to develop the technical and market-related network codes and to coordinate the operation of the grids[19]. In order to contribute to this task, TSOs must establish regional cooperation amongst themselves[20]. In the process of developing the network codes, ENTSO-E and ENTSO-G act in close coordination with and under the supervision of the Commission and ACER. Furthermore, ACER influences the work of the two networks by issuing guidelines for one of their main tasks, the development of network codes.

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[14] ACER considers that the implementation of REMIT is a major challenge. It expects to receive between 30,000 and 500,000 records a day.

[15] See *Haverbeke, Naesens* and *Vandorpe*, cited above in footnote 12, pp. 412 to 414.

[16] The lawfulness of granting decision making powers to an agency has been confirmed by the changes introduced by the Treaty of Lisbon to the former Article 230 TEC (now Article 263 TFEU), according to which the Court of Justice shall review *"the legality of acts of bodies, offices or agencies of the Union intended to produce legal effects vis-à-vis third parties"* (emphasis added).

[17] *Schulte-Beckhausen*, Netzkooperationen: Regulierung - politische Vorgaben - Szenarien, Recht der Energiewirtschaft 2011, p. 77.

[18] See Article 5 of Regulation No 714/2009 (electricity) and Article 5 of Regulation No 715/2009 (gas); on the legal aspects of their establishment see *de Moel* and *Melchior*, cited above in footnote 6, pp. 27 to 35.

[19] See Article 8 of Regulation No 714/2009 (electricity) and Article 8 of Regulation No 715/2009 (gas).

[20] See Article 12 of Regulation No 714/2009 (electricity) and Article 12 of Regulation No 715/2009 (gas). Seven regional initiatives for electricity and three regional initiatives for gas have been defined; see Commission Communication of 7.12.2010, The future Role of Regional Initiatives, COM(2010) 721 final.

A.2.2. The confirmed players: NRAs

The creation of ACER has had neither the aim nor the effect of diminishing the role of the NRAs. In many ways, the NRAs continue to play a central role in implementing the Third Energy Package.

Although ACER is a Union body with legal personality[21], it follows a bottom-up approach in that its main body, the Board of Regulators, is made up of the representatives of the NRAs. NRAs also contribute to ACER's working groups which are mainly composed of NRA representatives[22]. Furthermore, it has been argued that the efficiency of ACER in assuming its monitoring and oversight tasks depends heavily on input from the NRAs[23].

It is also noteworthy that ACER's remit does not cover the entire field of issues which were the subject of voluntary cooperation between the NRAs prior to the creation of ACER. In particular, the Council of European Energy Regulators ('CEER') will continue to serve as a forum – albeit to a much reduced extent – for cooperation between NRAs in areas outside of ACER's scope[24].

In addition, some of ACER's activities are undertaken upon request from NRAs, in particular the decisions on cross-border congestion management or on exemptions. Thus, not only do the NRAs form the institutional core of ACER, but they also have considerable impact on fields in which ACER becomes active throughout the year. ACER itself recognises that *"cooperation with the NRAs is, indeed, the mainstay of the Agency's role and activities"*[25].

Moreover, ACER's creation coincides with the adoption, within the Third Energy Package, of rules which confirmed and in some respects reinforced the important role which NRAs

[21] Article 2 of Regulation No 713/2009 (ACER).

[22] See details on existing working groups in ACER's 2012 Work Programme, p. 32.

[23] *Horstmann*, Agency for the Cooperation of Energy Regulators – Its Particularities and its Roles in Enhancing the Cooperation of National Energy Regulators, in: Roggenkamp and Hammer (ed.), European Energy Law Report VIII, intersentia 2011, pp. 43, 51.

[24] ACER recognises this in its 2012 Work Programme, p. 34. The example cited is the development of the "Target Model" for the internal gas market, which will outline the approaches and tools for the development of liquid gas markets and their integration into a single European gas market.

[25] ACER's 2012 Work Programme, p. 5.

play in the liberalisation of the gas and electricity markets[26]. The competencies of NRAs include[27], within their respective territories, the fixing or approval of transmission and distribution tariffs or their methodologies, ensuring compliance of TSOs with their obligations, and monitoring the investment plans of the TSOs. They also have powers related to the conditions for access to national networks, the provision of balancing services and access to cross-border infrastructures, including the allocation of capacity and congestion management[28].

The Third Package also strengthened the NRAs by requiring that Member States ensure their independence and grant them sufficient powers to carry out their tasks, including issuing binding decisions on undertakings, carrying out investigations and imposing penalties for non-compliance. Furthermore, NRAs are tasked with cooperating amongst each other and with ACER on cross-border issues. NRAs also need to be consulted on the development of network codes[29].

It must furthermore be noted that Regulation No 713/2009 is silent on ACER's power to enforce its decisions. Here too, ACER will have to rely on the NRAs to see its decisions applied in a correct and consistent manner[30].

Under REMIT, ACER has arguably become more autonomous from the NRAs. Under that Regulation, ACER has an independent role in monitoring the wholesale energy market at Union level and ensuring that suspected breaches of the Regulation are investigated. It collects data directly from market players and can issue binding requests to NRAs to investigate breaches[31]. Nonetheless, ACER relies on the NRAs for enforcing the respect of the substantive rules against market abuses under REMIT and NRAs also have access to the information held by ACER. Given that only a limited number of NRAs were previously active in carrying out market monitoring of the wholesale energy market, their new tasks

[26] See details, including on earlier forms of their cooperation, in *Haverbeke, Naesens* and *Vandorpe*, cited above in footnote 12, pp. 405 to 408.

[27] Article 37 of Directive 2009/72 (electricity) and Article 41 of Directive 2009/73 (gas).

[28] See also Annex I to Regulation No 714/2009 (electricity), and Article 13(1) of Regulation No 715/2009 (gas).

[29] Article 10 of Regulation No 714/2009 (electricity) and Article 10 of Regulation No 715/2009 (gas).

[30] *Haverbeke, Naesens* and *Vandorpe*, cited above in footnote 12, pp. 427.

[31] Article 9 and Article 16(4) to (6) of Regulation (EU) No 1227/2011 (REMIT).

under REMIT represent a significant challenge to them in terms of technical and human resources.

A.2.3. Conclusion

It follows from the above that the institutionalisation at European level of the cooperation of NRAs and of TSOs underlines the ambition to close the regulatory gap on cross-border issues and to create a single market for gas and electricity. The resulting structures aim, *inter alia*, at addressing the remaining challenges on cross-border exchanges and provide for additional instruments to this end. At the same time, the institutional set-up does not reinvent the wheel but continues to rely heavily on experienced players and in particular on the NRAs, which now have to widen their field of cooperation and work towards European solutions within the framework of ACER.

REMIT has significantly enhanced the role of ACER in monitoring and supervising the energy wholesale markets. Its ambition represents a significant challenge not only to ACER, which is given a central monitoring role involving large amounts of data, but also to NRAs, which are required to become active in this field.

A.3 The role of competition law in the energy sector

The energy sector has been the subject not only of intensive legislative activity, but also of considerable activity by competition authorities on the enforcement of competition rules. Whereas regulation attempts to shape the market by providing generally applicable rules [32], competition law operates on a case-by-case basis.

A.3.1. Coexistence of internal market legislation and competition law enforcement

The two approaches are complementary as both are aimed at achieving well functioning energy markets that ensure secure energy supplies at competitive prices. In its Energy Sector Inquiry, the Commission concluded that to address the malfunctioning of the markets and to significantly improve the scope of competition, *"it is essential to apply both competition and regulatory-based remedies"*[33].

[32] *Schulte-Beckhausen*, cited above in footnote 17, p. 77.

[33] Cited above in footnote 8, point 40.

The legislator has underlined this complementary nature of competition law in the Third Energy Package[34]. At the same time, the internal market legislation aims to ensure that high standards of public service are maintained and that the final consumer is protected. It allows Member States to impose, in the general economic interest, public service obligations on undertakings operating in the gas and electricity sectors, *"having full regard to the relevant provisions of the Treaty, in particular Article 86 thereof [now Article 106 TFEU]"*[35]. The protection of these interests may warrant, according to the relevant provisions, a State intervention[36].

Such interference with the market forces is, however, subject to scrutiny by the Commission. The Member States must inform the Commission of all measures adopted to fulfil public service obligations and their possible effect on national and international competition[37].

Furthermore, the Court has given guidance on the conditions and limits of State intervention in the context of the energy internal market legislation. It has held that Article 106 TFEU is designed to reconcile the Member States' interest in using certain undertakings as an instrument of economic policy with the Union's interest in ensuring compliance with the rules on competition and preservation of the unity of the internal market[38]. In its ruling in the *Federutility* case, the Court interpreted these provisions in the context of national rules on reference prices for the supply of natural gas to domestic customers[39]. The Court held that Member States may, under certain conditions, intervene by setting such reference prices. The proportionality test required in particular that the measure be *"limited in duration […] in order, in particular, not to render permanent a measure which, by its very nature, constitutes an obstacle to the realisation of an operational internal market in gas"*[40]. A more recent ruling concerning tender obligations on operators of essential installations confirms this line with regard to the Member States' remaining margin of manoeuvre. The Court examined in

[34] Recital 37 of Directive 2009/72 (electricity) and recital 33 of Directive 2009/73 (gas).

[35] Article 3(2) of Directive 2009/72 (electricity) and Article 3(2) of Directive 2009/73 (gas).

[36] See *Bouhier*, Vers un ordre public européen de l'énergie? R.A.E. – L.E.A. 2009, pp. 749, 756.

[37] Article 3(15) of Directive 2009/72 (electricity) and Article 3(11) of Directive 2009/73 (gas).

[38] Judgment of 21 September 1999, C-67/96, *Albany*, ECR I-5751, paragraph 103.

[39] Judgment of 20 April 2010, C-265/08, ECR I-3377.

[40] Point 35 of the ruling.

detail the features of the national rules in question and found them not to be precluded by the EU legislation on the electricity market and dispatching services, provided that these rules pass the proportionality test which is referred back to the national court[41].

A.3.2. The Commission's competition law enforcement in the energy sector

Competition rules are enforced both at national[42] and at European level. The Union's competition rules are enforced by the Commission. In its Energy Sector Inquiry, the Commission announced *"full and combined use of the Commission's powers under antitrust rules […], merger […] and State aid control"*[43] and numerous cases against European energy companies were opened in the wake of the Sector Inquiry.

Given the continuously high level of concentration of gas and electricity markets at the wholesale level, a large majority of these cases targeted the abusive behaviour by a dominant undertaking that aimed at excluding (potential) competitors from the market[44]. The Commission looked into instances of different forms of abuse of market power, in particular by companies which continue, given the mere progressive nature of the rules on unbundling, to be vertically integrated. Even though these companies complied with the existing rules on unbundling, the investigation launched against their abusive behaviour led to commitment decisions under Article 9 of Regulation (EC) No 1/2003[45] which included divestitures. One recent example[46] is the *ENI Capacity Hoarding* case[47] which resulted in a voluntary commitment by the undertaking to divest its international gas transmission pipelines.

[41] Judgment of 21 December 2011, C-242/10, *Enel Produzione SpA / AEEG*, not yet reported.

[42] For an overview of recent national enforcement activities see *Scholz* and *Purps*, The Application of EU Competition Law in the Energy Sector, Journal of European Competition Law &Practice 2011, pp. 62, 67 to 73.

[43] Energy Sector Inquiry, cited above in footnote 8, point 41.

[44] See Communication from the Commission - Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, OJ C 45 of 24.2.2009, p. 7.

[45] Council Regulation on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1 of 4.1.2003, p. 1.

[46] For a more complete account see *Talus*, Just what is the scope of the essential facilities doctrine in the energy sector?: Third party access-friendly interpretation in the EU v. contractual freedom in the US, CMLR 2011, pp. 1571, 1584.

[47] COMP/39.315 - ENI, Commission Decision of 29.9.2010, Summary in OJ C 352 of 23.12.2010, p. 8.

These cases have led to what has been characterised as 'unbundling through antitrust'[48]. To alleviate the Commission's competition concerns about their abusive practices, the undertakings agreed to divest themselves of parts of their business even though their control over these parts was not in conflict with the legislative unbundling standards in force[49]. Hence, the result of the Commission's competition law enforcement activities in this group of cases can be seen as *de facto* complementing the regulatory framework aimed at dismantling the dominant market power of pre-liberalisation monopolies.

The *Svenska Kraftnät* case[50] demonstrates that the Commission is determined to also keep ownership unbundled TSOs under competition law scrutiny[51]. The case concerned the completely unbundled Swedish electricity TSO whose exclusive concession to operate the Swedish transmission grid gave it a monopoly position in that market. The Commission found that the TSO had a practice of artificially reducing interconnection capacity towards Denmark in order to stabilise the Swedish spot market price. Instead of examining this behaviour in the context of the internal market legislation and the congestion management guidelines, the Commission investigated it in the framework of the competition rules against abuse of a dominant position.

A.3.3. Conclusion

The Commission's competition law enforcement activities have led to case-by-case improvements in opening the Union's energy markets to competition. Together with the legislative and regulatory interventions, these measures contribute to reducing sustained market power, in particular in wholesale markets. It remains to be seen whether the implementation of the Third Energy Package will reduce the need for antitrust interventions by the Commission in the energy sector.

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[48] *Vedder*, Competition in the EU energy sector – an overview of developments in 2009 and 2010, in Roggenkamp and Hammer (eds.), European Energy Law Report VIII, intersentia, 2011, pp. 3, 7.

[49] For a critical view of the cases involving long-term capacity reservation to fulfil import or supply agreements see *Scholz* and *Purps*, cited above in footnote 42, pp. 73 to 76.

[50] COMP/39.351 – Swedish Interconnectors, Commission Decision of 14.4.2010, Summary in OJ C 142 of 1.6.2010, p. 28.

[51] *De Hauteclocque and Hancher*, The Svenska Kraftnät case: introduction of bidding zones in Sweden, Network Industries Quarterly 2011, pp. 20, 22.

B. Promotion and Subsidy of Renewable Energy

B.1. Introduction

Directive 2009/28/EC on the promotion of the use of energy from renewable sources[52] (the "RES 2009 Directive") is one of the legislative instruments adopted to allow the energy sector to contribute to the Union's wider objectives on greening the economy, combating climate change and ensuring security of energy supply. This category of legislative acts has a clear environmental dimension which distinguishes it from other areas of the European energy legislation and gives rise to a different set of legal questions.

In the following section, the specificities of the RES 2009 Directive and in particular its approach to national support schemes will be examined in the light of the current state of liberalisation of the European market for renewables.

B.2. The specificities of the RES 2009 Directive

The RES 2009 Directive aims at reaching the Union's target of 20% energy from renewable sources by 2020. It is based on the assumption that sector specific intervention is needed to achieve this political objective. Its approach takes into account that promoting renewable energies is a task which Member States have been assuming in the past, inter alia on the basis of the precursor Directive 2001/77/EC[53], which provided for indicative national targets.

The centre-piece of the RES 2009 Directive is the introduction of mandatory national targets for the share of energy from renewable sources in 2020. The level of the national targets varies from 10% for Malta to 49% for Sweden[54]. This differentiation acknowledges, as explained in recital 15 of the Directive that *"the starting point, the renewable energy potential and the energy mix of each Member State vary"*. The differentiated approach easily won political support, as it required the same relative level of effort from all Member States and avoided a disproportionate sharing of the burden of reaching the Union's 20% target.

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[52] OJ L 140 of 5.6.2009, p. 16; see *Howes*, The EU's New Renewable Energy Directive, in Oberthür and Pallemaerts (eds.), The New Climate Policies of the European Union - Internal Legislation and Climate Diplomacy, VUB Press 2010, p. 117.

[53] OJ L 283 of 27.10.2001, p. 33.

[54] For Norway, a target of 67.5% is foreseen, see Council Decision of 12.12.2011 (2011/886/EU), OJ L 344 of 28.12.2011, p. 31.

The Directive provides flexibility for Member States in reaching their targets. Article 3(3) states that *"Member States may, inter alia, apply the following measures: (a) support schemes; (b) measures of cooperation between different Member States and with third countries"*. The availability of a wide range of existing and new means for reaching the targets was perceived as the necessary counterweight to agreeing on binding and ambitious targets.

While the development of the rules on the cooperation mechanisms (Articles 6 to 10) was mostly a matter of reaching and technically implementing a political consensus, the debate on the national support schemes was marked by legal considerations. The ruling of the Court of Justice in the *PreussenElektra* case[55] had dealt with one form of national support schemes for renewables, and during the negotiations the Commission received a complaint by a Finnish generator and trader of renewable energy about territorial restrictions under national renewable energy support schemes[56]. The very principle of supporting a particular form of energy (renewables) and the limitation of the support schemes to energy/electricity produced in the respective Member State were the issues on which Member States sought reassurances.

In *PreussenElektra*, the Court had found the German feed-in tariff to be compatible with the Union's state aid rules and the free movement of goods. Yet the ruling was far from giving Member States a blank check on national support schemes.

It stated that the scheme in question, with its limited geographical application, was *"capable, at least potentially, of hindering intra-Community trade"*[57]. Somewhat surprisingly, the Court went on to examine the justification of this barrier without taking account of the discriminatory nature of the German scheme. The distinction between discriminatory and non-discriminatory restrictive measures, i.e. between measures affecting only imported products and those affecting domestic and imported products without distinction, had thus far determined the extent to which a national measure could be justified on environmental

[55] Judgment of 13 March 2001, C-379/98, ECR I-2159.

[56] Press release 45/08 of 10 October 2008 of the European Federation of Energy Traders (EFET), www.efet.org

[57] Paragraph 71 of the ruling.

grounds[58]. This unconventional twist in the line of argument of the ruling has attracted some criticism[59] and it remains uncertain whether this line will be followed in the future[60].

Furthermore, the Court concludes that the German scheme is not incompatible with the free movement of goods *"in the current state of Community law concerning the electricity market"*[61]. This formulation suggests that the evolution of Union law could make it necessary to reassess the justification of similar national schemes.

It is thus fair to say that certain parts of the Directive were drafted mindful of and in response to the ruling in *PreussenElektra*.

B.3. The current level of harmonisation on renewable power

Since the Court ruling in *PreussenElektra*, the Union has passed the sector specific RES 2009 Directive and the Third Energy Package further liberalising, *inter alia*, the Union's electricity market. Both sets of rules constitute an evolution of Union law on electricity from renewables.

The Third Energy Package marks what is currently the last stage in the process of liberalising the power (and gas) market in the Union. Its rules also apply to electricity produced from renewable sources. Directive 2009/72/EC provides for some specific rules on renewable sources of energy[62]. Yet, the relevance of the Third Energy Package for the sector of renewable power is limited due to the existence of the sector specific rules in the RES 2009 Directive. The latter was adopted prior to the Third Energy Package, which did not in any way abrogate the sector specific rules in force for renewables.

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[58] Judgment of 20 September 1988, C-302/86, Commission / Denmark (*Danish Bottles*), ECR p. 4607; but see also Judgment of 9 July 1992, C-2/90, Commission v. Belgium (*Wallonian waste*), ECR p. 4431.

[59] See for exeample *Segnana*, Environnement et marché intérieur de l'électricité – l'arrêt PreussenElektra, Cahiers de droit européen 2002, pp. 131, 147 and following ; *Ekard* and*, Schmeichel*, Erneuerbare Energien, Warenverkehrsfreiheit und Beihilfenrecht – Nationale Klimaschutzmaßnahmen im EG-Recht, ZEuS 2009, pp. 171, 177 and 191.

[60] *Oschmann*, Neues Recht für Erneuerbare Energien, NJW 2009, pp. 263, 266.

[61] Paragraph 81 of the ruling.

[62] See rules on priority dispatching (Articles 15(3) and 25(4)), the possibility of imposing public service obligations relating to environmental protection, including energy from renewable sources (Article 3(2)), and the obligation to consider the Union's 20% renewables target when determining the criteria for authorizing new generation capacity (Article 7(2)).

Therefore, the Third Energy Package has not had the effect of harmonising the market for renewable power to the same extent as the electricity market in general. In relation to power from renewables, national regulatory intervention is thus not *per se* excluded[63] and its lawfulness has to be assessed in the light of the sector specific rules of the RES 2009 Directive.

Recital 27 of the RES 2009 Directive is explicit on the continuous need for public intervention in favour of renewables: *"Public support is necessary to reach the Community's objective with regard to the expansion of electricity produced from renewable sources, in particular for as long as electricity prices in the internal market do not reflect the full environmental and social costs and benefits of energy sources used"*.

Turning to the specific instruments provided for by the RES 2009 Directive to achieve the political objective of promoting renewables, two features would seem to be of particular importance in the light of the *PreussenElektra* jurisprudence: the introduction of guarantees of origin for energy from renewable sources and the rules on support schemes.

B.3.1. Guarantees of origin

Article 15 of the Directive addresses the question of determining the origin of renewable energy. The guarantees of origin prove to final customers the share or quantity of energy from renewable sources in an energy supplier's energy mix. This is significant, as the Court had referred, in *PreussenElektra,* in the context of its reasoning on the justification of the German scheme, to *"the current state of Community law"*[64]*,* which at the time did not allow the origin to be determined.

Yet the Directive confers a limited role to guarantees of origin: recital 52 stresses that they need to be distinguished from green certificates used for support schemes, and recital 56 clarifies that they *"do not by themselves confer a right to benefit from national support schemes"*. The fourth subparagraph of Article 15(2) precludes the guarantees of origin from having any function in terms of a Member State's compliance with its national target. In the logic of the Directive, guarantees of origin serve a transparency purpose vis-à-vis final customers, but do not constitute instruments which Member States can use to prove target

[63] *Ekardt* and *Schmeichel*, cited above in footnote 59, pp. 180 and following.

[64] Paragraphs 79 and 80 of the ruling.

compliance or which suppliers and generators can use in order to benefit from support schemes. On this issue, the RES 2009 Directive has not brought about an evolution of the legal situation compared to Directive 2001/77[65].

The legislator's clear intention was to avoid an incidental effect of the creation of guarantees of origin on one of the main instruments of national target compliance: the support schemes. The function of guarantees of origin is exclusively to improve the reliability of information to the consumer on the origin of energy from renewable sources.

It follows that the RES 2009 Directive has not introduced a system of certificates which would allow for the unrestricted trading of electricity from renewable sources.

B.3.2. Support schemes

The rules of the Directive on the second feature, the support schemes, mirror the fact that the Directive chooses the instrument of nationally differentiated targets to ensure compliance with the Union's 20% objective. In line with that logic, the Directive does not introduce a unified system of or even common framework for the support of renewables[66]. It relies on the diversity of support schemes existing in the Member States. Article 3(3) expressly lists support schemes amongst the measures which Member States have at their disposal to reach their national targets. Article 2(k) of the Directive provides a comprehensive definition of the term 'support scheme'. Furthermore, the last sentence of Article 3(3) accords Member States the right to decide *"to which extent they support energy from renewable sources which is produced in a different Member State"*. Recital 25 of the Directive explains the rationale behind national support schemes in the context of the objectives of the Directive and stresses the vital interest Member States have in controlling the effect and costs of their support schemes to ensure target compliance.

Arguably, forcing a Member State to open up its support scheme for renewable power produced in another Member State bears the risk of windfall profits: The renewable power producers could be tempted to officially sell their electricity in the Member State with the most generous support system. That import would most likely be offset by exports of power produced from non-renewable sources. This incentive structure does not lead to any evident

[65] See Article 5 of Directive 2001/77.

[66] This was still envisaged in Article 4(2) of Directive 2001/77.

gain in environmental terms or in terms of competition between generators or trader of renewable electricity, but would most likely have the effect of eroding well functioning support systems. Yet the legislator has identified such support systems as an important instrument to ensure compliance with the Union's objectives on renewables.

However, the RES 2009 Directive stops short of rubberstamping any and every kind of national support scheme for renewables.

For one thing, the Member States' right to decide to which extent they support renewables produced in another Member State is subject to two conditions: The scheme must be compatible with the Union's state aid rules and must be in accordance with the flexibility mechanisms provided for in the Directive[67]. This means, *inter alia*, that no support may be granted to incentivise mere compliance by operators with requirements under Union law[68]. It is also reasonable to assume that the national support schemes must comply with the principle of proportionality in light of the objectives of the Directive – even though the Court's ruling in *PreussenElektra* did not address this issue. The restrictions on intra-Union trade in renewable power resulting from the support scheme must not go beyond what is necessary for the system to ensure compliance with the national targets.

B.4. Conclusion

The 2009 RES Directive has preserved the specificities of the promotion and subsidy of power from renewable sources within the liberalised electricity market. Its rapid adoption with a relatively high level of ambition was possible also by virtue of its rules on national support schemes, which are designed to allow Member States to reach their national targets for renewables. When assessing the degree of liberalisation of the market for renewables, the sector specific rules need to be taken into account.

[67] See Article 3(3) last sentence: *"Without prejudice to Articles 87 and 88 of the Treaty"* (now Articles 107 and 108 TFEU) and *"in accordance with Articles 5 to 11 of this Directive"*.

[68] See Commission notice on Community guidelines on State aid for environmental protection, OJ C 82 of 1.4.2008, p. 1, points 26 and 29.

C. The Treaty

C.1. Introduction

The insertion of Article 194 TFEU is undoubtedly recognition of the importance which energy issues have gained in recent years and of the added value of Union action in this field[69]. Yet the activity of the Union in the field of energy predates the entry into force of the Treaty of Lisbon and indeed goes back a long way. Important cornerstones such as the liberalisation of the electricity and gas markets, the promotion of energy efficiency in various contexts, security of supply and the promotion of energy from renewable sources have been defined during the last 40 years, even though the Treaties did not, at the time of their adoption, provide for a specific legal basis for a Union policy on energy. Instead, the acts in question were mainly based on either the internal market legal basis (ex-Article 95 TEC) or the environment legal basis (ex-Article 175 TEC)[70].

Hence, by introducing a new Chapter on Energy (Title XXI) into the Treaties with Article 194 TFEU as a specific legal basis, the Treaty of Lisbon has not opened up an entirely new field of Union competence. The Convention's comments on the Constitution on the new legal basis on energy which is nearly identical to Article 194 TFEU stated that *"The draft text proposed for the legal basis for energy is designed to cover, in a fairly broadly worded paragraph 1, the kind of measures adopted up to now, without going into undue detail"*[71].

However, there is no reason to underestimate the legal effects of the introduction of Article 194 TFEU. The Union institutions now have the task of finding the right delimitation between the new legal basis and the pre-existing ones. The stakes are comparatively high, as Article 194 TFEU has added a new national competence reservation in the field of energy.

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[69] *Piris*, The Lisbon Treaty – A Legal and Political Analysis, Cambridge University Press, 2010, p. 319.

[70] Other legal bases used less frequently include ex-Article 93 TEC, now Article 113 TFEU (for Directive 2003/96/EC restructuring the Community framework for the taxation of energy products and electricity, OJ L 283 of 31.10.2003, p. 51); ex-Article 235 TEC, now Article 352 TFEU (for Directive 93/76/EEC to limit carbon dioxide emissions by improving energy efficiency (SAVE), OJ L 237 of 22.9.1993, p. 28); ex-Article 213 TEC, now Article 337 TFEU (for Regulation (EC) No 736/96 on notifying the Commission of investment projects of interest to the Community in the petroleum, natural gas and electricity sectors, OJ L 102 of 25.4.1996, p. 1); ex-Article 156 TEC, now Article 172 TFEU (for Decision No 1364/2006/EC laying down guidelines for trans-European energy networks, OJ L 262 of 22.9.2006, p.1). The first Directive on the security of energy supply dates back to the late 1960s, see Directive 68/414/EEC imposing an obligation on Member States of the EEC to maintain minimum stocks of crude oil and/or petroleum products, OJ L 308 of 23.12.1968, p. 14.

[71] Council document 727/03, Annex VII, p. 110.

C.2. Delimitation of the scope of Article 194 TFEU

The addition of the new legal basis entails the need to define its scope *vis-à-vis*, in particular, the respective scopes of Article 114 TFEU and Article 192 TFEU. In other words, in order to ensure the *effet utile* of the new energy title of the TFEU, Articles 114 and 192 TFEU have to be interpreted in the light of this new legal basis. In accordance with the settled case law of the Court, the choice of the legal basis must rest on objective factors which are amenable to judicial review, including in particular the aim and content of the measure[72].

The challenge lies in the potential overlap between the objectives pursued by Articles 114 and 192 TFEU, on the one hand, and Article 194 TFEU, on the other hand. The very wording of the first paragraph of Article 194 TFEU illustrates this point. The chapeau states that Union policy on energy shall pursue its aims *"In the context of the establishment and functioning of the internal market and with regard to the need to preserve and improve the environment [and] in a spirit of solidarity between Member States"* (emphasis added). Similarly, overlaps with the internal market and environment legal bases exist with respect to some of the aims which Article 194(1) TFEU lists as those of the Union policy on energy: Subparagraph (a) mentions the aim *"to ensure the functioning of the energy market"*, which is reasonably close – in particular if read in conjunction with the above-mentioned chapeau – to the formulation in Article 114 TFEU which tasks the Union legislator with adopting measures which *"have as their object the establishment and functioning of the internal market"*. Subparagraph (c) adds the aim *"to promote energy efficiency and energy saving and the development of new and renewable forms of energy"*, which in turn bears a close resemblance in substance to the first indent of Article 191(1) TFEU, which describes the *"prudent and rational utilisation of natural resources"* as one of the objectives pursued by the Union policy on the environment.

One relatively straightforward approach to defining the scope of Article 194 TFEU would be to view this provision as the *lex specialis* for market liberalisation and environmental resource saving measures in the energy sector[73]. Alternatively, some have suggested looking

[72] See for example judgments of 17 March 1993, C-155/91, *Commission / Council*, ECR I-939, paragraph 7; of 23 October 2007, C-440/05, *Commission / Council*, ECR I-9097, paragraph 61; of 6 November 2008, C-155/07, *Parliament / Council*, ECR I-8103, paragraph 34.

[73] See *Kahl*, Die Kompetenzen der EU in der Energiepolitik nach Lissabon, EuR 2009, pp. 601, 617 and following, who favours sees Article 194 TFEU as *lex specialis* to Article 114 TFEU, but points to reasons why the same is not necessarily true for the relationship between Article 194 TFEU and Article 192 TFEU.

for preponderance, which may lie, for example in the case of measures promoting renewables, in their positive impact on the environment[74]. Much depends on the interpretation of the chapeau of Article 194(1) TFEU[75]. If the chapeau of Article 194(1) TFEU is understood as a limitative framework (rather than a scene setter) for any measure based on that legal basis, it would restrict its application to measures which can demonstrate that they are taken *"in the context of the establishment and functioning of the internal market and with regard to the need to preserve and improve the environment"* (emphasis added). Measures which only fulfil one of these conditions would then have to be based on Article 114 or 192 TFEU respectively[76].

In practice, Article 194 TFEU has been used as a legal basis for five out of the six energy related legislative acts adopted since the entry into force of Treaty of Lisbon[77]. Amongst the four energy related proposals currently on the table of the Union legislator, the Commission has proposed two to be based on Article 194 TFEU, i.e. the Directive on energy efficiency[78] and the Decision setting up an information exchange mechanism with regard to intergovernmental agreements in the field of energy[79]. The proposal for a Regulation on safety of offshore oil and gas activities is based on Article 192 TFEU[80], whereas the proposal

[74] *Thieffry*, Les politiques européennes de l'énergie et de l'environnement: rivales ou alliées?, R.A.E. – L.E.A. 2009, 783, p. 795; *Kahl* comes to the same conclusion by pointing to the nuance in the drafting of Article 194(1)(c) TFEU : While it tasks the Union with promoting energy efficiency and energy saving, it merely speaks of *"development of new and renewable forms of energy"* (emphasis added), see *Kahl*, cited above in footnote 73, pp. 619.

[75] See a critical voice on the lack of clarity in this legislative technique in *Ehricke* and *Hackländer*, Europäische Energiepolitik auf der Grundlage der neuen Bestimmungen des Vertrages von Lissabon, ZEuS 2008, pp. 579, 585 and 592.

[76] *Blumann*, Les compétences de l'Union européenne dans le domaine de l'énergie, R.A.E. – L.E.A. 2009, 737, 745. Other legal bases which continue to apply to measures concerning energy include for example Articles 171 and 172 TFEU on trans-European networks.

[77] These are Directive 2010/30/EU on the labelling of energy-related products, Directive 2010/31/EU on the energy performance of buildings, Regulation (EU) No 994/2010 on security of gas supply, Regulation (EU) No 1233/2010 extending the economic recovery plan to energy efficiency and renewables, and Regulation (EU) No 1227/2011 on market transparency. Regulation (EU) No 617/2010 on notification of investment projects in energy infrastructure was based on Article 337 TFEU and Article 187 EA. The European Parliament has asked the Court to review this choice of the legal basis, see case C-490/10.

[78] COM(2011) 370 final of 22.6.2011.

[79] COM(2011) 540 final of 7.9.2011.

[80] COM(2011) 688 final of 27.10.2011.

for a Regulation on guidelines for trans-European energy networks is based on Article 172 TFEU[81].

C.3. New national competence reservation

The choice of basing a measure on Article 194 TFEU rather than on another legal basis has several implications. For one, the choice of the legal basis is, as has been seen above, amenable to judicial review, and the correct choice is a condition for the legality of the act in question. Furthermore, the provisions of Article 193 TFEU on more stringent national protective measures suggest that basing an act on Article 192 TFEU rather than on Article 194 TFEU might have consequences on the Member States' remaining margin of manoeuvre. Arguably, this difference may not always be relevant in practice as the legislator can chose to include a provision in the act in question with the same substance as Article 193 TFEU. An example of this can be found in Article 1(3) of Directive 2010/31 on the energy performance of buildings[82], which is based on Article 194 TFEU.

The main relevance of the choice between Article 194 and Article 192 TFEU might thus be seen to lie in the national competence reservation contained in the second subparagraph of Article 194(2) TFEU. According to that provision, the measures adopted to achieve the objectives of the Union policy on energy *"shall not affect a Member State's right to determine the conditions for exploiting its energy resources, its choice between different energy sources and the global structure of its energy supply, without prejudice to Article 192(2)(c)"*.

This formulation is reminiscent of a similar wording in the legal basis on the Union policy on the environment. Indeed, Article 192(2)(c) TFEU also makes reference to *"a Member State's choice between different energy sources and the general structure of its energy supply"*. Yet in contrast to acts based on the energy legal basis, environmental measures may indeed affect even *"significantly"* these national domains. If they do, the special legislative procedure mentioned in Article 192(2) TFEU is applicable, i.e. the act must be adopted by the Council acting unanimously and after consulting the European Parliament and the Committees, rather than by the ordinary legislative procedure.

[81] COM(2011) 658 final of 19.10.2011.

[82] OJ L 153 of 18.6.2010, p. 13.

While both limitations serve to protect national sovereignty with respect to the Member States' energy resources, the energy legal basis is far more rigorous: it forbids any Union measure affecting, significantly or not, this national reservation, and this prohibition cannot, it would seem, be overcome by unanimity in the Council.

The scope of this national competence reservation[83] remains to be clarified. A wide interpretation, curtailing the Union's competences in energy policy accordingly, could easily be seen to conflict with the aims of the Union policy on energy to which the Treaty commits the Union in Article 194(1) TFEU[84]. The combined reading of paragraph 1 and the second subparagraph of paragraph 2 suggests that the interpretation of the national reservation must leave intact the Union's ability to take the measures necessary to achieve these policy objectives. On the other hand, the insertion of a national competence reservation is a clear signal that the new energy title has not led to a 'communitisation' of Member States' energy resources. This is underlined by Declaration No 35 on Article 194 TFEU, according to which *"Article 194 does not affect the right of the Member States to take the necessary measures to ensure their energy supply under the condition provided for in Article 347".* It confirms that the Member States preserve the freedom to take the basic decisions on their provision with energy, in particular on the use of nuclear energy, as recognised in a declaration to the 1994 Act of Accession[85] and more recently confirmed by the European Council[86].

The phrase *"without prejudice to Article 192(2)(c)"* clarifies that the restrictions on the Union's policy on energy do not affect the ability of the Union to adopt measures implementing the Union's policy on the environment which affect the national energy mix and the general structure of the energy supply. Therefore, the choice of the legal basis between Articles 194 and 192 TFEU will in some instances have significant consequences for the Union's margin of manoeuvre.

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[83] *Blumann* speaks of "domaines sanctuarisés" and "zone de compétence nationale exclusive", cited above in footnote 76, p. 743.

[84] *Blumann,* p. 744.

[85] Joint Declaration (No. 4) on the application of the Euratom-Treaty, OJ C 241 of 29.8.1994, p. 382.

[86] Conclusions of the Presidency of the European Council of 8/9 March 2007, Council document 7224/1/07, point 11 of Annex I, p. 23.

C.4. Conclusion

The new Treaty provision on energy has confirmed the need for a Union policy on energy, but complex legal issues remain to be clarified. Measures affecting 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.