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SHINING A LIGHT ON ENERGY

10 YEARS OF THE LISBON TREATY

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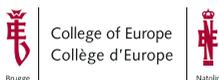
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10 YEARS OF THE LISBON TREATY

NATOLIN NESTS SERIES VOL. 1

SERIES EDITOR
DR BARBARA BOBROWICZ
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Natolin

Table OF CONTENTS

FOREWORD	8
Chapter 1. <i>Anna Herranz-Surrallés</i> , Introduction	14
PART I BETWEEN ENERGY SOVEREIGNTY AND SOLIDARITY	
Chapter 2. <i>Ewa Mazur</i> , From Notion to EU Legal Principle: Development and Implications of Energy Solidarity	28
Chapter 3. <i>Gianmarco Riva</i> , Rethinking Energy Diversification in the Baltic States: How Divergences in Threats Construction Shape National Policy Agendas	50
PART II TESTING THE LIMITS OF THE EU ENERGY COMPETENCE	
Chapter 4. <i>Anna Mathews</i> , The Energy Union Governance Regulation in the Context of the Member State's Right to shape National Energy Mix	74
Chapter 5. <i>Agnieszka Smoleńska & Paweł Tokarski</i> , The Greening of the ECB Monetary Policy: A Legal-Economic Analysis	98

PART III THE CHANGING GOVERNANCE OF RENEWABLE ENERGY

Chapter 6. *Arnold Bruhin*, Introducing flexible governance for renewable energy: How the EU came to drop nationally binding targets for 2030 120

Chapter 7. *Lisse G. van Vliet*, There and Back Again? ‘Bindingness’ and ‘Stringency’ in Post-Lisbon Renewables Governance in the EU and the Energy Community 146

PART IV MARKETS, CITIZENS AND COURTS IN THE ENERGY TRANSITION

Chapter 8. *Johannes Leininger*, Beyond subsidies: Renewables’ missing money dilemma 174

Chapter 9. *Zofia Roguska*, Climate litigation: A silver bullet for insufficient climate action? 198

PART V TOWARDS A JUST TRANSITION?

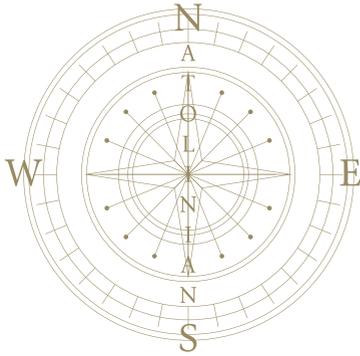
Chapter 10. *Alexandra Blin*, The challenges and stakes of conceptualising energy poverty in the EU 218

Chapter 11. *Heidi Renault*, Achieving a just transition: how can the European Pillar of Social Rights contribute to reskilling employees in fossil-fuel reliant regions? 242

PART VI

Chapter 12. *Emer Gerrard and Helena Hayman*, Conclusion 266

BIBLIOGRAPHY 284



FOREWORD

BY HELENA HAYMAN,
ON BEHALF OF THE NATOLIN CLIMATE AND ENERGY
SOCIETY, HANNAH ARENDT PROMOTION.



HELENA *HAYMAN*

Helena Hayman is a policy professional specialised in climate and energy topics. She is currently working for the United Kingdom's Foreign, Commonwealth and Development Office, where she works on international climate partnerships and climate finance programmes, with a focus on Latin America. Previously, Helena held various roles in the UK's Department for Business, Energy and Industrial Strategy, contributing to the development of the UK's International Climate Finance strategy and the UK's COP26 Presidency. She has also worked on energy innovation, managing domestic innovation programmes and supporting engagement and policy development in relation to the European Union on research and innovation for climate and energy. She holds a Bachelor of Arts and Sciences (BASc) from University College London and a Master of Arts from the College of Europe.

2019 was one of those years that, in hindsight, seems much more significant. Little did we know then that it would be the last year before Covid-19 transformed our lives and societies, triggering a pandemic that continues to have far-reaching consequences, the effects of which will be felt for many years to come.

For us, as master's students embarking on our journey at the College of Europe in Natolin, 2019 was the start of a new adventure. The College is an international, postgraduate institution, which (in 2019–2020) attracted 130 students from over 30 countries, all coming to Warsaw, Poland, to pursue their specialisms in European affairs. We could not have predicted what our year at Natolin would bring. What started off as a year filled with countless opportunities and encounters with students from across the globe, turned into an unprecedented situation where we found ourselves locked down – either on campus or in our home countries – restricted to Zoom and other online means for our lectures and interactions. This stark contrast between the start and the end of our studies provides an interesting backdrop for this publication and for the conference at which this collection of papers was first presented.

The origins of this publication lie in the first few weeks of our time at Natolin, where a group of students, building on the efforts of previous cohorts, formed the 'Natolin Energy and Climate Society'. Bringing together an enthusiastic group of students, we aimed to discuss questions of energy, climate change and environment, and to influence the campus and beyond to take greater action on these important areas. Alongside several other initiatives, we developed the idea of hosting a student-led international conference on the topic of energy, which would bring together academics and experts from across Europe. From this conference, and the ideas discussed, we planned to publish a collection of papers that would share these reflections with a wider audience – an aspiration that has materialised into the pages you are now reading.

For the most eager researchers of European energy policy, 2019 was also significant as it marked the ten-year anniversary since energy was first formally included within the European Union's constitutional basis, in the Lisbon Treaty of 2009. We chose to capture this tenth anniversary as the starting point for our conference, using it as a touchpoint to assess progress made and to reflect on the future of energy (and climate) policy. By widely extending a call for proposals to students, College alumni and young researchers across Europe, we hoped to bring together not simply specialists on energy policy, but a broad cross-section of representatives from different disciplines and professions, that could reflect on energy in novel and interdisciplinary ways. This meant delving not sim-

ply into the more ‘technical’ questions but also into questions related to climate change, international relations, law, politics and sociology. We hope that this breadth of topics and perspectives is reflected in the papers that were selected and the pages which follow.

In organising the conference, our idea was to invite all the speakers to the beautiful Natolin campus in June 2020 – an opportunity to exchange learning, share research and reflect together on the future of European energy policy. Of course, as we all know now, this was not to be. In March 2020, our year at Natolin was turned upside down, with Covid-19 and the subsequent lockdown leading many students to return to their home countries and pursue studies virtually. Others stayed in Poland, but academic activities and events remained highly restricted. We were faced, as many were, with the challenge of having to adapt our event to a digital format with a virtual audience. It was not easy – the plans we had devised for an interactive, interdisciplinary event were set back by the limitations of software and ‘Zoom fatigue’. However, with this came new options – the possibility of a wider audience, the ability to extend participation to those who may not have had the option to come to Warsaw in the first place, and the access to new digital tools, not to mention, the possibility to run a genuinely low-carbon conference, a concern that we all shared. We set to work on rethinking our concept, and, with huge thanks to all our speakers and authors for their patience and support, we were able to proceed with a digital, yet truly international, conference.

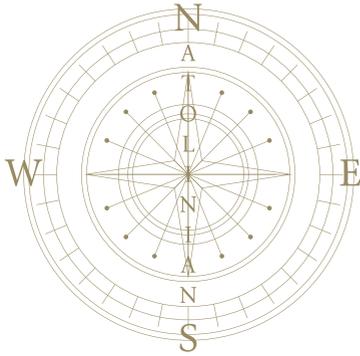
Over the course of two days, on the 17th and 18th of June 2020, the papers that now form this collection were presented by their authors and discussed with their fellow panellists and audiences of students, researchers, policymakers and other professionals. With expert moderation from the members of our scientific committee, we were able to delve into questions of energy security, solidarity, the transition to climate neutrality and many other relevant topics, and to engage in productive debate on how to address some of these issues. The recordings of these sessions can be found on the College of Europe’s website.

The conference marked the end of our year at the College of Europe in Natolin. As many of us will attest, it was not a year that played out as we had anticipated. However, the pandemic presented us with a reality check and a new perspective on our studies that may be unique compared to previous promotions, allowing us to ‘zoom out’ and to see the wider picture. It was a harsh wake-up call to the way that nature can transform our lives and of the potential of planetwide crises to reshape our societies. It may be that Covid-19 is just one of many greater crises to come in the next century, and we may end up looking back on 2019 with nostalgia. The current climate crisis is predicted to dwarf other crises, with

devastating impacts for communities, nations and nature. We hope that this publication reflects the severity of this challenge and the essential role that energy and climate policy have in helping us to confront it.

However, the pandemic also highlighted our reliance on each other – the importance of community networks and the essential role of international cooperation to help to overcome crises. To varying degrees, countries within Europe and across the world came together to develop joint policies and responses and to develop vaccines that would allow us to start overcoming this crisis. On a personal level, for our promotion at Natolin, the experience of lockdown gave us a new sense of unity, highlighting how resilience comes from being and working together, rather than separately. These are all important lessons to take forward if we are to face future challenges. This publication reflects this same spirit – the need to bring together diverse views, from different cultures, disciplines, and generations, to help us to understand and effectively confront shared difficulties. We hope that in its own small way, this collection can provide valuable learnings as well as important inspiration as we look to overcome challenges that lie ahead.

Before moving onto the following sections, which are filled with fascinating research and reflections from our authors, we would like to extend our gratitude to all those who have made this conference and this publication possible. A huge thanks goes to Artur Lorkowski and Babara Bobrowicz, who spent many hours with us, helping to shape our ideas for this conference and to navigate the complexities of running this type of conference. Many thanks also to our scientific committee: Dirk Buschle, Giacomo Luciani, Sebastian Oberthür, Frank Umbach, Andrea Bonzanni and James Henderson, who supported us with their time, advice and mentorship in the selection of papers and in facilitating the conference. We would like to especially thank Anna Herranz-Surrallés, who chaired our scientific committee and without whom the conference and this publication would not have been possible. Finally, of course, to all our fellow students of the Hannah Arendt promotion, for supporting us and each other through the highs and lows of that extraordinary year.



CHAPTER 1

Introduction

BY ANNA HERRANZ-SURRALLÉS



ANNA *HERRANZ-SURRALLÉS*

Dr. Anna Herranz-Surrallés is Associate Professor of International Relations at the Department of Political Science of Maastricht University and Visiting Professor at the College of Europe in Natolin. Her research concentrates on EU external energy policy and global energy governance, with a focus on the relationship between energy, security and democracy. Some of her recent work has focused on the emergence of EU energy diplomacy, the politicization of energy investments and infrastructure, or the changing paradigms and practices of energy cooperation in the EU's relations with neighbouring countries. Her work has appeared in journals such as *West European Politics*, *Journal of Common Market Studies*, *Mediterranean Politics, Cooperation & Conflict*, *Journal of European Public Policy* or *Politics and Governance*. Dr. Herranz-Surrallés has co-edited five volumes, including a recent special issue 'Renegotiating Authority in EU Energy and Climate Policy' (*Journal of European Integration*, 2020).

This book has its origins in the international conference on “Shining a Light on Energy: 10 Years of the Lisbon Treaty”, organised by the Natolin Climate and Energy Society at the end of 2020. A reassessment of the main changes, drivers and challenges of European Energy Policy post-Lisbon was deemed particularly necessary given the dynamism that the Treaty instilled to this policy domain. Since its formal recognition in the Treaty of Lisbon, the European Energy Policy has evolved from being a collection of measures developed on the margins of other policy sectors to becoming one of the EU’s topmost priorities. In December 2019, coinciding with the 10th Anniversary of the Lisbon Treaty, the newly elected Von der Leyen Commission launched the European Green Deal, an ambitious plan to transform the EU into the first carbon-neutral continent by 2050.¹ Energy and climate have therefore abandoned their peripheral position in EU policymaking to become *the linchpin* of all other EU policies. The outbreak of the Covid-19 pandemic in 2020 contributed further to this centrality, placing the green energy transition as the centrepiece of the EU’s economic recovery plans and a unique opportunity for “building back better”.

However, the implementation of the Lisbon Treaty’s energy chapter has also generated intense debates about the meaning of its provisions and the limits of EU competence. Moreover, the first post-Lisbon decade also coincided with periods of severe economic and political crises, which complicated energy policymaking and slowed down the deployment of renewable energy. Similarly, the energy price spikes in 2021 generated intense debates about the appropriateness of the EU energy market design and the timeline of decarbonisation. The turn of the 2020s is therefore a particularly apt moment to take stock of the evolution, current state and main challenges of European Energy Policy since its formalisation in the Lisbon Treaty. This is the task the contributions in this book seek to accomplish by looking into some of the most relevant policy developments and controversies that have emerged over the past decade. This chapter introduces the volume by presenting the background for, and main questions that the authors were asked to consider, touching on the *changes*, *drivers* and *challenges* of European Energy Policy post-Lisbon.

1. CHANGES: FROM AFTERTHOUGHT TO ORGANISING PRINCIPLE?

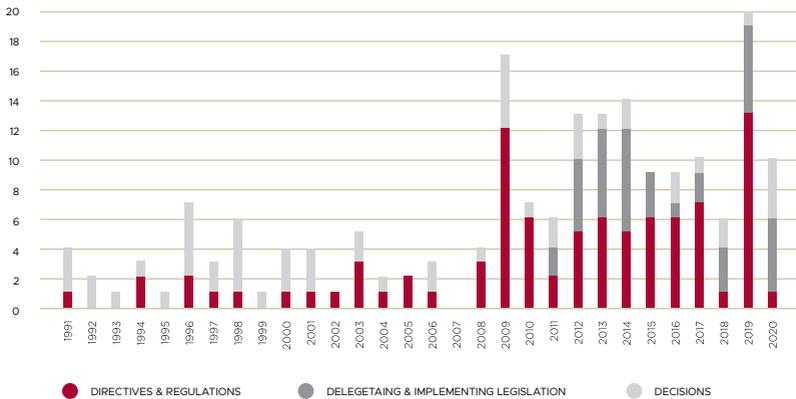
The inclusion of energy policy in the Lisbon Treaty was the culmination of decades of debate and negotiation, dating as far back as 1968 when the European Commission presented a memorandum on the “First Guidelines for a Community Energy Policy”.² However,

1 European Commission, ‘Communication of the European Green Deal’ COM (2019) 640 final (11 September 2019).

2 European Commission, ‘First Guidelines for a Community Energy Policy, Memorandum presented by the Commission to the Council’ COM (68) 1040.

the subsequent attempts to formalise energy policy as a (shared) EU competence failed³ exposing the sensitivity of this policy domain and the crucial role it plays in the economy, security and social fabric of all EU Member States. As a consequence, EU energy policy developed only gradually and, to some extent, in a piecemeal fashion within the scope of other EU policies, such as competition or environment. In this context, the encapsulation of energy policy in a formal treaty was not only a symbolic move to recognise its importance and the status quo but also an opportunity to give this policy domain new, increased momentum. As figure 1 shows, 2009 starts a period of intense legislative activity in energy policymaking, with a new suite of directives and regulations. The frequent use of delegated and implementing legislation, one of the novelties introduced by the Lisbon Treaty, also indicates the growing role of the Commission in energy policymaking.

Figure 1. Evolution of EU legislation on energy policy (1991–2020)



Source: Own compilation based on the Eurlex database

The prominence of energy policy was consolidated further by the Juncker Commission (2014–2019) which made the Energy Union initiative one of its flagship priorities.⁴ Launched in 2015, the Energy Union aimed at giving a more joined-up approach to the

³ For example, the European Commission tried to include energy policy in the Maastricht Treaty, but the proposed energy chapter was eventually rejected by the United Kingdom, Germany and the Netherlands. See Janne Haaland Matlary, *Energy Policy in the European Union* (London, Palgrave, 1997) 62.

⁴ European Commission, 'A Framework Strategy for A Resilient Energy Union with A Forward-Looking Climate Change Policy' COM (2015) 080 final (25 February 2015).

European energy policy by bringing the three main dimensions of energy policy as defined in article 194 TFEU – internal energy market, sustainability, and security of supply – together under a single policy framework. This search for a coherent approach led to the creation of a new position of Commission Vice-President for the Energy Union (occupied by Maroš Šefčovič) and the Regulation on the Governance of the Energy Union and Climate Action⁵ which set the responsibilities for implementing the 2030 energy and climate goals.

The *European Green Deal* reinforced this trend turning it into the EU's "new growth strategy"⁶ with the Commission presenting a package consisting of 13 pieces of legislation across a range of policy areas in July 2021. The broad outreach of this legislation seems to result from the recognition of the fact that achieving carbon neutrality requires a transformation of all economic sectors. Institutionally, the relevance of energy and climate was reflected in the Commission's organisational structure with the appointment of Frans Timmermans as First Executive Vice-President for the European Green Deal. The Von der Leyen Commission raised the stakes of the European Green Deal further by identifying the energy transition as a crucial step in defending Europe's sovereignty in a world of moving geopolitical plates.⁷

Another remarkable novelty of the Lisbon Treaty was the inclusion of the principle of *solidarity* advocated strongly by the Polish government⁸ which had already lobbied for the idea of "mutual assistance" during the first serious gas supply crisis that erupted in 2006 in the context of mounting tensions between Russia and Ukraine.⁹ Despite its vagueness, the practical meaning of the solidarity principle became gradually clearer, for example, in the debate on the need to coordinate decisions on external gas supplies with the adoption of the 2012 Information Exchange Mechanism on energy Intergovernmental Agreements

5 Regulation (EU) 2018/1999 of 11 December 2018 on the Governance of the Energy Union and Climate Action, OJ L328.

6 Ursula Von der Leyen, 'The European Green Deal – our new growth strategy' (11 December 2019), available at: <https://ec.europa.eu/commission/presscorner/detail/en/ac_19_6745>.

7 European Commission, 'A New Industrial Strategy for Europe' COM 102 final (10 February 2020) 1, 3.

8 Mathias Roth, 'Poland as a Policy Entrepreneur in European External Energy Policy: Towards Greater Energy Solidarity vis-à-vis Russia?' (2011) 16 (3) *Geopolitics* 600–625.

9 Michał Natorki and Anna Herranz-Surrallés, 'Securitizing Moves to Nowhere? The Framing of the European Union's Energy Policy' (2008) 4 (2) *Journal of Contemporary European Research* 71–89.

(IGAs).¹⁰ More recently, the principle of solidarity gained legal significance in the *Poland vs. Commission* court case, hinging on the question of whether the EU executive and Germany respected the solidarity principle when deciding on the regulation of the OPAL pipeline – the terrestrial leg of Nord Stream 1 in Germany.¹¹

All in all, the more European Energy Policy has developed, the more delicate the balance between the EU and Member States' competences has become. Despite the famous 194(2) clause of the TFEU, which recognises Member States' freedom to determine their energy mix and sources of supply, Member States are, de facto, constrained by the functional imperative of tackling climate change and the normative obligation of solidarity. In that light, the first question this book aims to tackle is: *To what extent have the energy provisions of the Lisbon Treaty been implemented and how this has affected the political-institutional balances within the EU and beyond?* More concretely, the authors were asked to assess the changes in: (i) the degree of *vertical integration*, namely, whether European Energy Policy has become more centralised and steered by supranational institutions; and (ii) the degree of *cross-sectoral integration*, focusing in particular on whether the Energy Union and the European Green Deal have achieved a more coherent and joined-up approach to energy policy-making.

2. DRIVERS: CRISES AS SPURRING OR SPOILING FACTORS?

One of the main drivers for the development of the European Energy Policy has been the periodic occurrence of energy crises, either caused by political events or market dynamics – and often a combination of both. This was the case in the mid-2000s, when the EU had to cope both with structurally high hydrocarbon prices, as a result of tight global energy markets, and serious gas supply interruptions, due to the tense political relations between Russia and Ukraine. This context of uncertainty and politicization of gas supplies gave the final impetus to the formal recognition of EU energy policy in the Lisbon Treaty and prompted Member States to accept a stronger role of the EU in securing energy supplies.¹² However, crises are double-edged swords that can also undermine the conditions for cooperation. The first post-Lisbon decade was rich in crises that impacted energy policymaking.

10 Decision 994/2012/EU of 25 October 2012 establishing an information exchange mechanism with regard to intergovernmental agreements between Member States and third countries in the field of energy, OJ L299.

11 Case T-883/16 *Republic of Poland v European Commission* (10 September 2019).

12 Anna Herranz-Surrallés, 'An Emerging EU Energy Diplomacy? Discursive Shifts, Enduring Practices' (2015) 23 (9) *Journal of European Public Policy* 1386–1405.

The risk of further supply crises remained high on the agenda, particularly after the EU-Russia diplomatic crisis following the latter's annexation of Crimea in March 2014. Energy security concerns laid the foundation for the *Energy Union* initiative, first floated by Donald Tusk, still in his capacity as Prime Minister of Poland, as a mechanism to step up gas diversification efforts, mutual assistance in case of supply shortage and joint purchasing mechanisms to give the Member States' more leverage in gas negotiations with Russia.¹³ Although the Energy Union concept that was finally adopted by the Juncker Commission was much broader, encompassing also the dimensions of internal market and sustainability, it also triggered some landmark decisions in the area of energy security. For example, the Commission and the Council published, respectively, the first European Energy Security Strategy and the first EU Energy Diplomacy Action Plan.¹⁴ The EU also updated both its regulation on the security of gas supply, with new regional coordination mechanisms to prevent and manage supply crises, and the exchange mechanism on IGAs, introducing additional oversight powers for the Commission.¹⁵

As the decade advanced, the attention shifted towards the slower-burning, yet potentially more disastrous climate crisis. To lead the global efforts against climate change, in 2008, the EU adopted ambitious binding targets for reducing CO₂ emissions and an increase in the share of renewables in the energy mix and energy efficiency – the so-called 20-20-20 by 2020. However, the unfolding of the Eurozone crisis, which lasted until the mid-2010s, was not the most propitious moment for further measures to support renewable energy production and energy efficiency. On the contrary, the enduring economic crisis created a backlash towards EU renewable energy policy in some Member States and led to a moderation of the EU's ambition in its 2030 climate and energy targets adopted in 2014.¹⁶ For the remainder of the decade, the EU remained politically absorbed by the migration crisis, Brexit or the controversy about the rule of law in certain Member States, all of which have shaken the foundations of the EU and raised questions about the duty of sincere cooperation and its limits. Therefore, the post-Lisbon reinforcement of the European Energy

13 Donald Tusk, 'A united Europe can end Russia's energy stranglehold' *Financial Times* (21 April 2014), available at: <<https://www.ft.com/content/91508464-c661-11e3-ba0e-00144feabdc0>>.

14 European Commission, 'European Energy Security Strategy' COM (2014) 330 final (28 May 2014); Council of the EU, 'Council conclusions on Energy Diplomacy' 10995/15 (20 July 2015).

15 Decision (EU) 2017/684 of 5 April 2017 on establishing an information exchange mechanism with regard to intergovernmental agreements and non-binding instruments between Member States and third countries in the field of energy, OJ L99; Regulation (EU) 2017/1938 of 25 October 2017 concerning measures to safeguard the security of gas supply, OJ L280.

16 Arnold Bürgin, 'National Binding Renewable Energy Targets for 2020, but Not for 2030 Any-more' (2015) 22 (5) *Journal of European Public Policy* 690–707.

Policy cannot be seen as a linear process, but a volatile one that may have even led to the policy's occasional dismantling.

Energy and climate policy regained momentum only towards the end of the decade. The realization that the pledges of the Paris Agreement would do little to keep temperatures below the 2°C threshold led to a growing societal mobilization urging leaders to declare a state of “climate emergency”. Echoing this mobilization, the European Parliament issued a climate emergency declaration and lobbied for raising the 2030 climate and energy goals.¹⁷ The European Green Deal initiative also owes a lot to this widespread awareness of climate crisis and intensification of climate activism, particularly amongst the youth, with movements such as Fridays for Future or Extinction Rebellion. To reach carbon neutrality by 2050, the Commission also eventually advocated the need for raising the 2030 interim target to 55 per cent reduction of CO₂ emissions by 2030 (see table 1).

However, ten years after the entry into force of the Lisbon Treaty, the EU is traversing yet another period of economic turmoil and institutional reorganisation following the outbreak of the Covid-19 pandemic. The effect of this crisis on EU energy and climate policy is yet to be determined. On the one hand, the energy transition has gained prominence in the EU's post-pandemic recovery plan. Nearly one-third of the EU 2021–2027 budget, including the €800bn of the Next Generation EU stimulus package, will need to be allocated to climate mitigation goals. The European Commission, the European Central Bank and the European Investment Bank are set to play a growing role in the allocation and certification of green financing. On the other hand, the economic hardship and uncertainty caused by the Covid-19 pandemic are also a challenging context for the implementation of ambitious climate policies and for attracting private investment.¹⁸

In sum, crises can either be a source of innovation and further EU integration dynamics in solving shared problems, or they can cause a deadlock and re-nationalisation tendencies. The chapters in this book thus also aim to reflect on *how have systemic crises (e.g. Eurozone crisis and Covid-19 crisis) affected the ambition and governance of the European Energy Policy?* Crises and their implications are by no means obvious facts. On the contrary, what counts as a crisis depends on how certain facts are apprehended by a variety of actors. The political consequences of crises are also highly dependent on how crises are framed within a broader context and which actors are mobilised to use the crisis as a

17 European Parliament resolution of 28 November 2019 on the climate and environment emergency (2019/2930(RSP)).

18 Sandra Eckert, ‘The European Green Deal and the EU's Regulatory Power in Times of Crisis’ (2021) *Journal of Common Market Studies*, early view, DOI: 10.1111/jcms.13241.

window of opportunity to push their agenda.¹⁹ Therefore, it is particularly important in that regard to gain further understanding of how crises are “constructed” by which actors and for what purposes. To this end, the authors were asked to reflect on (i) whether crises have been used to empower EU institutions or the Member States? And (ii) were crises used to justify change or continuity in EU energy and climate policy?

3. CHALLENGES: FIT FOR CARBON NEUTRALITY?

Apart from taking stock of the first decade of implementation of the Lisbon Treaty, the ambition of this volume is also to look ahead. As the EU aims to move quickly towards carbon neutrality, several economic, (geo)political, institutional and societal hurdles remain. To start with, according to the Commission’s calculations, the current commitments communicated by the Member States in their National Energy and Climate Plans (NECPs) would miss by far the updated 2030 climate and energy targets needed to place the EU on the path towards net-zero emissions by 2050 (see table 1).

Table 1. Overview of the EU Energy & Climate Goals and (projected) performance

	Status 2020	Current 2030 target	New 2030 target under EGD	Projections based on NECPs
CO² emissions	-24%	-40%	-55%	-32%
Renewable energy	-19%	-32%	-39%	-33%
Energy efficiency (primary energy consumption)	-1,2% (2018–2019)	-32,5%	-39–41%	-29,7%
Energy efficiency (final energy consumption)	+0,1% (2018–2019)	-32,5%	-36–37%	-29,4%

Source: own compilation from European Commission data and Taylor (2020)²⁰

19 Benedetta Voltolini, Michał Natorksi, and Colin Hay, ‘Introduction: the politicisation of permanent crisis in Europe’ (2020) 42 (5) *Journal of European Integration* 609–624.

20 Kira Taylor, ‘Mind the gap: how EU countries perform on climate’ *Euractiv* (22 December 2020).

The European Green Deal thus requires strong *political* steering by EU institutions, which might create new tensions and debates on the limits of EU authority in the domain of shared competence.²¹ To avoid the so-called “post-functional dilemma”,²² namely a situation when the EU continues to integrate despite the lack of domestic support, Member States’ decarbonisation policies would need to be underpinned by strong public backing. Eurobarometer surveys indicate that there is indeed a growing perception of climate change as a “serious problem”, from 69 per cent of respondents holding that view in 2015 to 78 per cent in 2021.²³ However, marked differences remain across the Member States. For example, nearly 20 per cent of the respondents in Finland or Latvia did not consider climate change as a serious problem, compared to just 2 per cent in Portugal or 4 per cent in Italy.²⁴ Marked differences also remain as to the responsibilities in tackling climate change. For example, 70 per cent of respondents in the Netherlands considered that the EU should be involved, a view that was held by only 41 per cent of Polish respondents.²⁵

In recognition that the *societal* costs of the energy transition and climate mitigation are unequally distributed and could lead to a backlash in support for ambitious targets, the Commission has placed the notion of “just transition” at the centre of the European Green Deal. Despite the unprecedented economic support of the newly created Just Transition Fund (JTF) (with a total budget of €17.5bn), the challenge of restructuration of coal regions and other fossil-fuel industry sectors remains high. More than one-quarter of the JTF funded from the multi-annual financial framework will be allocated to Poland, given the high concentration of employment in the coal sector.²⁶ Romania and Germany will also be amongst the main recipients with more than 10 per cent of the fund respectively, due to the strong weight of high carbon-intensive sectors in these countries’ economies. It is less clear how the EU can provide support for tackling energy poverty. Efforts so far have concentrated on identifying the extent of the problem by

21 Anna Herranz-Surrallés, Jenny Fairbrass, and Israel Solorio, ‘Renegotiating authority in the Energy Union: A Framework for Analysis’ (2020) 41 (7) *Journal of European Integration* 1–17.

22 Lisbeth Hooghe, and Gary Marks, ‘A Postfunctionalist Theory of European Integration: From Permissive Consensus to Constraining Dissensus’ (2009) 39 (1) *British Journal of Political Science* 1–23.

23 European Commission, ‘Special Eurobarometer on Climate Change’ SE 513 (March–April 2021) 24.

24 *Ibid.* 23.

25 *Ibid.* 31.

26 European Commission, ‘Allocation Method for the Just Transition Fund’, available at: <https://ec.europa.eu/commission/presscorner/detail/en/qanda_20_66>.

harmonising definitions and indicators of energy poverty and urging the Member States to protect vulnerable consumers.²⁷

Challenges are also *technical*, as illustrated by the so-called “first crisis of the energy transition”,²⁸ caused by a sharp rise in gas prices since the autumn of 2021. The greening of the electricity systems is being impaired by current market design and low investment in renewable energy, leaving the EU exposed to ever more volatile gas prices. Paradoxically, divestment from conventional generators over the past decade has obliged governments to maintain capacity mechanisms to meet demand peaks that cannot be covered by renewable energy, thus perpetuating the subsidisation of fossil fuels and further segmentation of the EU energy market. The exposition to gas price shocks in the route to energy transition might force governments to periodically support carbon-intensive industries as well as vulnerable consumers, further limiting the capacity to support renewable energy research and infrastructure. The uncertainty over the potential role of renewable hydrogen further complicates the process of setting clear decarbonisation paths.

Finally, the route to carbon neutrality is also beset by *geopolitical* challenges. In the context of the rising geo-economic order, where trade and economic relations are seen through the lenses of geopolitics and national security,²⁹ the energy transition is becoming a prominent area where global competition is playing out. Issues like foreign investment, hydrogen trade, global green tech supply chains or carbon border adjustment mechanisms are becoming more politicised as the EU and other major players strive to become energy transition leaders. This climate of heightened competition might therefore work against the global efforts to tackle climate change, which depend on high levels of trust amongst nations and cross-border exchange. The phasing out of fossil fuels may also trigger instability in producer countries in the vicinity of the EU, possibly preceded by some periods of greater assertiveness as Russia and other producer countries in the Middle East might temporarily concentrate a greater share of the global production of hydrocarbons.³⁰ The chapters in this volume thus also strive to identify these obstacles and discuss inno-

27 Commission Recommendation (EU) 2020/1563 of 14 October 2020 on energy poverty, OJ L357.

28 ‘The Energy Shock’ *The Economist* (16 October 2021) 11.

29 Anthea Roberts, Henrique C. Moraes, and Victor Ferguson ‘Toward a Geoeconomic Order in International Trade and Investment’, (2019) 22 (4) *Journal of International Economic Law* 655–676.

30 Andreas Goldthau and Kirsten Westphal, ‘Why the Global Energy Transition Does Not Mean the End of the Petrostate’ (2019) 10 (2) *Global Policy* 279–283.

vative solutions to make the European Green Deal ambition possible. In that light, the third guiding question is *what are the main challenges and policy options for the EU to succeed in its ambition to become a carbon-neutral continent by 2050?* In that task, the chapters in this volume focus mostly on whether the (i) *legal* and (ii) *institutional* architecture of the EU is ready for fostering carbon neutrality, or as the motto goes, “fit for 55”.

4. STRUCTURE OF THE BOOK

To unpack these questions, the book is structured into five parts, each consisting of two chapters that tackle related questions and dilemmas from different angles.

Part I looks at the tension *between sovereignty and solidarity* in the energy domain. Chapter 2 by Ewa Mazur traces the process of “juridification” of the principle of solidarity and its applicability in the energy sector, tackling important questions such as: can the principle of energy solidarity be understood as binding, thus giving rise to specific rights and obligations for the Union or the Member States? Does it imply support in crisis situations only or is it a rule of general application? Or can it be relied on before the courts in view of its abstract nature? Chapter 3 by Marco Riva adopts a more political angle, discussing why, despite sharing similar energy problematics, the Baltic States have adopted separate energy security strategies, which have often been against the spirit of solidarity and collaboration.

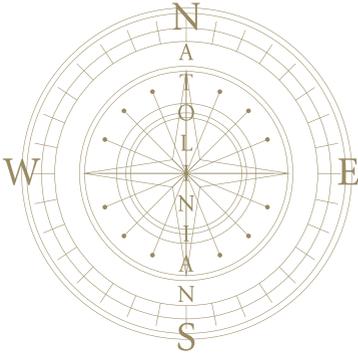
Part II addresses the question of the *limits of the EU competence* in the energy domain. Chapter 4 by Anna Mathews tackles head-on the question of whether the flurry of energy legislation and new governance arrangements to implement the 2030 Climate and Energy goals impinge on the Member States’ rights to determine their national energy mix, defined in article 194(2) of the Lisbon Treaty. The chapter focuses on the controversy surrounding the Commission’s newly gained power to issue recommendations on Member States’ energy and climate plans, including the latest developments in the CJEU jurisprudence on article 194. Chapter 5 by Agnieszka Smoleńska and Paweł Tokarski discusses the extent to which the European Central Bank (ECB) may incorporate climate change related concerns without overstepping its constitutional mandate. Combining legal and economic perspectives, the authors not only discuss the kind of instruments the ECB has at its disposal to support climate targets but also try to offer innovative solutions to the dilemma of how to ensure the accountability of the Bank’s green action without compromising its independence.

Part III examines the *changing governance of renewable energy in the EU and beyond*, focusing on the adoption of the 2030 climate and energy goals and the Regulation on the Governance of the Energy Union and Climate Action. Both chapters contribute to scholarly debates on the evolving modes of governance within the EU and what they mean for the balance between the Member States and supranational institutions. Chapter 6 by Arnold Bruhin examines the puzzle of why the EU abandoned the binding national targets for renewable energy in its 2030 climate and energy goals, focusing on the factors that favour or constrain the Commission's entrepreneurship. Chapter 7 by Lisse van Vliet delves into the substance of the new governance of renewables, offering a fine-grained analysis of the implications of the shift towards more flexible governance, both within the EU and in the framework of the Energy Community.

Part IV switches from EU institutions to discuss *the role of markets, citizens and courts in the energy transition*. Chapter 8 by Johannes Leininger investigates the economic, regulatory and technical challenges in greening the European power markets. Based on a detailed analysis of the impact of renewables on the electricity systems of Germany and the United Kingdom, Leininger discusses possible ways to address the "missing money problem", namely the risk that the EU power markets might be unable to provide the necessary price signal for further investment in renewable energy. Chapter 9 by Zofia Roguska moves on to examine the rising phenomenon of climate litigation, a new form of grassroots activism consisting of bringing lawsuits before national and EU courts to denounce governments' insufficient action against climate change. Through a detailed analysis of several landmark court rulings, Roguska discusses the potential and challenges of seeking to mobilise climate action through courts.

Part V discusses the concept of *Just Transition*. Chapter 10 by Alexandra Blin addresses the often neglected phenomenon of energy poverty, which affects as much as 150 million Europeans. Blin examines the extent to which the EU and its Member States are developing a common understanding of the concept of fuel poverty, as a necessary step to devising common action to tackle this serious problematic. Chapter 11 by Heidi Renault shifts to the societal impact on fossil-fuel reliant regions, which epitomizes the tension between the EU's climate ambition and the need to safeguard the social dimension of the internal market, as enshrined in the Charter of Fundamental Rights. Renault provides a detailed analysis of the different instruments of education, employment and cohesion policy the EU can mobilize to support the skills conversion of employees affected by green industrial restructuring.

Last but not least, the book closes with a concluding chapter by Emer Gerrard and Helena Hayman, which recaps some of the main findings and policy implications of this collection. The chapter captures the richness of this collection, covering a wide spectrum of the multi-faceted domain of European Energy Policy, from technical, legal, economic and societal angles. The authors thus bring back the spirit of the “Shining a Light on Energy” conference organised by the Natolin Climate and Energy Society in June 2020, which was to provide an interdisciplinary platform to share knowledge and construct holistic and sustainable solutions.



PART I

BETWEEN ENERGY SOVEREIGNTY AND SOLIDARITY

CHAPTER 2

From Notion to EU Legal Principle: Development and Implications of Energy Solidarity

BY EWA MAZUR



EWA MAZUR

Ewa Mazur is an EU energy and climate lawyer and decarbonisation expert specialising in strategy, policy and law-making with focus on hydrogen, RES, gas, oil and chemical industries. From 2016 to 2022 she worked in multiple roles at the Polish Ministries of Energy and Climate. In 2020-2022 she served as the head of hydrogen economy and innovation unit where she created and implemented a country-wide hydrogen strategy, policy and legislation for energy, industry and transport sectors. Before joining the Civil Service, Ewa worked for a Central-European law firm Solivan, where she provided legal assistance to investment projects in renewable energies. She graduated in law from Cardinal Stefan Wyszyński University in Warsaw, Poland, and from the College of Europe in Natolin with an MA in European Interdisciplinary Studies and spent a year studying at the University of Paris Nanterre.

1. INTRODUCTION

The tenth anniversary of the Treaty of Lisbon's entry into force provides an opportunity to reflect on the nature and consequences of the energy solidarity principle, enshrined in Article 194 TFEU. The vision presented over 70 years ago in Schuman's declaration resonates stronger than ever each time Europe faces important crises:

“Europe will not be made all at once, or according to a single plan. It will be built through concrete achievements which first create a de facto solidarity”.¹

The common understanding of solidarity refers to the unity between and support for the members of a group or among individuals for various reasons such as responsibility, compassion, sense of belonging or interest.² Solidarity also constitutes to be a founding value of the European Union (Article 2 TEU) and a prerequisite for further integration. It is associated with democracy, subsidiarity, loyalty, citizenship or sustainability and serves as a means to reconcile competition-based market integration with non-market values.³

While the general principle of solidarity has been thoroughly analysed in both the pre-Lisbon and post-Lisbon eras, energy solidarity received far less attention from European scholars. With the last Treaties' change, the principle of solidarity acquired new legal and political importance in the field of energy by making a prominent appearance in Article 194 TFEU. As the ability of the European Union to speak with one voice in global affairs in the energy and climate field is being challenged by different perceptions of energy security coupled with divergent interests of its members as well as the climate emergency, it is worth examining what energy solidarity means, and what can it deliver in concrete terms to address these challenges.

Even though the primary law did not provide a clear definition of energy solidarity, the political importance of the principle has been proven over time. Yet, the mysterious requi-

1 Fondation Robert Schuman, 'Declaration of 9th May 1950 delivered by Robert Schuman' European Issue No. 204 (10 May 2011).

2 Cambridge Dictionary, 'Solidarity', available at: <<https://dictionary.cambridge.org/dictionary/english/solidarity>>.

3 Markus Kotzur, 'Solidarity as a Legal Concept' in Andreas Grimm, Susan My Giang (eds), *Solidarity in the European Union. A Fundamental Value in Crisis* (Springer 2017) 40. On the possibilities to pursue non-market values in the EU internal market legislation refer to Bruno de Witte, 'Non-market values in internal market legislation' in Niamh Nic Shuibhne (ed), *Regulating the Internal Market* (Cheltenham, Edward Elgar 2006) 61–86.

rement to pursue energy policy “in the spirit of solidarity” leaves lawyers with somewhat uneasy feelings and provokes questions as to the legal nature, scope and application of this clause. When explored in light of other Treaty provisions relating to solidarity it can be argued that the spirit of solidarity from Article 194 TFEU is a manifestation and concretisation of the principle of sincere cooperation. If so, then what does it mean for the energy policy, so inherently tied to the realms of competition and a liberalised market and how should it be applied?

This paper attempts to explore the significance and implications of the principle of energy solidarity, as introduced by the Treaty of Lisbon and enshrined in Article 194(1) TFEU. To this end, I begin with an analysis of the conceptual and political developments that led to its juridification. Next, I reflect on the role of legal principles in EU law and, against this backdrop, analyse the legal nature of energy solidarity. The middle part provides a summary of the September 2019 ruling of the *Poland v. European Commission* (OPAL) case (T-883/16), where the EU General Court elaborated on the definition and characteristics of energy solidarity. Subsequently, I evaluate the reasoning of the General Court and examine its consequences. I argue that the ruling elevated energy solidarity to a constitutional principle and assigned it a new understanding that touches upon the difficult interplay between sovereignty, solidarity and energy interdependence of the Member States. Before concluding, the final sections focus on the regulatory and policy implications of the energy solidarity principle.

2. DEVELOPMENT OF ENERGY SOLIDARITY

The conceptual foundation for the evolution and development of solidarity proposed by Michel Virally can be applied also to the development of energy solidarity: it was first presented only as a notion, then as a political and finally as a legal principle of European law.⁴ Following this framework, I will track the notion of solidarity in the context of EU energy policy and analyse its political weight before formulating questions about its legal nature.

⁴ Michel Virally, ‘Le rôle des ‘principes’ dans le développement du droit international’ in Paul Guggenheim (ed), *Recueil d’Études de Droit International en Hommage à Paul Guggenheim* (Faculté de droit de l’Université de Genève, Institut universitaire de hautes études internationales 1968) 531 et seq.

2.1. Mission: “to fill with content and make operational what has been so far more a political concept”

The notion of solidarity is present in the European project from its very conception and so is the idea to create a framework for a common energy policy. The European Coal and Steel Community (ECSC) and the Euratom Treaty both allowed for energy-specific action based on solidarity. The Preamble to the Treaty establishing the ECSC recognised that “Europe can be built only through practical achievements which will, first of all, create real solidarity, and through the establishment of common bases for economic development”.⁵ Solidarity made its first distinct appearance in energy policy in the aftermath of the 1970s oil crisis.⁶ But in the following decades, when Europe was engaged in a process of liberalisation, neither policy papers nor the legislation in the field of energy mentioned solidarity at that time.

A growing dependency on foreign energy suppliers, rising energy prices and a need to embrace climate change led to a gradual reorientation from liberalisation to the securitisation of the European energy policymaking and is now closely tied with climate policy. A true political momentum for energy solidarity came with the Russian-Ukrainian gas crisis of January 2006, when energy policy and in particular security of supply became urgent. Roth notes that the European external energy policy was not at the top of the EU agenda before the crisis.⁷

A brief but disruptive Russian-Belarusian energy dispute in January 2007 once again put energy security in the spotlight. In coincidence with the efforts of the German Presidency to reopen negotiations on the constitutional treaty, a policy window for inserting energy solidarity into a legally binding treaty opened. Poland, supported by other countries of the region, seized this opportunity and following intensive negotiations, succeeded in the inclusion of ‘energy solidarity’ clauses into the Lisbon Treaty and most notably to Article 194 TFEU.⁸

5 Treaty establishing the European Coal and Steel Community (ECSC), Preamble, Publications Office of the EU, CELEX: 11951K000.

6 Council Decision 77/706/EEC of 7 November 1977 on the setting of a Community target for a reduction in the consumption of primary sources of energy in the event of difficulties in the supply of crude oil and petroleum products, OJ L 292 (16 November 1977) 9–10.

7 Mathias Roth, ‘Poland as a Policy Entrepreneur in European External Energy Policy: Towards Greater Energy Solidarity vis-à-vis Russia?’ (2011) 16 (3) *Geopolitics* 610.

8 David Phinnemore, *The Treaty of Lisbon. Origins and Negotiation* (Palgrave Macmillan 2013) 84, 98, 136; Roth (n 7) 616–617; Sami Andoura, *Energy Solidarity in Europe: From Independence to Interdependence*, Notre Europe – Jacques Delors Institute, Report no. 99 (July 2013) 30.

Under the Treaty of Lisbon, solidarity applies to all four objectives of EU energy policy and has received more sustained attention. In particular, the Commission pointed in the 2020 energy strategy of 2010 to the “obligation of solidarity among the Member States”⁹ and made it the first pillar of the Energy Union strategy of 2015: “Our vision is of an Energy Union where the Member States see that they depend on each other to deliver secure energy to their citizens, based on true solidarity and trust, and of an Energy Union that speaks with one voice in global affairs”.¹⁰ Under this flagship strategy of the Juncker Commission, energy solidarity was taken to a new level by the 2017 security of gas supply Regulation (EU) 2017/1938, where the notion of solidarity does not only appear 104 (!) times (compared to 13 in the 2010 regulation) but is also a tangible instrument. The new solidarity provision in the 2017 regulation “seeks to fill with content and make operational what has been so far more a political concept”,¹¹ by introducing solidarity as a measure of last resort to be applied when all other measures have been exhausted and a Member State in question is still unable to provide gas to its protected customers.

Despite entering the Treaty and being mainstreamed on the political level, the mysterious “spirit of energy solidarity” was perceived by many as a mere political declaration instead of a legal principle. Indeed many questions as to its legal nature can be raised.

2.2. Energy solidarity as a legal principle?

Of all the legal principles explicitly stated in the Treaties or derived from the Court’s case law, the general principle of solidarity, also known as the principle of sincere cooperation, loyalty or good faith,¹² is particularly relevant for European law and shapes the multitude of legal interdependencies between the national and European institutions.¹³ As referred to in, inter alia, Articles 2, 3(3) and 24(2) TEU, as well as Articles 122(1) and 222 TFEU, this principle is at the heart of the Union system as a whole and in accordance with the

9 European Commission, ‘Energy 2020 A strategy for competitive, sustainable and secure energy’, Brussels, 10.11.2010, COM (2010) 639 final, 10.

10 European Commission, ‘A Framework Strategy for a Resilient Energy Union with a Forward-Looking Climate Change Policy’ COM (2015) 080 final.

11 Maciej Ciszewski et al., ‘The Revised Security of Gas Supply Regulation and the Role of the Commission on Inter-Governmental Agreements’ in Christopher Jones (ed), *EU Energy Law, Volume XI: The Role of Gas in the EU’s Energy Union* (Claeys & Casteels 2017) 110.

12 For further reflections on terminology refer to Marcus Klamert, *The Principle of Loyalty in EU Law* (Oxford University Press 2014) 31.

13 Armin von Bogdandy, ‘Founding Principles’ in Armin von Bogdandy and Jürgen Bast (eds) *Principles of European Constitutional Law* (Oxford: Hart Publishing) 41.

commitment to loyal cooperation laid down in Article 4(3) TEU, according to which “the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties”. This principle is considered to be one of the principles that define the characteristics of EU law and determine the relations between the Member States and the EU institutions. Advocate General E. Sharpston recently labelled solidarity as “the driving force of the European project”.¹⁴

Van Elsuwege notes that since the Treaty of Lisbon the duty of sincere cooperation (solidarity) has been significantly strengthened and it is now a reciprocal, key constitutional principle of general application in the EU legal order.¹⁵ It can be argued that the principle of energy solidarity is a manifestation and concretisation of the principle of sincere cooperation in the field of energy policy and consequently has undergone a comparable development.

Since the Lisbon Treaty introduced the energy solidarity clause, the principle has been trapped in an interpretative dilemma. On the one hand, some legal scholars, Member States and other stakeholders have questioned its nature.¹⁶ On the other hand, there has been fervent opposition to the claim that it remains a political idea that cannot be used as a legal criterion from which rights and obligations arise. What is more, Member States’ approaches towards energy solidarity seem to have also been selective – the governments have been missing or demanding solidarity concerning energy security while at the same time lacking or expecting solidarity when sharing the burden of greenhouse gas emissions reduction.¹⁷

14 Opinion of Advocate General Sharpston delivered on 31 October 2019 in Joined Cases C-715/17, C-718/17 and C-719/17 *Commission v Poland, Hungary and Czech Republic*, ECLI:EU:C:2019:917, para 253.

15 Peter van Elsuwege, ‘The Duty of Sincere Cooperation and Its Implications for Autonomous Member State Action in the Field of External Relations’ in MartonVarju (ed), *Between Compliance and Particularism, Member State Interests and European Union Law* (Springer 2019) 283–284.

16 Kim Talus, *EU Energy Law and Policy: A Critical Account* (Oxford University Press 2013) 520–521; Esin Küçük, ‘Solidarity in EU Law: An Elusive Political Statement or a Legal Principle with Substance?’ (2016) 23 (6) *Maastricht Journal of European and Comparative Law* 972.

17 Michèle Knodt and Anne Tews, ‘European Solidarity and Its Limits: Insights from Current Political Challenges’ in Andreas Grimm, Susan My Giang (eds), *Solidarity in the European Union. A Fundamental Value in Crisis* (Springer 2017) 55–58.

Finally, in 2016, the EU top court's Advocate General Mengozzi defined the principle of solidarity expressed in art. 194 TFEU as having "constitutional" nature. Mengozzi stated that "Article 194 TFEU, which introduced into EU law for the first time a primary-law provision on Union energy policy, provides, in Paragraph 1, that that policy must be pursued 'in a spirit of solidarity between the Member States'. This reference to solidarity between the Member States, which was added into the wording of the text of the Treaty of Lisbon, is made in a context in which the principle of solidarity between the Member States has taken on a character that could be defined as a 'constitutional principle'".¹⁸

If assumed that the academics and the Advocate General are right, many questions still persist. May the principle of energy solidarity, as enshrined in Article 194(1) TFEU, be understood as a binding one and therefore give rise to specific rights and obligations for the Union or the Member States or does it require substantiation in the secondary law? Does it imply support in crisis situations only or is it a rule of general application? Can it be relied on before the courts in view of its abstract nature? A case study of a recent dispute provides the answers.

3. LEGAL RECOGNITION AND DEFINITION OF THE PRINCIPLE – THE OPAL CASE

For the first ten years, the obligation from Article 194 TFEU to act "in the spirit of solidarity" remained undefined and fuelled the discussions about its legal nature. Only in the September 2019 ruling of the *Poland v. European Commission* case (T-883/16, "OPAL case")¹⁹ did the EU General Court elaborate the definition and characteristics of energy solidarity. The ruling, pointing towards the breach of this principle, annulled a 2016 Commission decision and in consequence, limited Gazprom's access to 50% of the OPAL pipeline capacity.

The judgment constitutes a systematic development of the ideas expressed by Advocate General Mengozzi and a further confirmation of the binding nature of the principle in question. To better understand the consequences of the evolution of the principle of energy solidarity to a legal rather than a purely political criterion, the following sections will be devoted to the brief analysis of the 2019 judgment and more importantly to its likely far-reaching consequences.

18 Opinion of Advocate General Mengozzi delivered on 26 July 2017 in Case C226/16 *European Bicycle Manufacturers Association (EBMA) v Giant (China) Co. Ltd.*, ECLI:EU:C:2017:615, para 32–33.

19 Case T-883/16 *Poland v Commission*, ECLI:EU:T:2019:567.

3.1. Facts and background

The gas pipeline Ostseepipeline-Anbindungsleitung (OPAL) is the terrestrial section of the Nord Stream 1 gas pipeline, with the entry point by the Baltic Sea in the north-east of Germany, and the exit point in the area of Brandov in the Czech Republic and has a capacity of about 36.5 billion m³/year. In February 2009 the Bundesnetzagentur (BNetzA), the German national regulatory authority, issued decisions exempting the planned pipeline (in service since 13 July 2011) from the application of the rules on third party access and tariff regulation set in the Directive 2003/55/EC.²⁰ The same year, the Commission adopted a decision C(2009) 4694 (“the original decision”), by which it requested the BNetzA to amend its decisions by adding certain conditions, under which a dominant undertaking, in this case, Gazprom, could reserve only 50% of the cross-border capacities of the OPAL pipeline unless it released onto the market a volume of gas of 3 billion m³/year of that pipeline under an open, transparent and non-discriminatory procedure (“gas release programme”).²¹

The pipeline started operating in July 2011 and due to its technical configuration, was supplied only with natural gas from the Nord Stream 1 pipeline, used by the Gazprom group. As the Russian consortium did not implement the gas release programme, only 50% of the transmission capacity of the “Nord Stream onshore” pipeline was used and the other half remained untapped.²² Not willing to take part in an open auction of the gas release programme, which would reveal the market price of Russian gas to its customers, Gazprom sought a revision of the 2009 decision.

In May 2016, at Gazprom’s request, the BNetzA proposed a variation of the restrictions imposed by the original decision which, in essence, lifted the cap. By decision adopted on 28 October 2016, the Commission introduced certain amendments to the German proposal and approved the revised exemption regime.²³ As a result, 50% of OPAL’s capacity was still exempted from the rules on third party access and tariff regulation and the rest would be subject to two auction regimes. Poland, considering the revised allocation sy-

20 Directive 2003/55/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in natural gas and repealing Directive 98/30/EC.

21 Case T-883/16, paras 5–7.

22 Ibid, para 11.

23 Commission Decision of 28.10.2016 on review of the exemption of the Ostseepipeline-Anbindungsleitung from the requirements on third party access and tariff regulation granted under Directive 2003/55/EC, Brussels, (2016) 6950 final.

stem to be favourable for the dominant undertaking to the detriment of energy solidarity and security of supply in the European Union, in particular in Central Europe, brought an action for annulment against the October 2016 decision (“contested decision”) to the Court of the EU.²⁴

3.2. Argumentation of the parties

In support of the action, Poland, joined by Latvia and Lithuania, relied on five pleas in law of which the first one alleged infringement of Article 36(1)(a) of Directive 2009/73/EC (“the Gas Directive”),²⁵ in conjunction with Article 194(1)(b) TFEU, and of the principle of solidarity through the granting of a new regulatory exemption for the OPAL gas pipeline, even though that exemption undermines the security of gas supplies.

Notably, the applicant submitted that the principle of solidarity referred to in Article 194(1) TFEU obliges both Member States and EU institutions to conduct the EU energy policy in a spirit of solidarity. In particular, Poland claimed that measures adopted by EU institutions that compromise the energy security of certain regions or in some Member States, including their security of gas supply, would be contrary to the principle of energy solidarity. It pointed out that the contested decision enabled Gazprom and undertakings in the Gazprom group to redirect onto the EU market additional volumes of gas by fully exploiting the capacities of the Nord Stream 1 pipeline. Taking into account the lack of significant growth in demand for natural gas in Central Europe, that would, as its only possible consequence, have an influence on the conditions of supply and use of transmission services of the pipelines competing with OPAL, namely the Braterstwo and Yamal pipelines, in the form of a reduction or even a complete interruption of the transmission of gas through those two pipelines and increase in the cost of obtaining gas. A long list of consequences which the contested decision could have had was supported by a charge made against the Commission of having failed to examine its potential negative effects.²⁶

The Commission, supported by Germany, questioned those arguments. In particular, it argued that energy solidarity is a political notion that appears in its communications and documents, whereas the contested decision must only satisfy the legal criteria laid

24 Action brought on 16 December 2016 – *Republic of Poland v Commission* (Case T-883/16), OJ C 038/68, (6 February 2017) 52.

25 Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC.

26 Case T-883/16, paras 61–64.

down in Article 36(1) of the Gas Directive. According to the defendant, the principle of solidarity between Member States set out in Article 194(1) TFEU, first, is addressed to the legislature and not to the administration applying the legislation and, second, concerns only situations of crisis in the supply or functioning of the internal gas market, whereas the Gas Directive lays down principles relating to the normal functioning of that market. In addition, the Commission disagreed that the variation of the regime under which the OPAL pipeline operated, which was approved by the contested decision, could detrimentally affect the security of supply of natural gas in central and eastern Europe in general or in Poland in particular²⁷.

3.3. Judgment of the General Court

The Court ended a longstanding discussion among legal scholars over the nature and meaning of the principle of energy solidarity. It considered first the allegation of infringement of Article 36(1)(a) of the Gas Directive as ineffective and focused its argumentation on the infringement of Article 194(1) TFEU and the principle of energy solidarity. It has to be noted that the very structure of the ruling leaves no space for further doubts on the legal significance of energy solidarity. The main considerations are split into two parts: (1) *The scope of the principle of energy solidarity* and (2) *Consideration of whether the contested decision infringes the principle of energy solidarity*, not only recognising the constitutional quality of the principle and defining its characteristics but also making clear that it can serve and serves in the case at stake as a ground for judicial review.

The first part begins with the reference to the wording of Article 194(1) TFEU as a basis for the plea and as an express legal basis for the Union's energy policy. More interestingly, it is at once clarified that the mysterious "spirit of solidarity" constitutes a specific expression in this field of the general principle of solidarity between the Member States.²⁸ The latter, according to the TEU, is at the basis of the whole Union system and entails rights and obligations both for the European Union and for the Member States.

Based on this observation, the General Court made valuable remarks on the implications of the principle of solidarity in the context of energy policy. First, it requires mutual assistance in crisis or emergency situations as regards Member States' gas supply. It cannot,

²⁷ Ibid, paras 65–66.

²⁸ Ibid, para 69; see, to that effect, also joined cases 6 and 11–69 *Commission v France*, ECLI:EU:C:1969:68, paragraph 16.

however, be limited to these extraordinary situations only, as the Commission claimed. On the contrary, the Court stressed that the principle produces a general obligation on the part of the European Union and the Member States, in the exercise of their respective powers. The general obligation is to avoid adopting measures that are likely to affect their respective interests concerning the security and diversification of supply or sources of supply as well as their economic and political viability. This interpretation refers to Schuman's declaration by reminding that the stakeholders have to follow these obligations to "take account of their interdependence and de facto solidarity".²⁹

The General Court pursued the matter of energy solidarity principle even further, by setting up the conditions of its application, according to which "the EU institutions and the Member States are obliged to take into account, in the context of the implementation of that policy, the interests of both the European Union and the various Member States and to balance those interests where there is a conflict".³⁰ Having said that, it tested whether the contested decision fulfilled these criteria and ruled that the Commission, by failing to examine the impact of the variation of the OPAL pipeline regulatory regime on the security of supply and energy policy in Poland, and by failing to balance those effects against the interest that drove its decision (supposed increased security of supply that it had found at EU level), breached the principle of energy solidarity as provided for in Article 194(1) TFEU.

3.4. Proceedings before the Court of Justice

Germany lodged an appeal against the judgement of the General Court on 20 November 2019.³¹ The appellant relied on five grounds of appeal, claiming in the first one that: "[t]he principle of energy solidarity in Article 194 TFEU is, as a general guiding principle, a purely political notion and not a legal criterion".³² Other grounds relate to the non-application of the principle in the contested decision and, as a precautionary claim, that the Commission did observe the principle of energy solidarity. Poland, Lithuania and Latvia disputed those arguments. The Commission did not appeal the decision nor did it formally intervene in support of any of the sides of the dispute. It has, however, summoned by the Court, intervened at the hearing and supported, to some extent, Germany in the first ground of appeal.³³

29 Ibid, para 73.

30 Case T-883/16, para 77.

31 Case C-848/19 P *Germany v Poland*.

32 Ibid.

33 Opinion of Advocate General Campos Sánchez Bordona delivered on 18 March 2021 in Case C 848/19 P *Germany v Poland*, ECLI:EU:C:2021:218, paras 91–93.

On 18 March 2021, Advocate General Campos Sánchez-Bordona issued an opinion in which he suggested dismissing or declaring inadmissible all of the grounds of appeal. In his view “the principle of energy solidarity under Article 194(1) TFEU produces effects which are not merely political but legal: a) as a criterion for interpreting provisions of secondary law adopted in implementation of the European Union’s powers in energy matters; b) as a means of filling any gaps identified in those provisions; and c) as a parameter for judicial review, either of the legality of the aforementioned provisions of secondary law or of decisions adopted by the bodies of the European Union in that field”.³⁴ The opinion adds an important new element to the case which has not been raised by any of the parties – it stresses that the ‘spirit of solidarity’ must guide the Union policy on energy in every one of its objectives, and should not be limited to the energy security only.³⁵

The Grand Chamber of the Court dismissed the appeal in its entirety on 15 July 2021 since none of the grounds of appeal could be upheld.³⁶ The final judgement confirmed the reasoning of the General Court on all important points: the legal character of the principle,³⁷ obligations for the EU institutions and the Member States that it entails³⁸ and a need to balance the interests of the European Union and the various Member States.³⁹ Importantly, the Grand Chamber endorsed the understanding of the Advocate General that the principle of energy solidarity governs the whole of EU energy policy: “that principle cannot, moreover, be regarded as being synonymous with or limited to the requirement to ensure the security of supply, referred to in Article 36(1) of Directive 2009/73, which is merely one of the manifestations of the principle of energy solidarity, since Article 194(1) TFEU sets out, in points (a) to (d), four different objectives which, in a spirit of solidarity between the Member States, EU energy policy aims to achieve.”⁴⁰

The OPAL case is likely to become one of the milestones of the European case law on energy and to have important implications for the interpretation and application of the rules of EU energy law.

³⁴ Ibid, para 96.

³⁵ Ibid, para 76–77 and 104.

³⁶ Case C-848/19 P, para 110.

³⁷ Ibid, paras 43–46.

³⁸ Ibid, paras 49, 52, 69, 71.

³⁹ Ibid, paras 53, 73.

⁴⁰ Ibid, para 47.

4. ENERGY SOLIDARITY IN ACTION – APPLICATION AND IMPACT OF THE PRINCIPLE

First of all, the OPAL case confirmed a constitutional and binding character of the principle of energy solidarity, placing it among such comprehensive principles as those of proportionality or subsidiarity. In particular, it made clear that an interpretation limiting this principle only to a political declaration or crisis management was wrong. The new understanding of the principle touches upon energy sovereignty and the division of competences between the Member States and the Commission which from now on have to be shared from the solidarity perspective. It will also most likely have an impact on how the future regulatory regime will be shaped, by tacitly adding new conditions which have to be met to satisfy the substantial and procedural requirements (e.g., to grant a derogation from applicable law). Beyond that, the energy solidarity principle will be even more present in the EU's energy policy and might even become a pillar of climate solidarity on the pathway to decarbonisation by 2050. Some potential implications will be analysed below.

4.1. Impact on energy sovereignty and division of competences

The CJEU reinvented the principle of energy solidarity without providing many details on the depth and application of this principle. However, it is clear that the correct interpretation of Article 194 TFEU does not allow to disregard the principle of energy solidarity in the exercise of powers in the field of energy. Understood as a qualified form of the principle of sincere cooperation, energy solidarity binds both the Member States and EU institutions:

“[I]t should be emphasised that the principle of solidarity entails rights and obligations both for the European Union and for the Member States. On the one hand, the European Union is bound by an obligation of solidarity towards the Member States and, on the other hand, the Member States are bound by an obligation of solidarity between themselves and concerning the common interest of the European Union and the policies pursued by it”.⁴¹

Although the old call for the EU to “speak with one voice” resonates once again in the OPAL case, it does not oblige the Member States to unconditionally stick together. To avoid that, the General Court introduced a two-stage test of the application of the principle. First of all, the act in question must belong to the field of energy in

41 Case T-883/16, para 70.

order to qualify for assessment from the point of view of the principle of solidarity. Secondly,

“The application of the principle of energy solidarity does not however mean that EU energy policy must never, under any circumstances, have negative impacts for the particular interests of a Member State in the field of energy. However, the EU institutions and the Member States are obliged to take into account, in the context of the implementation of that policy, the interests of both the European Union and the various Member States and to balance those interests where there is a conflict”.⁴²

The CJEU has put a reasonable limitation to the scope of energy solidarity, emphasising that it cannot lead to the conclusion that the EU’s energy policy may not, in any event, adversely affect the particular interests of the Member States. Given the sometimes-divergent interests of individual Member States, particularly given the different decisions on energy mixes and sources of supply, this reservation was justified and needed to make solidarity operational. It is therefore necessary to take account of the interests of other stakeholders to carry out a proper analysis of the circumstances relating to those interests. Secondly, the General Court pointed out that, in the event of a conflict between the interests of various actors in the field of energy security, including the EU and individual Member States, they should be subject to a balancing exercise. The principle of energy solidarity is therefore not absolute. The implementation of the rule itself amounts to balancing the interests of the Member States and the EU, for example, in assessing whether an act was not adopted for the benefit of a single Member State at the expense of the others, as the claimant argued in the present case.

The ruling raises, however, an important issue related not only to its application but also to the energy sovereignty of the Member States. Given that in the EU the competences in the energy field are divided between the EU level and the Member States, the question arises as to which of those levels the discussed judgement applies? Should the principle of energy solidarity always be a criterion for assessing the legality of every action performed in the field of energy, or is it limited to actions based on measures that have their origin in EU energy law and policy? Article 194 TFEU sets out in the first paragraph the objectives of the European energy policy which should be pursued “in the spirit of solidarity”, while stressing in the following one, that, such EU level measures “shall not affect a Member State’s right to determine the conditions for exploiting its energy resources, its choice

42 Ibid, para 77.

between different energy sources and the general structure of its energy supply, without prejudice to Article 192(2)(c).”

This famous “energy sovereignty clause” appears to be affected by the judgement, which imposes another restriction on national energy sovereignty, already substantially limited by other instruments and policies.⁴³ To assess how deeply the newly established principle can affect the Member States’ competencies and sovereign rights, I will follow and expand a double reading of the OPAL ruling proposed by Buschle and Talus.⁴⁴

The first and more expansive reading is based on the literal interpretation of the judgement and suggests that the OPAL test applies to all energy law and policy choices of the Member States, also those belonging to the sphere of their exclusive competences. That would impact the energy rights guaranteed in Article 194(2), as they would have to be exercised following the energy solidarity test. This would be highly relevant to most energy policy decisions the Member States take, including those related to their energy mixes.

Given the number of cross-border interconnections, it is hard to imagine an important shift from nuclear or coal-based electricity production to renewable sources without affecting the energy security of the neighbouring countries and the effective functioning of the concerned energy system. It would be, under the wider understanding of energy solidarity, a legal obligation to examine a possible impact of new measures on the Member States concerned. Having regard to the advanced stage of the European internal energy market integration process it is clear that close cooperation between the Member States had been a key element for this process long before the OPAL case. This ruling together with the latest European climate law⁴⁵ results in the principles of subsidiarity and solidarity along with the recognition of mutual interdependence effectively replacing the concept of energy sovereignty.⁴⁶

43 See Anna Mathews, ‘The Energy Union Governance Regulation in the Context of Member State’s Right to shape National Energy Mix’ in this volume.

44 Dirk Buschle and Kim Talus, ‘One for All and All for One? The General Court Ruling in the OPAL Case’ (2019) 5 OGEL 9, retrieved 28 May 2020 from: <<https://www.ogel.org/article.asp?key=3849>>.

45 Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 (‘European Climate Law’).

46 Buschle, Talus (n 44) 9.

According to the second and more narrow reading of the ruling energy solidarity principle would entail the same obligations but apply only to actions undertaken in the exercise of rights that have their origin in EU-level energy law and policy.⁴⁷ This more restricted interpretation is based on the background of the OPAL case, which was made of the decision of an EU institution applying EU law, not a purely national measure. Both the German measure in question and the contested decision of the Commission concerned the (non)application of EU law, being an exemption from EU-level regulation, namely the Gas Directive.

Remarkably, both interpretations increase the powers and role of the Commission, by enabling it to initiate infringement proceedings against Member States' measures that have been taken regardless of the requirements set by the principle. Hence, the Commission is enabled and obliged to assess national decision-making in line with new conditions before deciding on its compatibility with EU law, which will very possibly have an impact on how the future regulatory regime will be shaped.

4.2. Regulatory implications

The ruling was passed in the framework of an exemption procedure under the Gas Directive and will also have important implications for the assessment of future exemptions and implementation of other regulations which may fall under the scope of solidarity principle.

The derogation procedures from the revised⁴⁸ Gas Directive initiated by the BNetzA in response to applications submitted by Nord Stream AG and Nord Stream 2 AG have become the first litmus test of the effectiveness of the energy solidarity principle. BNetzA granted a derogation from the regulation for the Nord Stream 1 pipeline for the period of 20 years.⁴⁹ The German agency found that the derogation does not harm energy solidarity since the applicant analysed the markets of the CEE region in detail with a view to the solidarity principle and found no negative effects on the security of supply.⁵⁰

47 Ibid.

48 Directive (EU) 2019/692 of the European Parliament and of the Council of 17 April 2019 amending Directive 2009/73/EC concerning common rules for the internal market in natural gas.

49 Bundesnetzagentur, Derogation from regulation in accordance with section 28b EnWG, Ruling Chamber 7, proceedings BK7-19-108, retrieved 30 September 2021 from: <https://www.bundesnetzagentur.de/DE/Beschlusskammern/1_GZ/BK7-GZ/2019/BK7-19-0108/BK7-19-0108_Beschluss_DE_download.pdf?__blob=publicationFile&v=4>.

50 Ibid 41.

Unlike the first one, the application of the controversial Nord Stream 2 was rejected since it does not meet the essential criterion specified in the German Energy Industry Act, transposing the revised Gas Directive, i.e. it was not completed by 23 May 2019.⁵¹ As the initial benchmark was not met, other criteria, such as the impact on energy solidarity, competition or effective functioning of the internal market in natural gas were not examined.

The consultation requirement on the derogation from the revised Gas Directive reads as follows:

“Where the transmission line concerned is located in the territory of more than one Member State, the Member State in the territory of which the first connection point with the Member States’ network is located shall decide whether to grant a derogation for that transmission line after consulting all the Member States concerned”.⁵²

Although this means that consultation was not compulsory in the case of Nord Stream 2, as it crosses only German territorial waters (in the case of Nord Stream 1 it is German and Danish), the BNetzA decided to carry out broad consultations. In the course of proceedings, it consulted all EU Member States, which had the opportunity to analyse the applications and to submit their responses. This diligent consulting can be seen either as a sign of confusion of procedures (broader consultations would be required under the exemption procedure from Article 36) or, more likely, as a precautionary measure taken in case the Commission would decide to scrutinise BNetzA’s decisions in light of the principle of energy solidarity.

As results from the OPAL case and as shown by the example of Nord Stream 2 derogation procedure, it seems that no exemption or derogation can be granted without considering the solidarity principle and the impact of the infrastructure in question on other Member States. It is, however, still not known how this impact should be assessed, what factors should be considered and how various interests should be balanced. Should the impact of gas infrastructure be checked and balanced against gas-related interests only or is it

51 Bundesnetzagentur, Derogation from regulation in accordance with section 28b EnWG, Ruling Chamber 7, proceedings BK7-20-004, retrieved 30 September 2021 from: <https://www.bundesnetzagentur.de/DE/Beschlusskammern/1_GZ/BK7-GZ/2020/BK7-20-0004/BK7-20-0004_Beschluss_EN_download.pdf?__blob=publicationFile&v=3>.

52 Consolidated text: Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC, Article 49a(2), retrieved 16 May 2020 from: <<https://eur-lex.europa.eu/eli/dir/2009/73/2019-05-23>>.

legitimate to raise concerns of its influence on other energy markets or the climate? What is the standard to be imposed on the Member State – is it enough to demonstrate that it has consulted the decision with its neighbours or must it also provide a reasoned decision as to why it has rejected their concerns and explain how exactly it has balanced all the interests? And finally, is the Commission entitled to perform a balancing exercise on its own and on what ground should this delicate and difficult task be carried out?

These questions cannot be ignored, but one also needs to ask why the CJEU decided to push for this understanding of energy solidarity and what would be the alternative to solidarity-driven integration? At first sight, the CJEU proposed a reasonable solution: application of a balancing mechanism employing the principle of proportionality including the requirement of appropriateness, necessity and proportionality *stricto sensu*. The principle forged in the OPAL case gives due attention to the interests of all, even smaller, countries and can serve as a unifying tool that brings the Member States even closer and strengthens their *de facto* solidarity. It comes however at a price of – at least interim – legal uncertainty as to its applicability. Legal certainty and answers to the above questions will come with time once the courts will have an opportunity to better identify the shape and missing elements of the principle. What is more pressing for the proper application of energy solidarity is the Member States' will to pursue dialogue and sincerely cooperate.

4.3. Policy implications

Whereas the OPAL judgement offers an imperfect mechanism for implementation, it also gives a chance to develop a truly shared European approach toward the multifaceted principle of energy solidarity. There have been political, economic, historical and social factors that led to conflicting outlooks from governments on this issue. Differences in the availability of energy sources, financial assets, technologies and political legacies are still reflected in the energy mixes and perceptions on energy solidarity of the Member States.

With a proposal for concrete actions, the CJEU takes energy solidarity far beyond financial support and enables a change in perception of this principle that may also lead to wider social and economic solidarity that surpasses financial transfers from the “rich” to the “poor”. Judicial activism of the Court, together with policy entrepreneurship of the Member States, is likely to inspire policy change that assigns solidarity a greater role not only in EU energy policy but also climate policy at a crucial time when the future of the EU energy systems is being shaped by the ambitious goal of climate neutrality by 2050.

Ursula von der Leyen, when calling for climate neutrality in her Opening Statement in the European Parliament, declared that:

“We need a just transition for all. Not all of our regions have the same starting point – but we all share the same destination. This is why I will propose a **Just Transition Fund** to support those most affected”.⁵³

A political declaration supported by the European Parliament’s Committee on Industry, Research and Energy chaired by Jerzy Buzek who strongly advocated for the creation of such a fund,⁵⁴ was soon followed by a legislative proposal.⁵⁵ The Just Transition Fund as the first pillar of a more robust Just Transition Mechanism intends to allocate important financial resources and provide support in the transition towards climate neutrality to the regions that will be most affected by the structural change on the way to climate neutrality.⁵⁶

These recent developments, driven by the European Green Deal,⁵⁷ show that energy solidarity may eventually evolve into climate solidarity, as the fight against climate change is one of the areas that illustrates and has justified the implementation of enhanced solidarity.⁵⁸ The EU’s climate action, based on fair burden sharing and mutual commitments for the achievement of a common goal, already represents a form of solidarity. It remains to

53 European Commission, ‘Opening Statement in the European Parliament Plenary Session by Ursula von der Leyen, Candidate for President of the European Commission’, retrieved 24 May 2020 from: https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_19_4230.

54 ‘Buzek: A new fund will make a just energy transition possible (INTERVIEW)’ (*BiznesAlert.pl*, 17 April 2019), retrieved 24 May 2020 from: <https://biznesalert.com/buzek-energy-transformation-itre/>; Opinion of the Committee on Industry, Research and Energy for the Committee on Budgets on the Interim report on MFF 2021–2027 - Parliament’s position in view of an agreement, 2018/0166R(APP), Rapporteur for opinion: Jerzy Buzek, retrieved 24 May 2020 from: https://www.europarl.europa.eu/doceo/document/ITRE-AD-625481_EN.html?redirect.

55 European Commission, ‘Proposal for a Regulation of the European Parliament and of the Council establishing the Just Transition Fund’ (Brussels, 14 January 2020) COM (2020) 22 final.

56 Note that amid the COVID-19 pandemic of 2020 the Commission proposed to strengthen the JFT with an additional €32.5 billion: Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions: ‘Europe’s moment: Repair and Prepare for the Next Generation’ (Brussels, 27 May 2020), COM (2020) 456 final.

57 Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, ‘The European Green Deal’ COM (2019) 640 final.

58 Andoura (n 8) 18.

be seen whether climate solidarity will pave the way to just and efficient decarbonisation and reduction of regional disparities or will it be used as a tool to slow down the transition for the sake of particular interests of the Member States under the guise of “solidarity”.

In light of my considerations on the consequences of the OPAL case and given the re-orientation of the EU energy policy towards decarbonisation, it is not unimaginable that the Member States’ right to decide upon their energy mixes will transform from an absolute one to one that can only be exercised “in the spirit of solidarity”. Making solidarity operational – just like the effort of the energy and climate transition – will require the Member States to change the paradigm of their energy policies and to move away from energy sovereignty by truly embracing their *de facto* interdependence.

5. CONCLUSION

Energy solidarity is a dynamic concept that has developed over the years, mainly in response to emergencies or disruptive threats. The evolution of this principle proves that it is by no means a form of moral selflessness. This is illustrated by the selective approaches of the Member States towards energy solidarity, which varied depending on what interests were at stake. Even though the inclusion of “the spirit of solidarity” in the Treaty of Lisbon might have determined its legal nature, it did not provide any ultimate answers about its definition, scope or application.

I inferred from the wording of the Treaty that energy solidarity, understood as a specific expression of the principle of loyal cooperation, has become a constitutional principle after Lisbon. However, the lack of a clear definition has trapped this principle in an interpretative dilemma between, on the one side, the legal principle of general application in the energy policy and, on the other, the political declaration of mutual support in case of a crisis. Even when it seemed that the General Court has solved this dilemma in the OPAL case, Germany brought an appeal against the judgement, claiming again that the principle is not a legal criterion but “a purely political notion” – which epitomises the problem the EU has with (energy) solidarity. Since the judgement was upheld by the CJEU in July 2021, the understanding of energy solidarity is no longer the same. One will have to split their analysis between the “pre-OPAL” and “post-OPAL” eras when studying this principle.

The CJEU confirmed a constitutional and legally binding character of the principle of energy solidarity, proving that an interpretation only limited to crisis management was wrong. The principle calls the Member States to change the paradigm of their policymaking

in the energy field by moving away from energy sovereignty which does not take account of their interdependence. To make energy solidarity operational, the General Court introduced a specific “energy solidarity test” where various interests have to be examined and balanced in case of a conflict, which places the principle in question among such comprehensive principles as those of proportionality or subsidiarity. Energy solidarity will not only have an impact on the market and regulatory fate of energy infrastructure such as Nord Stream 2 but also a vital role in EU energy and climate governance towards climate neutrality by 2050. The new understanding of energy solidarity touches upon the delicate question of energy sovereignty of the Member States. It appears that their right to decide on their energy mixes, already substantially limited by other instruments and policies, might transform from an absolute one to one that can only be exercised ‘in the spirit of solidarity’.

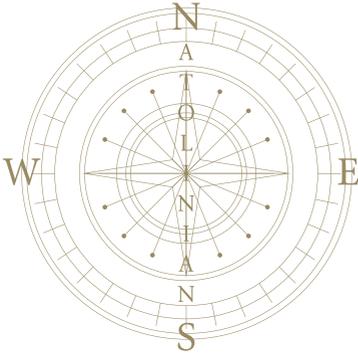
What if the judgement of the General Court was set aside by the CJEU? In every scenario, further clarification from the European courts would be needed. One should remember that the European energy policy is not and cannot be limited to the matter of solidarity. It consists of three major components: “competition that stimulates, cooperation that reinforces and solidarity that unites”.⁵⁹ Even without a definition and a test introduced in the OPAL case, solidarity remains a founding value of the Union which has market rules and mechanisms that help create solidarity and limit the risks of uncompetitive or abusive behaviours of the Member States and stakeholders.

However, a model of selective solidarity and interpretative dilemma does not seem to be a viable option if Europe wants to face the challenge of climate change in an effective and socially acceptable way. This will require a unifying force of solidarity instead, which will not materialise if the Member States do not break with the policymaking which does not consider others’ interests. Energy is therefore yet another field where a shift from a national perspective to a shared one is desired.

As Jacques Delors said: “Solidarity mechanisms are not based on pure generosity but enlightened self-interest”⁶⁰. It remains to be seen if and how enlightened the Member States and EU institutions will be when defending their self-interest. The realisation of the principle of energy solidarity appears demanding, but eventually promising.

⁵⁹ Andoura (n 8) 16.

⁶⁰ Jacques Delors, Foreword to Sofia Fernandes and Eulalia Rubio (eds) ‘Solidarity within the Eurozone: How much, what for, for how long?’ (2012) Report of Notre Europe, retrieved 4 May 2020 from: < <https://institutdelors.eu/wp-content/uploads/2018/01/solidarityemus.fernandes-e.rubiofeb2012.pdf>>.



CHAPTER 3

*Rethinking Energy Diversification
in the Baltic States:
How Divergences in Threats
Construction Shape National
Policy Agendas*

BY GIANMARCO RIVA



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1. INTRODUCTION

Since independence was regained in 1991, energy reliance on Russia has represented an ever-increasing concern for the Baltic States. The three countries had been dependent on Russia's electricity and gas because of their supply network designed and constructed during the Soviet Era. This condition made them energy islands, isolated from the EU energy markets and, once the three states joined the EU and NATO in 2004, they became the most vulnerable member states. Differently from other post-Soviet states, the Baltics were not transit routes for Russian gas exports to Western markets,¹ a situation that significantly increased the perception of their vulnerability. In this regard, Lithuania was the only country enjoying a different position, being a transit territory to the Russian enclave of Kaliningrad. This fact has been often exploited by Vilnius as a bargaining tool vis-à-vis Moscow over the years². Being the energy systems of the Baltics structurally equal and equally dependent on one single foreign provider for almost all of their oil and natural gas supply, the necessity of mustering national energy resources to ensure economic welfare has thenceforth ranked as a priority issue on their governments' agendas.

Structural conditions alone were not the only factor driving the Baltics' struggle for energy independence. The supply network has allowed Moscow to benefit from its privileged position as a monopolistic energy supplier to preserve a certain influence over its post-Soviet satellites, exposing their susceptibilities to possible gas cut-offs. This tendency became more frequent under the leadership of Vladimir Putin, using dependency as a means to achieve the objectives of Russia's foreign and energy policy.³ Recently occurred episodes include the interruption of oil supplies to Latvian port operator Ventspils Nafta (VN) in 2003, to the Lithuanian oil refinery Mazeikiu Nafta (MN) since 2006 and to the oil supply rail route to Estonia in May 2007. Such coercive attempts aimed to punish the Baltic governments for adopting policies that were not in accordance with Russia's interests.⁴

1 Andrea Prontera, *The new politics of energy security in the European Union and beyond: states, markets, institutions* (Taylor & Francis 2017).

2 Daniel W. Drezner, *The Sanctions Paradox: Economic Statecraft and International Relations* (Cambridge University Press 1999); Agnia Grigas, *The Politics of Energy and Memory Between the Baltic States and Russia*. (Routledge 2013); Matúš Mišík and Veronika Prachárová, 'Before "Independence" Arrived: Interdependence in Energy Relations Between Lithuania and Russia' (2016) 21 (3) *Geopolitics* 579–604.

3 Gianmarco Riva, 'The Baltic States and Energy Security: How Else Can the EU Foster Their Energy Resilience in the Face of Russian Pressure?' (2020) 665 *PONARS Eurasia*.

4 Agnia Grigas, 'Legacies, Coercion and Soft Power: Russian Influence in the Baltic States' (Chatham House 2012) 4.

In the light of such controversy, over the following years Estonia, Latvia and Lithuania put in place a series of initiatives aimed at increasing their energy security vis-à-vis Russia on the one hand, and to integrate into the European energy market on the other hand. To this end, the EU has been taking various steps to help the Baltic states in advancing their energy diversification and integration, for instance, by funding programs and policy directives. The new regulatory momentum was inaugurated with the launch, in 2009, of the Baltic Energy Market Interconnection Plan (BEMIP), an initiative meant to achieve an integrated regional electricity and gas market with the EU, thus ending the Baltics' energy isolation.⁵ As part of it, a number of Projects of Common Interest (PCI) have been implemented across the three states. In the electricity sector, key infrastructure initiatives include the two high-voltage direct current (HVDC) submarine power cables Estlink 1 and Estlink 2, connecting Estonia and Finland; the NordBalt power cable (also known as SwedLit) between Lithuania and Sweden; the LitPol interconnection link between the Lithuanian and the Polish electricity systems. Regarding the gas sector, major projects are (i) the Gas Interconnection Poland-Lithuania (GIPL) expected to be operational at the end of 2021, and (ii) the Baltic connector – a bidirectional natural gas pipeline between Estonia and Finland entered into commercial use since 2020. As a whole, these projects have improved the Baltics' integration in the EU's energy market, increasing the overall security of their regional gas and electricity supply. To date, the three countries are one of the best-interconnected regions in Europe, with an interconnectivity level amounting to 23%.⁶

Despite positive achievements that have enhanced the energy security of the Baltic states by decreasing their sensitivity to potential supply disruptions,⁷ their full integration in the EU network has been fraught with difficulties, challenges and disagreements among key actors, which often jeopardize the coordination and implementation of strategic projects. Issues remained unresolved with respect to both gas and electricity sectors due to the scarcity or the lack of inter-regional agreements between key actors.⁸ Arguments often arose about either how to implement the synchronization process or where to allocate re-

5 European Commission, 'Baltic Energy Market Interconnection Plan' (2014) <https://ec.europa.eu/energy/topics/infrastructure/high-level-groups/baltic-energy-market-interconnection-plan_en>.

6 Ibid.

7 Ramūnas Vilpišauskas, 'The evolving agenda of energy security in the Baltic Sea region: Persistent divergences in the perception of threats and state-market relationship' in Andris Sprūds, Māris Andžāns (eds), *Security in the Baltic Sea region: Realities and prospects* (Latvian Institute of International Affairs 2017) 187–199.

8 Irma Paceviciute, 'Towards the Energy Union: the BEMIP and the case of Lithuania' (2017) 17 LAI Working Papers; Vilpišauskas (n 7); Grigas (n 4).

gional strategic projects, such as the LNG terminals. The absence of union between Tallinn, Riga, and Vilnius when it comes to deciding about what is secure for all has thus represented a hindering factor to a regionally coordinated approach towards energy security challenges. What comes out of this uncooperative attitude is that the three states have often found themselves prioritizing national conveniences to the detriment of regional energy interests.

Departing from this standpoint, this study aims to identify rationales for the uneven tendencies of regional cooperation in the Baltic States when it comes to approaching energy security challenges. The ultimate purpose is to articulate a conceptual narrative of energy security that could highlight its political and contested nature. The central theme will be that of subjectivity and how constructions and perceptions of economic or security narratives are critical for addressing energy security issues. With the priority accorded to politics, and whilst recognizing that any extensive understanding of energy security necessitates drawing from a multiplicity of disciplines, a literature review is first conducted by locating the concept within the discipline of security studies, specifically within the theoretical realms of securitization theory. Secondly, an analytical framework is offered to provide a view on the methodology adopted, the hypothesis chosen and the criteria selected to test them. The fourth part – empirical analysis – will be dedicated to investigating from a comparative perspective the energy diversification and integration policies of the Baltic States, by taking into account their energy dependence on Russia. Finally, conclusions are drawn based on the findings.

2. LITERATURE REVIEW: WHAT SECURITIZATION THEORY CAN OFFER TO ENRICH THE ACADEMIC DEBATE

Reviewing the literature around the topic one can easily find a wide variety of academic production dedicated to investigating the reasons lying behind the lack of coordination in the Baltics' energy policies. In general terms, two different typology factors are detected: exogenous and endogenous, both of which can be considered mutually reinforcing. Concerning the first category, some scholars⁹ acknowledged Russia's energy diplomacy towards the region, which encompasses both hard power (coercive measures include use of sanctions or gas/oil cuts-off) and soft power (penetration by business interests, political lobbying and party financing, networking and strategic partnership with major natural

9 Grigas (n 4); Zachary Hanson, *Russia's Energy Diplomacy in the Baltic States* (Virginia Commonwealth University 2013); Arunas Molis, 'Rethinking EU-Russia Energy Relations: What do the Baltic States Want?' (The Study Programme on European Security (SPES) 2011).

gas companies) measures.¹⁰ Others have attributed the lack of common action to the EU increasing interventionist approach towards energy policy, which since the adoption of the Third Energy Package in 2009 shifted from a purely legislative to a more interventionist agenda by emphasizing regional cooperation and joint projects. Contrary to the expectations, this change of policy has led to a different level of market liberalization, which in turn spurred competition and held back market integration.¹¹ As a result, even if the Baltic states found a way to bring their energy policies in line with the EU to catch up with market integration, all three managed to safeguard domestic energy interests, even when these hindered the development of more effective regional cooperative practices. On the other hand, endogenous factors include unequal levels of commitment when it comes to deciding on joint infrastructure,¹² lack of consensus among the three states towards their energy relations with Russia, different domestic energy mixes¹³ and domestic political systems characterized by weak political parties vying for power. The latter factor is particularly problematic in the context of sensitive issues such as energy policy, which may often induce such parties to fragment, thereby making consistent and united policies towards Russia not easy to achieve.¹⁴

Overall, the explanations of these authors refer to factors of political and/or economic nature, be they of external or internal origin. In this sense, it seems that just a few pieces of academic production have so far tried to investigate the issue at hand from a different perspective. One is by Arunas Molis¹⁵ where the author explains how the absence of Baltic solidarity towards energy challenges may be due to a problem of interpretation. The object of his analysis are the two directives of the Third Legislative Package – the

10 Grigas (n 4); Filippou Proedrou, 'Russian Energy Policy and Structural Power in Europe' (2018) 70 *Europe-Asia Studies* 75–89.

11 Vija Pakalkaitė and Joshua Posaner, 'The Baltics: Between Competition and Cooperation' in Jakub Godzimirski (ed), *New Political Economy of Energy in Europe* (Palgrave Macmillan 2019) 215–237.

12 Simon Hollerbauer, 'Baltic energy sources: diversifying away from Russia' (*Foreign Policy Research Institute*, 14 June 2017), available at: <<https://www.fpri.org/article/2017/06/baltic-energy-sources-diversifying-away-russia/>>.

13 Grigas (n 4).

14 Ibid.

15 Molis (n 9).

electricity directive 2009/72/EC¹⁶ and the gas directive 2009/73/EC¹⁷ respectively. While acknowledging the benefits that both directives have brought to the Baltic states in terms of diversification, market liberalization, and infrastructure expansion, the author notes that they did not enhance cooperation between the three countries. This, in turn, leaves a certain room for uncooperative practices in both sectors, as a result of which agreeing on a common ground for the strategic allocation of projects within the region has often proved uneasy.¹⁸ In this respect, the term ‘solidarity’ often could fall prey to different understandings by the states, which might understand it as either providing support to neighbouring countries or cohesively pursuing long-term goals.¹⁹

Consequently, the divergent understanding can result in member states displaying unequal levels of commitment in pursuing projects of regional importance, such as those envisaged by the BEMIP initiative. Looking at how the Baltics have been dealing with high energy import dependence from this perspective, it is not surprising to note that such seemingly cooperative states have instead endeavoured diverging approaches. As noted by Aboltis, only Estonia and Lithuania out of the three countries have implemented the requirements of the gas directive straight away by unbundling TSOs and developing rules regulating access to and the use of natural gas transmission systems. For its part, Latvian policymakers have instead given in to lobbies controlling national gas and have in turn adopted decisions that obstacles liberalization of the market and obstruct its effective functioning.²⁰ This seems to indicate that the three states have a different understanding of what ‘solidarity’ would mean with Estonia and Lithuania comprehending it more as ‘cohesiveness in pursuing goals’ while Latvia as ‘mutual help’. In conclusion, the ‘solidarity’ principle proves to be a contested concept that influenced the way a country posits itself with respect to its domestic and external energy policy.

16 Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC, OJ L 211.

17 Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC, OJ L 211.

18 Paceviciute (n 8).

19 Molis (n 9) 84.

20 Aboltniš Reinis, ‘Natural Gas in the Baltic States: The Dividing Factor’ in Liutho Kari (ed), *Natural Gas Revolution and the Baltic Sea Region* (Turku: Centrum Balticum, BSR Policy Briefing 2015) 148–160.

While the literature on the topic has been helpful in exploring some of the determinants of the Baltics' uncooperative tradition in pursuing energy policy, there is a dimension that remains unexplored: securitization theory. According to a securitization logic, the process of energy integration and diversification undertaken by Estonia, Latvia, and Lithuania can be perceived as a way to securitise their dependence on Russia as the single source of supply, which is recognized as the main security concern to their national energy security. In this regard, the fact that Russia represented the main security concern of the Baltic states has been acknowledged by prominent scholars in the field of security studies to the point that some of them have come to identify the three countries as an inter-linked entity or a 'regional security complex' (RSC).²¹ This indicates that, as also Kaksi concluded in extensive research on the topic, the primary security concerns of the Baltic States are so closely interlinked that they cannot be properly understood separately.²² Transposing this condition to the sphere of energy security, it is possible to have an 'energy regional security complex' characterized by a status of energy dependence and the same perceptions of this dependence as a security threat.²³ Countries within an energy regional security complex usually identify the same energy security threats and build up similar visions of energy security. In other words, securitisation of energy security threats is valid for the whole group. Having in mind that the main security concern in the Baltics energy policy has always been represented by their energy dependence on Russian supplies and, considering that Estonia, Latvia, and Lithuania up until 2012 (when the implementation of projects to diversify energy resources started to progress) shared the same level of dependence on Russia – about 90% for oil and 100% for gas,²⁴ one might then expect that the securitization process of their energy dependence would have started and subsequently materialized in an equal way across the three countries. However, the reality has shown that it was not the case, with Lithuania generally being most vocal and willing to advance with diversification and integration.

In this regard, the benefit of adopting the security studies approach to investigate determinants for the lack of cooperation in the Baltics is its capacity to expand the scope of research by introducing a new form of analysis. The security study approach adopted

21 Barry Buzan, Ole Wæver, *Regions and Powers: The Structure of International Security* (Cambridge University Press 2003).

22 Antti Kaksi, *The security complex: a theoretical analysis and the Baltic case* (Turun yliopisto 2001) 158–160.

23 Mikko Palonkorpi, *Energy security and the regional security complex theory* (Aleksanteri Institute, University of Helsinki. Manuscript 2007).

24 Grigas (n 4) 3.

acknowledges that energy security is not an objective but, instead, a socially constructed reality and that conceptualization of energy security is framed and influenced by social, political, cultural and economic conditions. Notably, as Ole Weaver wrote, the analysis of securitization practices can disclose some causal mechanisms and provide hypotheses about reasons why certain issues and not others were securitized and what significant changes, if any, that securitization brought about.²⁵ In the context of the Baltic States' energy sector, I, therefore, deem the study of securitization practices to be necessary as it can provide useful insights about the developments of inter-state behavioural dynamics under the pressure of energy security concerns from an alternative perspective.

3. ANALYTICAL FRAMEWORK: ASSESSING SECURITIZATION PRACTICES IN A COMPARATIVE PERSPECTIVE

This study is elaborated by using qualitative research methods and aims at investigating, in a comparative perspective, causal factors, ends and means of energy diversification policies carried out by Estonia, Latvia, and Lithuania throughout the past decade. Specifically, it wants to prove explanations of what factors have contributed to the lack of unity amongst the three countries on how to address energy security challenges. In this respect, the analytical comparison of the national strategic documents of Estonia, Latvia, and Lithuania is ultimately aimed at verifying: (a) possible rationales behind the three countries' uneven tendencies for inter-state cooperation when it comes to approaching energy security challenges and (b) whether and how securitization processes of each energy sector unfolded and whether similarities are detectable between them.

Assessment of different energy policies is carried out by analyzing the respective national strategic documents of each Baltic republic from the biennium 2009–2010. This date has been chosen by the author as a reference point for two major reasons: first, it marks the launch of the Baltic Energy Market Interconnection Plan (BEMIP), i.e., the regional initiative introduced with the primary objective of achieving an open and fully integrated regional gas and electricity market between the EU and the countries of the Baltic Sea region, thus ending the energy isolation thereof (EC, 2014); secondly, it coincides with the two major gas disputes erupted between Kyiv and Moscow, which have been widely perceived as symptoms of convergence in the Baltic States' security concerns towards Russian energy policy as well as of an increased geo-politicization of the EU energy paradigm. In this sense, the period 2009–2010 can be regarded as a reasonable point of departure

25 Ole Wæver, 'Politics, security, theory' (2011) 42 (4–5) *Security dialogue* 465–480.

from which to begin analyzing significant changes and adaptation in the energy policies of Estonia, Latvia, and Lithuania, especially considering their political resonance within the changing EU energy agenda and the strategies thereof in the broader spectrum of EU-Russia energy relations.

The main hypothesis is that energy dependence on Russia, despite being factually the same, has not come to be recognized, accepted as a 'security' issue and then securitized by all three states equally. If this hypothesis will be proved, it would imply that: (a) the lack of a regional consensus among the Baltic States on how to address energy security challenges is to be attributed to additional factors other than the merely economic, political and structural ones proposed by the literature so far; (b) in contradiction to what has been acknowledged by the existing literature, the Baltics shall not constitute an energy Regional Security Complex as perceptions of threats to energy security are not shared, thereby making the securitization process not valid for the whole group.

To test the hypothesis, a comparative analysis on the national security and energy strategies and proposed energy projects of Estonia, Latvia and Lithuania since 2009 has been conducted. The choice of focusing the attention of the analysis on national security and energy strategies instead of speech acts alone, as much often do studies devoted to investigating securitisation in the 'classic' formulation of the Copenhagen School, follows the logic that the process of securitization, to gain legitimacy and obtain a successful response by the audience is to be formalized by national governments within national security documents and agendas. It follows that focusing the analysis merely on illocutionary speech acts would likely result in a study that exposes intentional warmongering of political actors²⁶ but which leaves unspecified both the context (in which such acts happen) and the audience response, thus leaving the link between rhetoric and practice implied. The aim of conducting a comparative analysis of the national strategic documents is to discover: (i) what determinants have led Estonia, Latvia and Lithuania to accept or not their energy dependence on Russia as a "security" issue; (ii) what reasons laid behind the three countries' attempt to securitize or not their energy dependence; (iii) why securitization of the energy dependence happened or not.

Criteria to evaluate the securitization process relates to questions such as *how*, *why*, and *does* each country securitize energy dependence in its strategic documents. These criteria provide characteristics not only regarding proclamations of a threat but also to the secu-

26 Stefano Guzzini, 'Securitization as a Causal Mechanism' (2011) 42 (4–5) Security Dialogue 329–341.

ritization process in its complexity, including the motives behind it, the sources adopted to conduct it and the main consequences it led to. In this comparative analysis the following criteria are employed:

(a) Inclusion of 'energy dependence' as a security concern. Given that the general result of a securitization act is the designation of an issue as an object of concern, if energy dependence is mentioned in national security strategies, this would mean that it is the expression of the national consensus to define such particular issue as a "threat" and therefore, it can be considered as an act of securitization.

(b) The type of frame adopted. It is generally acknowledged that "energy security" falls prey to subjective interpretation as it can be understood differently in relation to the framework within which the notion is inscribed: security or economic. If the security framework is adopted, energy security tends to be generally conceived as "security of supply", meaning constant access to reliable energy resources. In this sense, the attention is focused on the reliability of the supplier, which is considered more important than the price of the resources supplied. On the contrary, if the economic framework is adopted, energy security is usually conceived as "affordability", meaning the availability of cheap resources. In this regard, economic considerations prevail over political ones. With respect to the comparative analysis of national strategic documents, if "energy security" is referred to as energy supply at affordable prices to promote economic growth, this means that an economic frame is adopted; on the other hand, if energy security is described as a competitive sector with associated political risks, then it would mean that a security frame is adopted. The adoption of a security frame in national strategy would indicate the intentions of using extraordinary means to solve energy issues.

(c) The nature of the energy threat. According to Barry Buzan's notion of historical *amity* and *enmity*, energy dependence tends to be more securitized if it is linked to controversy or conflict²⁷ since energy dependence can be perceived as either positive or negative. In the latter case, the securitization process tends to be driven by a 'self/us' versus 'other/them' threat and security logic. Accordingly, the presence of Russia as a single dominant energy supplier in the Baltics' energy sector plays a substantial role in the securitization process as it becomes more easily associated with an antagonistic 'other' posing a threat. Concerning my analysis, if the Russian 'other' is central to a national security strategy (meaning that it is considered in closer relationship with political issues), this would imply that energy cooperation with Russia is perceived as undesirable, thereby legitimizing the securitization process. On the other hand, if Russian 'other' is not found in or is marginal to a national security strategy, this might imply, conversely, that energy cooperation

27 Barry Buzan, *People, States and Fear: An Agenda for International Security Studies in The Post-Cold War Era* (2nd edn, Harvester Wheatsheaf 2008).

with Russia is not perceived as undesirable and, as such, securitization is not acted on.

(d) Extraordinary measures. According to securitization theorists, through a securitization process, a state actor designates and transform subjects into “security” matters, thereby enabling the adoption of extraordinary means in the name of security.²⁸ What Buzan and Wæver assert is that successfully securitized subjects are given disproportionate attention and resources as compared to unsuccessfully or non-securitized subjects. This indicates that, if initiated, the securitization process has the purpose of resulting in ‘extraordinary’ policy changes that would be inconceivable without a securitization attempt. To identify specific energy projects that can be considered as ‘extraordinary measures’, the criteria proposed by the Copenhagen School will be adopted. These are: (i) the novelty of the projects (new initiatives as compared to ordinary ones might be considered as extraordinary); (ii) the cost of the projects (the more financial investments are required by a given initiative, the more atypical as an energy security-oriented measure it may be); (iii) the scale of the projects (the more actors involved; the more likely a given project can be defined as ‘extraordinary’). This implies that big-scale regional initiatives as compared to national small-scale ones are more likely to be treated as atypical; (iv) the time of realisation (the longer it takes for a project to be realised, the more extraordinary and atypical it can be considered).

4. EMPIRICAL ANALYSIS

4.1. Estonia

National Security Concept of Estonia

The National Security Concept of Estonia (NSC) is the major strategic document aimed at establishing the objectives, directions and principles of the country’s security policy. Whilst strongly pledged to sustain multilateral co-operative practices allowing the advancement of political dialogue and security, the ultimate goal of the country’s security policy is that of safeguarding Estonia’s independence and sovereignty.²⁹ This objective finds application also in the electricity sector, where the notion of energy dependence occupies a quite central position.³⁰ Notably, the reduction of energy dependence on energy imports is depicted as a vital policy goal for Estonia, not only for enhancing the overall

28 Barry Buzan, Ole Wæver and Jaap De Wilde, *Security: A New Framework for Analysis* (Lynne Rienner Publishers 1998) 25.

29 Ministry of Foreign Affairs of Estonia, ‘National Security Concept of Estonia (2010)’ 4, available at: <<https://vm.ee/en/national-security-concept-estonia-2010>>.

30 Ibid 19.

efficiency of its energy sector but also for maximizing utilization of renewable energy options and improving at best the security of energy supply.

In the NSC, the notion of 'energy security' tends to be associated with the concept of 'security of supply', understood as secure access to reliable energy sources.³¹ Hence, the importer decides to devote more attention to the trustworthiness of the supplier than the price of the source supplied, letting the security aspect prevail over economic considerations. This shows that, when it comes to conceptualizing energy issues (i.e., energy dependence), Estonia tends to frame them by adopting a security logic. In doing so, the energy sector, as well as the problems related to it, come to be more easily associated with political risk, implicitly underlining the necessity to undertake proper measures in response thereof.

The presence of Russia within the document is relatively sporadic. Out of a total of 21 pages, Russia is referred to four times only: at page 7 the NSC acknowledges Russia's leaning to use military force as well as its energy resources as political and economic means, recognizing that the interests of its foreign and energy policy are defined departing from the country's attempt to restore its 'superpower' status; at page 8 the NSC underlies that Estonia's capacity and ability to pursue economic activities is highly sensitive to external economic and political pressure, both within and outside the energy sphere; finally, at page 12 it is highlighted that Estonia intends to pursue an open dialogue with Russia in multiple sectors and aims at finding opportunities to advance practical cooperation. In conclusion, if, on the one hand, Russia's entanglement in the Estonian energy environment appears to be attached great political salience, thus indicating a certain degree of 'othering' towards Moscow (energy relationships are seen as detrimental), on the other hand, Estonia does not seem to perceive Russia as an utterly antagonistic Other. Indeed, as the NSC reports, the former shows the intention to pursue an open dialogue with the latter in a spirit of mutual collaboration.

Securitization of Estonia's energy sector

Out of a totality of six major energy projects and activities that Estonia has planned to undertake for the achievement of the objectives set down in the National Energy Devel-

31 Ibid 18.

opment Plan (NEDP) until 2020,³² five of them seem to be not new, relatively low cost and national in terms of their scale, and with a short realization term. These are: (i) the enhancement of the total capacity of offshore wind farms from 200 to 1200 MW³³ – as it came to developing already existing infrastructures, the project cannot be considered a novelty in itself and did not represent a significantly expensive investment either. Also, considering its objective being to offset the instability of wind turbines as well as cover possible consumption peaks within the country, it is logical to regard its scale as national. Finally, being the envisaged activity limited in time (renovations were planned to be implemented gradually and on a yearly basis), the project does not meet the fourth criteria either, i.e., long implementation term; (ii) the HVDC submarine power cable, Estlink 2.³⁴ This project met only two out of the four criteria set to identify an extraordinary measure, namely the cost (320m EUR) and the scale (connecting the electricity system of Estonia and Finland the project can be considered to have a regional dimension). Concerning the first and fifth criteria, Estlink 2 could not be considered as a cutting-edge initiative since it represented a duplication of the already present Estlink 1 connection. Besides, the project was envisaged to be completed in four years, so its realization term was not long enough to consider the measure as extraordinary; (iii) Establishment of IEA compliant liquid fuel stocks.³⁵ This activity does not meet any of the criteria as it is not new, it is not the most expensive investment that the Estonian energy sector had to face, it is national in scale and it has a short realization term; the same considerations apply to initiative (iv), i.e., modernization of the already existing energy infrastructure in Kiisa and Narva;³⁶ (v) the construction of a new fossil fuel power plant (PP) project in Narva.³⁷ This project cannot be considered new since there were already other power plants in the area. Also, its scale cannot be defined as regional because the scope of its activity is focused on the domestic provision of electricity. Finally, despite representing one of the most expensive projects

32 Ministry of Economic Affairs and Communications of Estonia, 'National Energy Agency Development Plan Until 2020' (Republic of Estonia, Ministry of Economic Affairs and Communications 2021), available at: <<https://www.riigiteataja.ee/aktiilsa/0000/1319/4286/13195400.pdf>>.

33 Ibid 20.

34 FINGRID, 'Estlink 2 – Second High-Voltage Direct Current Link Between Finland and Estonia' (Fingrid 2021), available at: <<https://www.fingrid.fi/en/grid/construction/arkisto/estlink-2/>>.

35 Ministry of Economic Affairs and Communications of Estonia (n 32) 43.

36 Ibid 46–47.

37 Ministry of Economic Affairs and Communications of Estonia, 'Development Plan of the Estonian Electricity Sector Until 2018' (Republic of Estonia, Ministry of Economic Affairs and Communications n.d.), available at: <<https://www.riigiteataja.ee/aktiilsa/0000/1319/4286/13195400.pdf>> 43.

implemented by Estonia (950 million euros), its realization occurred over a relatively short period (ca. three years).

The only Estonian energy project that can be labelled as extraordinary is the development of the Balticconnector submarine gas pipeline between Estonia and Finland.³⁸ Indeed, this proves to meet three out of four criteria adopted: first, it is a novelty in itself since it represents the first gas interconnector between Estonia and Finland; secondly, its completion took four years, which can be considered a relatively long period; thirdly, as the infrastructure aimed at ending the gas isolation of Finland while helping to boost the security of supply of both Finland and Estonia, it can be considered to have a regional dimension.

In conclusion, although reduction of energy dependence is depicted as a vital policy goal in the national energy strategy and the country proves to associate energy security with sensitive political considerations, Estonia did not seem particularly interested in securitizing its energy sector. This is demonstrated by the fact that extraordinary measures are not prevalent in the implementation of the national energy policy. Indeed, only one out of six energy initiatives advocated in the NEDP proves to meet all the criteria set to define an energy project as an extraordinary measure. Such a situation is indicative of how Estonia tends to perform a rather comprehensive and fairly rational energy diversification policy. As the energy sector was not securitized, Estonia's energy security was improved by quite ordinary political measures, which demonstrates how Estonia tried to solve problems relating to energy issues without successfully securitizing them.

4.2. Latvia

National Security Concept of Latvia

The National Security Concept (NSC) of Latvia determines the strategic basic principles, priorities and measures for identification of threats and risk factors to the state, as well as their possible reduction or prevention. If, on the one hand, Latvia's and Estonia's NSCs prove to share a degree of similarity in their framing 'security' as an all-inclusive concept, on the other hand, the same cannot be true concerning formulations of the notion of 'energy independence'. Indeed, while this occupies a central position in Estonia's NSC, it is not the case for the Latvian one, where the concept is mentioned, indirectly, just once

38 Ibid 44.

– ‘Latvia [...] imports electricity’³⁹. With a relatively marginal position within the national strategy document, the status of dependence on external supplies does not seem to be considered by Latvia as a primary threat for national security, which can indicate how the government is not particularly interested in securitizing its energy sector.

For the second criteria taken into consideration to evaluate the conditionality of an energy securitization act, i.e., the conceptualization of ‘energy security’ from a political/security frame, it is worth noting that the national strategy document does not provide any specially dedicated area to energy security. On the contrary, energy-related issues are included within the section that covers economic security aspects, which can be denotative, to a certain extent, of how the country tends to prioritize economic considerations over political ones in its understanding of the notion of ‘energy security’. It is, therefore, logical to assume that the adoption of an economic logic equals a lack of intention by Latvia to describe energy security as a critical sector with associated political risks, and thus not as something requiring to be securitized by the adoption of a non-ordinary policy response (extraordinary measures).

As far as the level of Russia’s penetration in NSC is concerned, it appears just twice in eighteen pages: on page 3, where it is acknowledged that the signing and ratification of the treaty on the Russian-Latvian state border by the Saeima in 2007 ‘is a confirmation of a positive improvement of the national security environment of Latvia’;⁴⁰ and on page 5, in the section dedicated to the country’s national security⁴¹. Peculiarly, neither allusions to Russia are by no means made when discussing security aspects of the energy sector, nor any general reference to Russian energy foreign policy is detectable. Within the realms of this research, it is thus reasonable to deduce that not giving Russia a central stage in the whole document might indicate how the country does not perceive – or, at least, officially express – it as a significant threat to its national security, either when it comes to dealing with energy or economic issues. By implication, this proves how Latvia, albeit dependent on Russian energy sources, does not perceive Russian entanglement as totally undesirable, thereby showing no intention to define it as ‘a threat’.

39 Ministry of Defence of Latvia, ‘National Security Concept’ (The Ministry of Defence of Latvia 2008), available at: <<https://www.mod.gov.lv/sites/mod/files/document/2008.nd.en.pdf>> 9.

40 Ibid 3.

41 Ibid 5.

Securitization of Latvia's energy sector

Out of a totality of seven major energy projects and activities that Latvia planned to undertake to achieve the objectives set down in its national strategy documents (*the Energy Development Guidelines 2007–2016*⁴² and *Energy Development Guideline for 2016–2020*⁴³), only two proved to meet the necessary criteria to be defined as extraordinary measures. These are the third power transmission line between Latvia and Estonia and the Kurzeme Ring. Though the former cannot be considered a novelty in itself as being built along the already existing two interconnection routes, its total cost was estimated to be around 170m EUR. Furthermore, the facility can be considered regional in scale as it increases the reliability of electricity supply between Estonia and Latvia as well as both countries' power systems. Also, it provides for effective transit of power between the Baltic and the Nordic power systems via the Estonian-Finnish interconnections Estlink 1 and Estlink 2, as well as to the south via the NordBalt and LitPol link interconnections. Finally, being realised over eight years (2012–2020), the interconnection can be considered a long-term project. As for the Kurzeme Ring, the project is not a novelty in itself since it is not the first high voltage power transmission line that Latvia ever built. Nonetheless, the initiative has a substantial cost of implementation (223,22m EUR), it is regional in scale (being part of the NordBalt project, it allows for significant improvements of the efficiency in the Baltic States' electricity market) and has a long time of realization (2013–2019). For the other energy projects, none of them can be considered as an extraordinary measure: (i) the creation of an Energy Agency – despite being a new initiative, the investment for this project has been relatively modest (12m EUR). Also, the Agency represents a small-scale national initiative, and its realization term was not that long since it took just three years (2007 to 2010) for its completion; (ii) electrification of the EW railway and Pieriga routes - in terms of its cost (346.63m EUR) and time of realization, this initiative could be considered as extraordinary. However, the project was neither new (since it comes to modernizing an already existing infrastructure), nor regional in scale as it has a mere national impact; (iii) construction of a new UGS facility in the Dobele district – though the project is a novelty in itself because it represents the first UGS facility to be built in Dobele, it is not the most expensive investment that the Latvian energy sector had to face. Also, the facility does not have a regional dimension – since it is mainly directed to

42 Ministry of Economics of Latvia, 'Energy Development Guidelines 2007–2016' (Ministry of Economics of Latvia 2006), available at: <<http://polsis.mk.gov.lv/documents/2017>>.

43 Ministry of Economics of Latvia, 'Energy Development Guidelines for 2016–2020' (Ministry of Economics of Latvia 2016), available at: <<https://likumi.lv/ta/en/en/id/280236-on-the-energy-development-guidelines-for-20162020>>.

improving domestic energy conditions – and has a short realization term (2007–2009); (iv) construction of a plant of condensation for development of solid fuels – despite it is a relatively expensive and takes time for its realization, the condensation plant does not represent a new initiative, nor it has significant regional importance; (v) development of environment-friendly public transports – this project does not meet any of the criteria that allow it to be defined as an extraordinary measure: it is not new, it does not require a particularly substantial financial investment (108.53m EUR), it is national in its scale, and it has been completed over a short-term period.

In summary, Latvia does not seem to be willing to securitize its energy sector. Extraordinary measures are indeed rare among the whole set of energy projects that the country has planned to adopt for the development of its energy sector through the period 2006–2020. Latvia's reluctance to securitize its energy sector is confirmed by the absence of references to the status of energy dependence in national energy strategy documents. Although the country has been dependent on imported sources, mainly from Russia, this condition does not seem to have been perceived as a particular risk or threat for national energy security, nor Russia as a dominant supplier played a central role in the country's energy policy formulations. Overall, this situation indicates that Latvia conducts a relatively ordinary energy diversification policy which is characterized by the implementation of business-as-usual activities.

4.3. Lithuania

National Security Concept of Lithuania

According to the State Security Department of the Republic of Lithuania (SSD), identification of threats to national security is strictly related to the geographical position of the country as well as the intent of regional neighbours to directly affect or control domestic politics and decision-making (SSD, 2020). Concerns for external players' actions towards national security are indeed clearly detectable in all the *National Threat Assessment (NTA)* that have been reviewed,⁴⁴ where one can easily spot multiple references to how these negatively affect Lithuania's domestic security. Particularly, apprehensions are expressed about the fact that the country's borders represent also the EU and NATO's external borders with Russia, which makes any major argument between the latter and the North Atlantic Treaty Organization negatively influencing also the geopolitical environment of Lithuania.

⁴⁴ 'The National Threat Assessment' reports analyzed cover years 2013 to 2014 and 2016 to 2020.

The first criteria adopted to assess whether Lithuania is willing to securitize its energy sector is the extent to which allusions to the status of energy dependence are evident in the country's national NTA reports. Against expectations, references to Lithuania being dependent on Russian energy as a source of threat are oddly absent. Nonetheless, the issue of energy dependence proves to be acknowledged from the Russian perspective, i.e., the analyzed reports widely acknowledge how policy attempts by Central and Eastern European states to ensure energy independence are seen by Russia as an economic and political threat to its national security. In this respect, the integration and synchronization process of Lithuania with the European energy market is seen as exerting a substantial negative impact on the interests of Moscow and its energy policy. This is due to various reasons: first, Russia's state budget is heavily dependent on the revenues from energy resources export – in 2012, 50.2% of the Russian federal budget was made up of earnings from the oil and gas sectors;⁴⁵ secondly, energy is acknowledged to be a keystone of Russian foreign policy. As reported in most of the NTA reports, Lithuania is aware of Russia's proneness to exploit bilateral relations with European players in the energy market as a tool for achieving the objectives of its foreign policy;⁴⁶ thirdly, any infrastructural, financial, or legal change made to the energy systems of Lithuania is regarded as an additional threat to Moscow's security especially because of the dependence of the Kaliningrad Russian exclave on energy transits through a NATO member state.⁴⁷

The second criteria adopted to validate the presence of a securitization practice within Lithuania's national discourse relates to the type of frame in which the country inscribes the notion of 'energy security', i.e., whether it is understood in an economic or a security logic. At first glance, it seems that the former would prevail over the latter because energy-related issues are officially addressed alongside economic ones. Indeed, in most of the documents analyzed both subjects are included in one single chapter named '*Economic*

45 State Security Department of Lithuania, 'Assessment of the threats to national security', State Security Department of Lithuania (2013), available at: <<https://www.vsd.lt/en/threats/threats-national-security-lithuania/>>.

46 State Security Department of Lithuania, 'Assessment of the threats to national security', State Security Department of Lithuania (2016), available at: <<https://www.vsd.lt/wp-content/uploads/2016/10/EN-2015-gresmes.pdf>>.

47 State Security Department of Lithuania, 'Assessment of the threats to national security', State Security Department of Lithuania (2014), available at: <<https://www.vsd.lt/wp-content/uploads/2016/10/gresmes-2013.pdf>>; 'Assessment of the threats to national security' (n 46).

and Energy Security'.⁴⁸ Such a structural condition notwithstanding, by reviewing the contents of the reports one can easily deduce that Lithuania seems more willing to adopt a security logic when discussing policy matters related to its energy sector. This argument is proved by the evident tendency of the country to frequently associate energy security discourses with political risk, be it strictly connected to the Eastern neighbour or other external actors. As affirmed in the NTA reports, the main threat perceived to the national security was represented by the energy projects developed from third countries contradicting the political interests of Lithuania, such as the construction of the Astravyets NPP in Belarus and the Baltic NPP in the Kaliningrad Oblast.⁴⁹ In line with the security logic, Lithuanian conceptualization of energy security should reasonably be equal to 'security of supply' instead of 'affordable energy'. This is demonstrated by the direct references to Russia as an unreliable partner within the country's strategy documents, which brings the core of the analysis to the third criteria adopted for examining securitization of the energy sector: the level of Russia's penetration and perceptions thereof.

Russia plays a role of great centrality in the energy security conceptions of Lithuania. In all NTA reports, the section devoted to energy matters is to a great extent focused on Russia as well as its policy stance towards Lithuania. For instance, the NTA 2020 affirms that the biggest threat to Lithuania's energy independence is represented by Moscow's aim to preserve its dominance over the Baltic energy markets through its state-owned energy companies continually seeking to adapt to the evolving conditions of the Lithuanian domestic energy regulation.⁵⁰ Also, it is stressed how Russia constantly seeks to affect the decisions of the Baltic States regarding synchronization of their energy system with the Continental Synchronous Area (CSA) as a part of a long-term game aimed to restore its position as the dominant supplier in the regional energy market.⁵¹ Russia is seen as aiming at hindering the process of building a common European energy market by discrediting

48 'Assessment of the threats to national security' (n 46); State Security Department of Lithuania, 'Assessment of the threats to national security', State Security Department of Lithuania (2017), available at: <<https://www.vsd.lt/en/threats/threats-national-security-lithuania/>>; State Security Department of Lithuania, 'Assessment of the threats to national security', State Security Department of Lithuania (2018), available at: <<https://www.vsd.lt/wp-content/uploads/2018/03/ENG.pdf>>; State Security Department of Lithuania, 'Assessment of the threats to national security', State Security Department of Lithuania (2019), available at: <<https://www.vsd.lt/wp-content/uploads/2019/02/2019-Gresmes-internetui-EN.pdf>>; State Security Department of Lithuania, 'Threats for the National Security in Lithuania' State Security Department of Lithuania (2020), available at: <<https://www.vsd.lt/en/threats/threats-national-security-lithuania/>>.

49 'Assessment of the threats to national security' (n 48).

50 'Threats for the National Security in Lithuania' (n 48).

51 Ibid.

the idea of the EU energy union as well as by providing EU member states with alluring offers (e.g., energy at discounted prices) and projects, which contribute to sparking inter-state tensions and slowing down the energy diversification process.⁵²

Securitization of Lithuania's energy sector

Only one of seven major energy initiatives that Lithuania has planned to undertake for the achievement of the objectives set down in its *Energy Independence Strategy 2012*⁵³ can be defined as ordinary: the strengthening of domestic power grids and transformation stations. Indeed, this initiative satisfies only two of the four criteria, which are the high cost and long-term time of realization. As per the other two criteria, the activity cannot be considered as new since it envisaged just a renovation of already existing infrastructure and it cannot be considered as a regional-scale one either since, although planned to facilitate synchronization of Lithuania's electricity transmission system with those of Estonia and Latvia as well as with the ENTSO-E, the activity has a mere local dimension. On the other hand, six energy projects can be defined as extraordinary measures. These are LiPol Links 1 and 2, the NordBalt power cable, the Visaginas NPP, the LNG terminal in Klaipeda, and the GIPL gas pipeline. Concerning the LitPol interconnection links between the Lithuanian and the Polish electricity systems, both projects result in a high cost of implementation (i.e., ca. 135,5m EUR and 106m EUR, respectively), and a long-term realization since the first was launched in 2015 whereas the second is expected to be operational by the end of 2021. Also, the two links can be considered of regional importance because (a) their construction involved multiple state actors (Lithuania and Poland) and (b) the whole Baltic region gained benefits from their realization as they allowed for facilitation of the interconnection between the three countries and the European electricity network. LitPol link 2 was not considered as a novelty as it represents just a mere duplication of the already built LiPol 1.

The third extraordinary energy project is the NordBalt HVDC submarine cable completed in 2015. Considering the financial requirements necessary for its realization (ca. 223,5m EUR) this infrastructural undertaking can undoubtedly be defined as a high cost one. Moreover, it can also be viewed as a novelty since the cable represents the first power transmission built between Lithuania's and Sweden's electricity systems. Finally, the realization of the project was completed by multiple actors (i.e., both the Lithuanian and

52 'Assessment of the threats to national security' (n 46).

53 Seimas of the Republic of Lithuania, 'National energy independence strategy', Seimas of the Republic of Lithuania (2012).

the Swedish electricity transmission system operators), which makes it satisfy also the third criteria, namely that of a regional-scale initiative. Another extraordinary project that Lithuania has planned to undertake is the Visaginas NPP. Although the initiative does not satisfy the first criterion since its construction was already commissioned in 1983, the plant can be defined as atypical for the country by three main factors: first, its cost (4.75b EUR) makes it one of the most expensive that Lithuania has even planned to undertake; second, it is a project of regional importance in that, once operational, it was expected to ensure additional electricity capacity to both Latvia and Estonia thereby increasing the energy security of all three Baltic States; third, the realization of the infrastructure was initially planned to be completed in 2020, which makes it a long-term initiative. An additional project which can be identified as extraordinary is the LNG FSRU in Klaipeda. Indeed, this proves to meet three out of four criteria: first, the project is a novelty in that there were no other similar LNG facilities in Lithuania before; secondly, the project can be defined as a high-cost one since its total financial investment amounted to 105m EUR, which is a substantial investment for the country; thirdly, the project can be considered of strategic importance for the whole Baltic region thanks to the fact that, by diversifying gas supply, it brought more energy security for all three Baltic States and simultaneously improved their bargaining position against Russian gas contracts. Finally, the last project that proved to meet all the criteria of an extraordinary measure is the Lithuanian-Poland gas pipeline GIPL, which aims to connect the Baltic States with Poland and the EU's gas pipeline network. Firstly, the project can be defined as new since it represents the first gas pipeline connecting Lithuania to Poland and also the first one between the Eastern Baltic region and Continental Europe. Secondly, having considered that the total construction costs of the project amount to 558 million EUR, it can be considered a high-cost initiative. Thirdly, the infrastructure can be assessed as having a regional- scale because of (a) its role in ensuring energy supply security in the whole Baltic region - the pipeline, which has received the status of an EU PCI, is expected to bring socio-economic benefits not only to the three Baltic States but also to Finland by contributing to end their gas isolation and (b) the involvement of more than one actor in its realization (i.e., both Lithuania and Poland's transmission system operators).

In confirmation of its conceptualizing energy-policy issues from a security logic, Lithuania proved to be apt to securitize its energy sector as the domestic energy policy is implemented almost entirely through the adoption of extraordinary measures. The exposure of Lithuania's energy sector to securitization substantiates the high level of politicization to which the national energy policy is affected.

5. CONCLUSION

Despite the same level of dependence on Russian sources, Lithuania has been the most willing among the three countries to securitize its energy sector and consequently advance with energy diversification initiatives. Such a result is confirmed by the fact that the country satisfies all the four conditions of existence of an energy securitization process: (i) the issue of energy dependence is indirectly acknowledged in all of the country's security reports; (ii) the country associates energy security discourses with political risk, which illustrates how Lithuania seems apt to adopt a security logic when discussing policy matters related to its energy sector. In this sense, Lithuania seems to pay more attention to the trustworthiness of the energy supplier rather than the price of the energy source supplied; (iii) Russia plays a role of great centrality in Lithuania's energy security conceptions and strategies, which are extensively devoted to the policies that Russia and the eastern neighbourhood at large adopt towards the country; (iv) out of seven major energy projects, six of them match the characteristics of extraordinary measures.

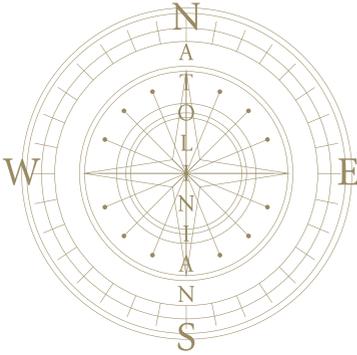
Concerning Estonia and Latvia, neither of the two countries' energy sectors proved to be successfully securitized. In the case of Estonia, the country meets only two out of the four securitization criteria adopted in the analysis: (i) the issue of energy dependence occupies a relatively central position in Estonia's national security concept, where reduction thereof is depicted as a vital policy goal for the country; (ii) energy security is associated with 'security of supply', indicating how the security aspect prevails of the economic one when addressing energy issues. As per the other two criteria: (iii) Russia is not negatively depicted as an antagonistic Other and it does not cover a role of centrality in the country's strategy documents; (iv) out of six major energy projects, only two have the characteristics of extraordinary measures.

In the case of Latvia, on the other hand, the country proves to be the least willing among the three to securitize its energy sector. This is demonstrated by the fact that none of the four securitization criteria adopted were satisfied: (i) the notion of 'energy dependence' is barely mentioned in the national strategy document, which indicates how the status of a country dependent on external supplies does not seem to be considered by Latvia as a primary threat for its national security; (ii) Latvia's strategy document does not provide any specially dedicated area to energy security either and energy-related issues are indeed included within the section covering economic security aspects. This can be indicative of how the country tends to prioritize economic considerations over political ones in its understanding of the notion of 'energy security', which equals a lack of intention in iden-

tifying the energy sector as something to be securitized; (iii) Russia does not appear as a recurring theme in the country's strategy document, nor allusions to it are made when discussing security aspects of the energy sector. Within the realms of this research, such a condition proves how Latvia, albeit dependent on Russian energy sources, does not perceive Russian entanglement as totally undesirable, thereby showing no intention to define it as 'a threat' to its national security; (iv) out of seven major energy projects, only one results to have the characteristics of an 'extraordinary measure'.

In view of the outcome of the comparative analysis, the hypothesis of this research seems to be confirmed: energy dependence on Russia, despite being factually the same, has not come to be recognized, accepted as a 'security' issue, and then securitized by all three states in the same manner. Indeed, as revealed by the study conducted, not only the three countries result to have a dissimilar understanding of what 'energy security' means, but they also seem to display diverging perceptions of their energy dependence status vis-à-vis Russia, which in turn influences the way how each national actor develop its energy policy agenda.

In the light of the foregoing observation, I would argue that (a) the often-missing regional consensus among the Baltic States on how to address common energy security challenges can be attributed to, but not only, divergences in the construction of threats to what each national actor understands as secure. By consequence, unequal understandings of 'energy security' lead the three states to manifest different recognitions of the need for securitizing their energy sectors, thereby leaving the pursuit of energy security to primarily national rather than cross-border measures, and (b) the Baltic States cannot be defined an energy Regional Security Complex due to the fact that perceptions of threats to their energy dependence are not equally shared among them, thereby invalidating the condition of existence of a Regional Security Complex, i.e., countries within an RSC identify same security threats and build up similar visions of those threats, meaning that securitization of certain issues is valid for the whole group.



PART II

TESTING THE LIMITS OF THE EU ENERGY COMPETENCE

CHAPTER 4

The Energy Union Governance Regulation in the Context of the Member State's Right to shape National Energy Mix

BY ANNA MATHEWS



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1. INTRODUCTION

The Regulation on the Governance of the Energy Union and Climate Action¹ (2018/1999, ‘Regulation’) was one of the proposals of the Clean Energy Package for All Europeans², presented on 30 November 2016, commonly known as the Winter Package. The Regulation introduces new obligations for the Member States (‘MS’ or ‘Member States’) in the area of energy and climate and provides the European Commission (‘EC’) with competencies corresponding to MS’ obligations. The most controversial of these competencies are the power to make recommendations as well as other measures and powers that the EC can use, discussed in detail below.

Some of these new powers impact MS’ energy rights, specified in Article 194(2) of the Treaty on the Functioning of the European Union (‘TFEU’, ‘Treaty’). Article 194 TFEU was added to the TFEU as a result of the Lisbon Treaty amendments and ‘provides the first energy-specific basis for legislative action at the EU level’³, without transferring national energy competencies to the European level.⁴ Article 194(2) addresses the issue of limits of the EU’s competence in the field of energy. As indicated in one of the studies ‘the development of the Energy Union resulted in the first comprehensive renegotiation of capacities, expectations, and roles in the broad area of energy policy’.⁵

1 Regulation (EU) 2018/1999 of the European Parliament and of the Council of 11 December 2018 on the Governance of the Energy Union and Climate Action, amending Regulations (EC) No 663/2009 and (EC) No 715/2009 of the European Parliament and of the Council, Directives 94/22/EC, 98/70/EC, 2009/31/EC, 2009/73/EC, 2010/31/EU, 2012/27/EU and 2013/30/EU of the European Parliament and of the Council, Council Directives 2009/119/EC and (EU) 2015/652 and repealing Regulation (EU) No 525/2013 of the European Parliament and of the Council [2018] OJ L 328.

2 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, the Committee of the regions and the European Investment Bank: ‘Clean Energy for All Europeans’ [COM/2016/0860 final/2 – not published in the Official Journal].

3 Kristin Haraldsdóttir, ‘The Limits of EU Competence to Regulate Conditions for Exploitation of Energy Resources: Analysis of Article 194(2) TFEU’ (2014) 23 (6) *European Energy and Environmental Law Review* 208.

4 Michele Knodt, ‘Multilevel Coordination in EU Energy Policy: A New Type of “Harder” Soft Governance?’, in Nathalie Behnke, Jörg Broschek, Jared Sonnicksen (eds), *Configurations, Dynamics and Mechanisms of Multilevel Governance* (Springer 2019) 173. Similar Anna Herrranz-Surallés, Israel Solorio, Jenny Fairbrass, ‘Renegotiating authority in the Energy Union: A Framework for Analysis’ (2020) 40 (1) *Journal of European Integration* 1–2 – ‘the Energy Union has not, so far, led to any additional transfers of competence from the member states to the EU level or the development of new institutions. On the contrary, in some dimensions of EU energy policy the efforts have been in the opposite direction, as member states strive to retain or re-claim authority’.

5 Herrranz-Surallés, Solorio, Fairbrass (n 4) 4.

The author analyses whether the Regulation – specifically the recommendations and other measures and powers granted to the EC – impact the right of choice between different energy sources and the general structure of MS energy supply. The contribution begins by describing Regulation 2018/1999 (its aims and the most important instruments). Section 3 offers a detailed description of energy regulation in TFEU, so the issue of shared competence, providing the summary of legal doctrine in this matter and case-law acquis. Finally, the author critically analyses the Regulation’s impact on the right to choose between different energy sources and the general structure of MS energy supply.

2. THE SCOPE OF THE REGULATION 2018/1999 – INSTRUMENTS TO BE ASSESSED IN THE CONTEXT OF ARTICLE 194

2.1. The aims of the Regulation

There are several objectives which have guided the EU legislator in adopting the Regulation, among which two main points can be highlighted: (1) to implement the energy union and energy and climate objectives as well as (2) to increase the transparency and consistency of the activities of the Member States and the European Commission in the area of energy and climate (by reducing administrative burdens and simplifying certain procedures).

The concept of the energy union was presented in ‘A Framework Strategy for a Resilient Energy Union with a Forward-Looking Climate Change Policy’⁶. This strategy is based on five dimensions: (1) energy security, solidarity and trust, (2) a fully integrated European energy market, (3) energy efficiency contributing to moderation of demand, (4) decarbonising the economy, as well as (5) research, innovation and competitiveness. The energy union is intended to provide end-users (consumers) – households and businesses – with secure, sustainable, competitive and affordable energy.⁷

As opposed to the energy and climate targets for 2020, the 2030 targets (for renewable energy sources and energy efficiency) will be binding to the whole Union, not on the individual Member States. However, this does not mean that the Member States will not

6 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, the Committee of the Regions and the European Investment Bank, ‘A Framework Strategy for a Resilient Energy Union with a Forward-Looking Climate Change Policy’ [COM/2015/080 final – not published in the Official Journal].

7 See Recital (3) of the Regulation.

be obliged to take action in this respect. They will be obliged to make applicable contributions, in order to achieve the EU objectives, assessed by the EC at the stage of approval of the integrated national plans and as part of subsequent monitoring. The Regulation specifies the mechanism for determining these contributions⁸ and the catalogue of EC powers in this area (making recommendations or taking additional measures). With the replacement of binding national energy and climate targets by 2020 - with 2030 targets, binding at European Union level only – '[g]overnance was to be critical to bridge the gap between the Union-level targets and national execution, and the governance regulation in the Winter Package reveals the proposed blueprint for that bridge'.⁹ Regulation 2018/1999 is a central piece of the 2030 clean energy governance framework.¹⁰ As explained by Oberthür 'it is not clear whether the nature of the 2030 Framework's obligations is more or less stringent than the 2020 Framework (...). Overall, the abandonment of national binding RE targets is hence significantly balanced by the introduction and strengthening of other elements.'¹¹ For an analysis of whether the management system introduced by Regulation 2018/1999 is soft or hard – see Chapter 6 by Lisse G. Van Vliet in this volume.

2.2. The most important instruments of the Regulation

A governance mechanism, established by the Regulation, is often referred to in the literature as an intricate system¹² of planning, reporting and assessment. Regulation 2018/1999 introduces a two-level system for reporting and planning the Member States' activities. The mechanism for managing the Energy Union, adopted in this regulation, consists of several stages of cooperation between MS and the European Commission.

The basic framework proposed in the legislation under consideration is the integrated national plans and long-term strategies (with a minimum 30-year perspective), which are

8 See Article 5 and 6 of the Regulation.

9 Jean-Michel Glachant, Angel Saz-Carranza, Marie Vandendriessche, 'The governance of the EU's Energy Union: bridging the gap?' (2017) 51 Working Paper, EUI RSCAS 16, Retrieved June 5, 2020, from: <<https://cadmus.eui.eu/handle/1814/48325>> 16.

10 Pierre Bocquillon, Tomas Maltby, 'EU Energy policy integration as embedded intergovernmentalism: the case of Energy Union governance', in (2020) 42 (1) Journal of European Integration 39, 40.

11 Sebastian Oberthür, 'Hard or Soft Governance? The EU's Climate and Energy Policy Framework for 2030' (2019) 7 (1) Politics and Governance 22.

12 Laura Ammannati, 'The Governance of the Energy Union: An 'Intricate System' Unable to Achieve the European Union Common Goals' (2019) 3 Oil, Gas & Energy Law, OGEL, similarly Michele Knodt, Marc Ringel, 'The governance of the European Energy Union: Efficiency, effectiveness and acceptance of the Winter Package 2016' (2018) 112 Energy Policy 216; Glachant, Saz-Carranza, Vandendriessche (n 9) 6.

developed by the Member States. The EU monitors the implementation of the integrated national plans by analyzing annual and two-year reports (so-called biennial reports) submitted to the EC. In the reports, MS describe the state of implementation of the plans.

Integrated national plans

Integrated national energy and climate plans ('integrated national plans') are prepared by the Member States every 10 years, for a period of a decade, but with a longer perspective. The first plans (for 2021-2030) had to be notified to the European Commission by the end of 2019.

The Commission indicates that '[t]he national plan should take a holistic approach and address the five dimensions of the Energy Union in an integrated way which recognises the interactions between the different dimensions.'¹³ The Regulation provides that the integrated national plans shall set out in particular the national targets, objectives and contributions in all five pillars of the energy union and the relevant policies and measures needed to achieve them. In their first plans, the Member States identified contributions for 2030 concerning, inter alia, renewable energy sources, energy efficiency and electricity interconnections.

In practice, the plans provide detailed information on MS choices between different energy sources and the general structure of their energy supply – so-called energy mix. Therefore, EC has some influence on these matters.

The procedure for approving integrated national plans consists of multiple stages. The Regulation specifies this iterative process in detail (see Articles 9-14 of the Regulation). It should be highlighted that the European Commission had been made the guardian of the integrated national plans process.¹⁴ At one of these stages the Commission may issue recommendations and propose measures to exercise its powers at the EU level in respect to the draft of the integrated national energy and climate plans.

13 Guidance to member states on national energy and climate plans as part of the energy union governance – Annex 2 to the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, the Committee of the Regions and the European Investment Bank State of the Energy Union 2015, [COM/2015/0572 final – not published in the Official Journal].

14 Dries Acke, Erica Hope, David Lopez Morales (eds), 'Planning for net zero: assessing the draft national energy and climate plans' (2019) Ecologic Institute and Climact for the European Climate Foundation 55. Retrieved 5 June 2020, from: <<https://europeanclimate.org/content/uploads/2019/11/05-2019-planning-for-net-zero-assessing-the-draft-national-energy-and-climate-plans.pdf>>.

The national plans for 2030 are subject to an update in 2024. This allows the integrated national plans to be aligned with the outcomes of the international climate policy stock-taking foreseen for 2023 under the Paris Agreement¹⁵. Each Member State shall submit an updated draft of its (last submitted) plan to the EC. The Commission can make recommendations to the draft update.¹⁶ These draft updates are also subject to public consultation and regional cooperation.¹⁷

The integrated national plans and their updates are assessed by the European Commission – in accordance with Article 13 of the Regulation, this includes in particular whether ‘the objectives, targets and contributions are sufficient for the collective achievement of the Energy Union objectives and, for the first ten-year period in particular, the targets of the Union’s 2030 Climate and Energy Framework’ and whether ‘the plans comply with requirements of Articles 3 to 12 and the Member States have taken due account of the Commission recommendations issued pursuant to Article 34’.

EC competencies in the governance mechanism

The legal doctrine states that ‘the role of the European level [in the governance mechanism – A.M.] is twofold: (a) assess the progress that the Member States have made in terms of reaching the energy and climate objectives and policies and (b) providing feedback and taking corrective action, in the event of insufficient ambition.’¹⁸ To this end, the Commission has at its disposal a toolbox to deal with cases of non-compliance, insufficient ambition or insufficient progress towards the energy and climate targets and the five dimensions of the Energy Union. With regard to renewable energy sources and energy efficiency targets, the EC obtained additional instruments (see Article 32(2)-(5) and (6) of the Regulation). The most important competencies available to the EC are the:

- recommendations of Article 9(2) of the Regulation,
- recommendations of Article 30(1) of the Regulation,
- recommendations of Article 31(1) of the Regulation,
- measures and powers at the Union level of Article 31(3) of the Regulation,

15 Michele Knodt, Marc Ringel, ‘Flaws in the EU 2030 Energy Policies: Stakeholder perception of the Clean Energy Package’ (2018) 20 Mainz Papers on International and European Politics (MPIEP) 7, Retrieved 5 June 2020, from: <<https://international.politics.uni-mainz.de/files/2018/08/MPIEP-20-CEDI-WP-12.pdf>>.

16 See Article 14(6), in connection with Article 9(2) and Article 34 of the Regulation.

17 See Article 14(6), in connection with Article 10 and Article 12 of the Regulation.

18 Knodt, Ringel (n 15) 215.

- recommendations of Article 32(1) of the Regulation,
- recommendations of Article 32(2) sentence first of the Regulation,
- measures and powers at the Union level of Article 32(2)(2) and (3) and Article 32(6) of the Regulation.

Furthermore, Article 34 of the Regulation lays down the general principles for the Commission to issue recommendations, and for the Member States to take them into account. The most controversial of these recommendations for the integrated national plans will be discussed below.

Recommendations for the draft of integrated national plans

When reviewing the draft plans submitted by the Member States the Commission may issue recommendations to the Member States. The recommendations can be issued no later than 6 months before the date of submission of the plans¹⁹, ie, by the end of July of a given year. They are also issued only after the EC has summed up the planned contributions of all the Member States to assess the EU level of ambition.

The EU legislator has clarified that the recommendations issued by the Commission may concern, *inter alia*²⁰: contributions with a view to collectively achieve the Union's 2030 targets for renewable energy and energy efficiency as well as the level of electricity interconnectivity that a Member State aims for in 2030; policies and measures relating to Member State- and Union-level objectives and other policies as well as measures of potential cross-border relevance. The Commission will also be able to make recommendations on any additional policies and measures that might be required in the integrated national plans, as well as interactions and consistency of existing and planned policies and measures included in the integrated national plan. The catalogue of these circumstances is therefore quite broad. In addition, the EU legislator used the term 'in particular', which indicates an open catalogue of matters in which the EC can issue recommendations.

The goal of the recommendations is to ensure that the objectives of the energy union are met²¹. The recommendations shall be 'taken due account' by each Member State in their integrated national plan (final version)²². If the State does not take due account of the

19 See Article 9(2) of the Regulation.

20 See Article 9(2) of the Regulation.

21 See Article 34(1) of the Regulation.

22 See Article 9(3) of the Regulation.

EC recommendation (in whole or in large part), it is obliged to provide reasons for its decision and make them public.

It is also worth noting that, in accordance with the wording of the Regulation (Article 9(2) of the Regulation), ‘the Commission shall assess the draft integrated national plans’ and ‘may issue country-specific recommendations to the Member States’. Therefore, while the EC is always obliged to carry out an assessment, it does not always have to issue recommendations. As part of its first experience with the plans – the Commission has exercised its right to make recommendations and presented its assessment on each of the drafts of the national integrated plans. In practice – for example, in the case of Poland, they were published separately – the assessment of the draft plan, as a Commission staff working document, and the Commission recommendations.

The Commission’s involvement in the preparation of the plans (issuing recommendations on draft plans) can strengthen the European perspective, ie, to help ensure that the Member States take full account of the overall EU targets and obligations and to improve the plans’ overall coherence.²³ According to M. Duwe and others, it can also help avoid narrow national views on climate and energy policies.

Nevertheless, the provisions of the Regulation concerning ‘measures and powers at Union level’ should be considered as imprecise as the Union legislator has not defined these measures and powers. The literature indicates that the EC can choose from a wide range of ‘policy options’²⁴. According to the author of this article the instruments granted to the Commission should be described more precisely by the EU legislator, for example at least in the Preamble to the Regulation, if the introduction of a catalogue of instruments in the Regulation itself, for example, would prove to be too problematic.

Other instruments of the Regulation

An important element in the preparation of the integrated national plans is the process of public consultations. Draft integrated national plans are made public. The Member States shall, in accordance with Article 10 of the Regulation, provide the public with the opportunity to participate in the preparation of the draft plans. A summary of the

23 Matthias Duwe, Nils Meyer-Ohlendorf, Katharina Umpfenbach, ‘Governance of the Energy Union, Assessment of the Commission Proposal for a Governance Regulation’ (2017) Ecologic Institute 8, 2 February 2017. Retrieved 5 June 2020, from: <https://www.ecologic.eu/sites/files/publication/2017/ecologic_institute_2017_assessment_of_governance_regulation.pdf>.

24 Ammannati (n 12) 13, similarly Glachant, Saz-Carranza, Vandendriessche (n 9) 7.

opinions or preliminary opinions submitted during the consultation process – shall be submitted to the Commission.

Furthermore, regional cooperation is an important element²⁵. Even before submitting the draft integrated national plan to the EC, each Member State should define the possibilities of regional cooperation and obligatorily consult the neighbouring countries (and, if it considers them applicable, also consult the other Member States, including third countries, outside the EU). The addressees of these consultations should have a ‘reasonable time’ to reply. In the draft integrated national plan, a Member State shall indicate the preliminary results of such regional consultations, including how it has ‘taken into account’ comments from the Member States or third countries. The Member States’ comments (opinions) presented during regional cooperation shall also be ‘taken into account’ in the final versions of the integrated national plans.²⁶ Provisions about regional cooperation will be discussed in an extended version of the article, also in the context of Article 194 TFEU.

Another interesting instrument is the ‘multilevel climate and energy dialogue’ (ie, not only on integrated national plans, but generally, on all energy and climate issues).²⁷ Each Member State should establish a permanent dialogue platform to facilitate this process (dialogue).

In addition, one of the most important instruments adopted in the Regulation is the creation of an ‘e-reporting platform’.²⁸ In order to facilitate communication between the Commission and EU countries, in matters related to the Regulation, the EC will establish a public online platform.

Moreover, a very interesting instrument, introduced by the Regulation is the Union renewable energy financing mechanism. It can be assumed that this is the first real programme intended to support renewable energy sources in the EU.²⁹

25 See Article 12 of the Regulation.

26 See Article 12(5) of the Regulation.

27 See Article 11 of the Regulation.

28 See Article 28 of the Regulation.

29 Severin Fischer, ‘Energy Union: Delivery still pending’ (2017) 5 (1) Policy Perspectives Retrieved 5 June 2020, from: <<https://css.ethz.ch/content/dam/ethz/special-interest/gess/cis/center-for-securities-studies/pdfs/PP5-1.pdf>>.

3. ENERGY IN THE TREATY OF FUNCTIONING OF THE EUROPEAN UNION

3.1. The shared competence – Article 4 and 194 TFEU

The area of energy is a shared competence between the Member States and the EU, on the basis of Article 4(2) (i) TFEU. This means that both the EU and MS can adopt binding legislation in this scope. The Member States shall exercise their competence to the extent that the Union has not exercised its competence. In turn, Article 194 TFEU (also concerning energy) provides a sector-specific legal basis. As indicated in one of the studies: ‘energy is an area that sits at the cross-roads of different policy domains and areas of competence, ranging from EU exclusive competence (competition policy), to shared competence (climate policy, single market) and intergovernmental domains (security of supply), and includes both an internal and external dimension, it provides a wide range of examples to analyse the extent and consequences of the post-functional dilemma.’³⁰ However, echoing Herranz-Surralses, Solorio and Fairbrass – the growing functional necessity for increased cooperation has gradually overcome some of the traditional resistance from national governments in ceding their control over energy issues.³¹

Article 194(t) (a)-(d) TFEU enumerates the objectives of the energy policy of the Union in the form of a catalogue.³² These include: ensuring the function of the energy market; ensuring the security of energy supply in the Union; promoting energy efficiency and energy savings and developing new and renewable forms of energy, as well as promoting the interconnection of energy networks. ‘These aims are to be executed in a ‘spirit of solidarity’ between the Member States.’³³ Additionally, it should be underlined that the scope of Article 194(t) also applies to the establishment and functioning of the internal market as well as preservation and improvement of the environment.

However, Nowacki claims that the main objective of the European Union’s energy policy is to ensure the energy security of the individual Member States and the European Union as a whole. In his opinion, although such an objective is not explicitly stated in Article 194

30 Herranz-Surralses, Solorio, Fairbrass (n 4) 2.

31 Ibid 3.

32 Markus Kotzur, ‘Commentary to Article 194 TFEU’, in Rudolf Geiger, Daniel Erasmus Khan, Markus Kotzur (eds), *European Union Treaties. A Commentary* (Beck/Hart 2015) 731.

33 Leigh Hancher, ‘Chapter 32, European energy law – from market to Union’, in Pieter Jan Kuijper, Fabian Amtenbrink, Deirdre Curtin (eds), *The Law of the European Union* (Wolters Kluwer 2018) 1091.

TFEU, it follows the logic of the process of shaping energy policy in the EU and many documents adopted by EU institutions within its framework.³⁴

Nevertheless, Article 194 is primarily the basis for legal acts in the area of energy. Johnston and Marel indicate that the usefulness of Article 194(1) TFEU as a basis for secondary legislation is curtailed by the second sentence of Article 194(2) TFEU ('the caveat').³⁵ The caveat, stipulated in the discussed provision, states that EU measures 'shall not affect a Member States' right to determine the conditions for exploiting its energy resources, its choice between different energy sources and the general structure of its energy supply' (hereinafter: 'MS energy rights').

As a general rule, legislation furthering the objectives formulated in Article 194(1) TFEU – can be adopted in an ordinary legislative procedure. There are two exemptions from this rule, stipulated in Article 194 TFEU. Firstly, the second sentence of Article 194(2) TFEU, codifies the right of the Member States under Article 192(2)(c) TFEU (environmental issues) to determine independently the Member States' energy rights. In this respect, unanimity is required for the votes on the draft legislation concerned in the course of legislative work in the Council (with reference to Article 192(2)(c) TFEU). The combination of the TFEU's derogations from the Member States energy rights with a special legislative procedure allows MS to block work on draft EU legislation that could have too far-reaching impact on a Member State's internal energy supply structure.³⁶ Secondly, in accordance with Article 194(3) TFEU, in the case of works on acts that are primarily of a fiscal nature (and thus concern the revenue and expenditure of the budget of the European Union and the Member States), it is necessary to apply a special legislative procedure (see Article 289(2) TFEU).

Most importantly, Article 194(2) addresses the issue of limits of the EU's competence. MS appear to retain extensive competence to determine their energy mix.³⁷ According to Haraldsdottir '[t]wo main elements determine the boundaries and content of the area of

34 Marcin Nowacki, 'Komentarz do art. 194 TFEU', in Krystyna Kowalik-Bańczyk, Monika Szwarc-Kuczer, Andrzej Wróbel (eds), *Traktat o funkcjonowaniu Unii Europejskiej. Komentarz. Tom II* (WKP 2012).

35 Angus Johnston, Eva van der Marel, 'Ad Lucem? Interpreting the New EU Energy Provision and in particular the Meaning of Article 194(2) TFEU' (2013) 22 (5) *European Energy and Environmental Law Review* 181.

36 Nowacki (n 34) point 194.7.

37 Hancher (n 33) 1091.

competence of the Union (...): firstly, the reference to the context of the establishment and functioning of the internal market and secondly, the exhaustive list of the policy aims shaped by that context.’³⁸

It should be explained that energy-mix is defined as a percentage balance in consumption of individual energy sources at a given moment in a given territory, which illustrates the degree of use of individual energy sources (conventional energy sources – coal, oil as well as natural gas and alternative energy sources - nuclear energy, renewable energy sources).³⁹ How the mixes of individual countries are formed – depends on many factors: economic, environmental, historical, political, and economic modernization. It is also strongly related to the possibility of diversification of energy sources, directions of supply, and technologies used.

3.2. The interpretations of Article 194 TFEU – legal doctrine

Article 194 TFEU, and specifically, the freedom concerning the MS’ energy rights stipulated in this provision – raises a lot of doubts. There are some positions in the legal doctrine, regarding this matter.

Johnston and Marel propose a few hypothetical interpretations of Article 194 TFEU. Firstly, they examined whether the derogation options resulting from Article 114(4) and (5) TFEU would remain applicable even in the context of a harmonizing measure based on Article 194(2) TFEU. Secondly, they consider whether the substantive and procedural requirements of the derogation provision in Article 114(4) and (5) may still serve as a role model and ‘be used to put at least some flesh on the very bare bones of Article 194(2) TFEU’.⁴⁰ Thirdly, in their article, an interpretation has been proposed that the caveat either (A) implies that an EU measure based on Article 194 TFEU should include an ‘opt-out’ clause so that MS energy rights remain unaffected, or (B) amounts to a free-standing derogation provided expressly by the TFEU which would allow MS to derogate from the requirements of legislation adopted under the first paragraph of Article 194(2) where its energy rights were significantly affected. Fourthly, the authors consider whether EU harmonization measures in the energy field will require unanimity voting in Council when the measure risks affecting MS energy rights, and finally (fifth hypothesis) whether a measure based on Article 194 may not (whatsoever) affect MS energy rights (absolute competence limit). Unfortunately, the authors concluded that none of the

38 Haraldsdóttir (n 3) 210.

39 Nowacki (n 34) point 194.7.

40 Johnston, Marel (n 35) 185–187.

proposed hypotheses is both deeply convincing and obviously easy to implement in practice.⁴¹ However, it is worth mentioning that according to Johnston and Marel there could be an interpretation of Article 194(2) TFEU by the Court of Justice of the European Union ('CJEU') – in which the CJEU would indicate which measures infringe this freedom (they call it 'significance threshold' approach). Although there is no clear basis for this in Article 194 TFEU, it should be remembered that the CJEU has already followed this approach, eg with reference to Article 34 TFEU – when the CJEU applied 'market access test', de minimis threshold 'to find a national measure in breach of Article 34 TFEU, by specifically examining the measure's hindrance of market access.' or with reference to Article 101(i) TFEU.⁴² The authors even considered that the introduction of such a 'significance threshold' in the case law is likely. Though it has not happened yet – the CJEU has not often dealt with the interpretation of this provision and in a few issued judgments – no such rule of interpretation had been introduced. More about the current CJEU case law – below.

In turn, Haraldsdóttir indicates that '[t]he caveat limits the exercise of the powers conferred on the Union and can be seen as a form of a specific ex ante subsidiarity assessment, recognizing that certain matters are best solved at national level.'⁴³ She underlines that '[i]t requires a general assessment and balancing of the interests involved and an effect based de minimis evaluation.'⁴⁴

Johnston and Marel state that 'the very fact that so many possible approaches have been developed to the interpretation of Article 194(2) TFEU – suggests that the introduction of the new Energy Chapter into the TFEU has granted significant uncertainty as to the scope of this new EU legislative competence'.⁴⁵ They also indicate that the precise implications of the caveat inserted as the second paragraph of Article 194(2) may yet cast doubt (the meaning and scope of the caveat).⁴⁶ They conclude that it is far from clear whether Article 194 TFEU tilts the balance in favour of the EU or rather of the Member States.⁴⁷

41 Ibid 198.

42 Ibid 183.

43 Haraldsdóttir (n 3) 218.

44 Ibid 218.

45 Johnston, Marel (n 35) 181 et al.

46 Ibid 182.

47 Ibid 197.

According to Hancher ‘a wide interpretation curtailing or even excluding the EU’s competence on energy could be in conflict with the aims of the EU policy on energy to which the EU is committed in Article 194 (1) TFEU.’⁴⁸ At the same time she indicates that Article 194(2) ‘appears to forbid any EU measure affecting, whether significantly or not, this national reservation and this prohibition cannot be overcome by unanimity in the Council’.⁴⁹

A part of the discussion is focused on whether the MS energy rights are absolute or relative.⁵⁰ If the MS energy rights are absolute in the sense that Union measures must not have any effect on them – then this does not leave much room for actions by the Union on the basis of Article 194.⁵¹ In this sense, subject to the wording alone, any effect on the three ‘energy rights’, no matter how small or indirect, is prevented by the caveat.⁵² Finally, one of the authors concluded that the MS rights under the caveat are not absolute but relative – ‘[t]he rights are subject to a *de minimis* rule that requires an assessment of the effect that Union measures have on Member State’s rights and a general balancing of Member States and Union interests.’⁵³ She also underlines that MS rights to decide on matters are in fact never absolute as the Member States must respect their obligations under the fundamental rules of the Treaties.⁵⁴

Nowacki indicates that within the confines of its competence, limited to the two cases mentioned above (measures aimed at achieving environmental policy objectives and measures of a fiscal nature) and subject to their adoption under a special legislative procedure, the Union may influence the national energy-mix of the Member States directly and indirectly.⁵⁵ Measures of a direct nature simply shape the internal energy supply structure

48 Hancher (n 33) 1092.

49 Ibid 1092.

50 Johnston, Marel (n 35) 182, 183, also Haraldsdóttir (n 3) 211, 212.

51 Ibid 211.

52 Ibid 212.

53 Ibid 213. These rights are not absolute also according to Gustavo Rochette, ‘Is the French Nuclear Strategy Lawful Under EU Law? Article 194(2) TFEU and its Limitations’ (2020) 29 (6) *European Energy and Environmental Law Review* 232, 239. It is also worth noting that he indicates that ‘the concept of security of supply seems to limit the right of a Member State to determine its energy mix included in Article 194 (2) TFEU’.

54 Haraldsdóttir (n 3) 212. Gustavo Rochette presents Euratom Treaty as another example of provisions, which the Member States must respect – Rochette (n 53) 237.

55 Nowacki (n 34) point 194.7.

of individual Member States through obligations to use a specific energy source at least at a strict minimum level. An example of such a measure is the 2009/28 Directive⁵⁶ on the promotion of the use of energy from renewable sources, which provisions include mandatory national targets. In turn, the indirect impact of the measures adopted by the Union on the energy mix of individual Member States is primarily related to the EU's environmental policy, including in particular the policy on counteracting the negative effects of climate change. Nowacki states that restrictive climate policy, which imposes far-reaching restrictions on Member States' CO₂ emissions, is causing MS to move away from high-carbon energy sources (primarily coal) to low-carbon sources such as natural gas.

3.3. The interpretations of Article 194 TFEU – CJEU cases

Unfortunately, the CJEU has not offered any clear and unambiguous statement on this provision. However, there were several cases regarding Article 194 TFEU which the CJEU dealt with. Two of them deserve attention because, although not comprehensive, they provide some interpretative guidance. These are i.a. the case of Poland (T-370/11 *Poland v Commission*, despite its dismissal) and the case of *Parliament v Council* (C-490/10).

In Case T-370/11 *Poland v Commission*, Poland raised a plea alleging infringement of the Article 194(2) (second subparagraph) TFEU, read in conjunction with point (c) of the first subparagraph of Article 192(2) TFEU. According to Poland, Commission adopting Decision 2011/278/EU determining transitional Union-wide rules for harmonised free allocation of emission allowances pursuant to Article 10a of Directive 2003/87, '(...) has focused on natural gas, which is dominant only in some Member States, compared to other fuels such as coal, which is used as the main fuel in other Member States. The Commission used natural gas as the reference fuel to determine the product, heat and fuel benchmarks.'⁵⁷ Poland has maintained that '[r]edirecting companies towards purchasing gas technology, as a consequence of the contested decision, would increase the natural gas needs of the State concerned, disrupt its energy balance and force it to redefine its overall energy policy.'⁵⁸ However, CJEU did not follow this interpretation, finding that the contested decision constitutes an implementing measure of Directive 2003/87, since its legal basis is Article 10a of that directive. The legal basis of the latter, in turn, is Article 175(1) EC (now, after amendment, Article 192(1) TFEU). The contested decision is therefore a

56 Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC [2009] OJ L 140.

57 Case T-370/11, *Poland v Commission*, ECLI:EU:T:2013:113, para 10.

58 Ibid.

measure taken in the area of environment policy and not a measure taken in accordance with the first subparagraph of Article 194(2) TFEU.⁵⁹ Finally, the Court avoided explicitly assessing whether there is an infringement of MS' energy rights in such a situation and took the position that since the contested decision was adopted on the basis of a directive that is not within the scope of Article 194(2)(1) TFEU, and the choice of the legal basis of that directive is not disputed by Poland – the complaint must be rejected.⁶⁰ To summarize, CJEU stated that 'there is no reason to suppose that the second subparagraph of Article 194(2) TFEU establishes a general prohibition to assign that right that is applicable in European Union policy in the area of the environment.'⁶¹ Thus, it follows from the cited judgment that if a legal basis other than Article 194 is used – MS' energy rights under the second subparagraph of Article 194(2) TFEU will not apply.

In turn, in Case C-490/10 *Parliament v. Council*, CJEU provided guidance on the relationship between Article 194 and other Articles of the Treaty, in particular Articles 122 (supply of Energy), 170 (Trans-European Energy Networks) and 337 TFEU (collection of information by the Commission), assessing whether the contested act constitutes a necessary means for the achievement of the objectives set out in Article 194(1) TFEU.⁶² In practice, this judgment provides information regarding the choice of legal basis for a legislative act.

4. ASSESSMENT OF THE RECOMMENDATIONS OF THE REGULATION IN THE CONTEXT OF ARTICLE 194 TFEU

To assess how the recommendations under Regulation 2018/1999 can impact the right to shape national energy mix, the nature of the recommendations should be analyzed first. Although recommendations are generally non-binding the Regulation requires that MS 'shall take due account' of them. Subsequently, the author assesses the effectiveness of the recommendations under the Regulation and, finally, the impact of the recommendations on the Member States' energy rights.

4.1. The legal nature of the recommendations

As regards the legal nature of the recommendations, the European Commission, when

59 Ibid 13.

60 Ibid 15.

61 Ibid 17.

62 Case C-490/10, *Parliament v Council*, ECLI:EU:C:2012:525, para 79.

issuing the recommendations, acts within the limits of the powers conferred to by the Treaties. Recommendations are issued on the basis of Article 292 TFEU, while in accordance with Article 288 TFEU, recommendations have no binding force. At the same time, however, in Recital (54) of the Regulation, the EU legislator clarified that '[w]hereas recommendations have no binding force, (...) Member States should nevertheless take due account of such recommendations and explain in subsequent progress reports how they have done so'.

The CJEU in case C-322/88 *Grimaldi* stated that recommendations 'are generally adopted by the institutions of the Community when they do not have the power under the Treaty to adopt binding measures or when they consider that it is not appropriate to adopt more mandatory rules.'⁶³ The Advocate General's opinion in the *Grimaldi* case further clarified that '[t]he Member States to which it is addressed are therefore not only free to choose the form and methods by which it is implemented in national law, as they can do in the case of a directive, but they are entirely free to act on it or not.'⁶⁴

The Regulation introduces in Article 9(3) the obligation that 'each Member State shall take due account of any recommendations from the Commission in its integrated national energy and climate plan'. Additionally, '[i]f the Member State concerned does not address a recommendation or a substantial part thereof, that the Member State shall provide and make public its reasons.'

Interestingly, Article 34(2)(a) highlights that recommendations should be taken due account of 'in a spirit of solidarity between Member States and the Union and between Member States'. This provision refers to the recommendations mentioned in Article 9(3), which concern integrated national plans. For an analysis of the solidarity principle see Chapter 2 by Ewa Mazur in this volume.

It is worth clarifying that the wording 'Member States shall take utmost [emphasis added] account of any recommendations from the Commission when finalising their integrated national energy and climate plan', appears in the proposal for the Regulation (Article

63 See Case C-322/88 *Salvatore Grimaldi v Fonds des maladies professionnelles*, ECLI:EU:C:1989:646, para 13.

64 Opinion of Mr Advocate General Mischo delivered on 10 October 1989 in Case C-322/88 *Salvatore Grimaldi v Fonds des maladies professionnelles*, ECLI:EU:C:1989:366, para 6.

9(3) of the Proposal for the Regulation⁶⁵), while the wording ‘[e]ach Member State shall take due [emphasis added] account of any recommendations from the Commission in its integrated national energy and climate plan. If the Member State concerned does not address a recommendation or a substantial part thereof, that Member State shall provide and make public its reasons’ appears in the final (binding) version of the Regulation (Article 9(3) of the Regulation). Therefore, the Commission, presumably under pressure from Member States or stakeholders, may have decided to weaken this solution, which could otherwise be perceived as too far-reaching. As explained by Knodt ‘the Commission’s proposal for the Governance Regulation was considerably weakened in terms of the EU’s sanctioning potential, despite widespread support in the European Parliament for a harder form of governance. Nevertheless, it still consists of harder elements’.⁶⁶

As already indicated above, the Member States should explain how they implemented the recommendations. However, there is no specific verification process or any specific consequences of not implementing them. Adding to this the lack of clear criteria for issuing recommendations, according to M. Duwe and others, ‘[t]his will provide for many ways for Member States to evade or contest the recommendations’.⁶⁷ Consequently, it should be pointed out that the provisions on recommendations formulated in this way do not provide for sufficiently rigorous follow-up. The Regulation does not specify exactly what will happen if a Member State does not follow the recommendations. According to the experts, this silence suggests that there are no consequences.⁶⁸ It risks the failings of the European Semester (a system often compared to Regulation), which suffers from a low compliance rate.⁶⁹

4.2. Assessment of the impact on the right to choose between different energy sources and the general structure of MS energy supply

First of all, it should be made clear that the scope of both the integrated national plans and the recommendations that the EC can make are quite wide. In the integrated na-

65 Proposal for a Regulation of the European Parliament and of the Council on the Governance of the Energy Union, amending Directive 94/22/EC, Directive 98/70/EC, Directive 2009/31/EC, Regulation (EC) No 663/2009, Regulation (EC) No 715/2009, Directive 2009/73/EC, Council Directive 2009/119/EC, Directive 2010/31/EU, Directive 2012/27/EU, Directive 2013/30/EU and Council Directive (EU) 2015/652 and repealing Regulation (EU) No 525/2013 [COM/2016/0759 final - 2016/0375 (COD) – not published in the Official Journal].

66 Knodt (n 4) 174.

67 Duwe, Meyer-Ohlendorf, Umpfenbach (n 23) 4.

68 Ibid 15.

69 Ibid.

tional plans, the Member States describe their choices between different energy sources and the general structure of their energy supply. Consequently, the recommendations issued by the EC under Article 9(3), described above, certainly refer to MS energy rights. It is not difficult to imagine a situation in which Member States would propose in their integrated national plans that they intend to implement one of the dimensions of the energy union, using a given energy source to a certain extent, and then the EC would issue recommendations suggesting that the level of ambition to share this source is too low and should be improved.

At this point it is worth highlighting that in the opinion of some commentators, the Commission's '(...) call for more and more ambitious instruments might in extremis be judged as indirect influence on the Member States' right to fully determine their national choice between different energy resources – thus surpassing article 194(2) TFEU'.⁷⁰ The formula introduced in Annex II of the Regulation (in the area of renewable energy source) is also likely to protect the Member States from over-ambitious recommendations of the European Commission. However, similar ambitious mechanisms (like Annex II) have not been introduced, e.g., in terms of energy efficiency or other 'objectives, targets and contributions' (very general wording of the Regulation, eg, in Article 4) to be included in the integrated national plans.

In the opinion of the author of this article, despite the fact that the Regulation introduced is an obligation to take due account of recommendations – they are rather a tool of political pressure and an attempt to deepen cooperation with the Member States. As indicated by Knodt '[t]his governance relies on a densely meshed reporting structure leading to a structured dialogue between several groups of stakeholders within a Member State, among the Member States and finally between the Member State and the European Commission. The Commission was able to establish an interactive communication structure with the Member States through the Governance Regulation playing a more political role.'⁷¹ There were also voices (still at the stage of legislative work on the regulation) that 'although the Commission's attempt to rein in the Member States, by way of 'quasi-binding recommendations' and where appropriate additional EU measures – particularly to develop renewable energy and increase energy efficiency – is understandable, it should be

70 Michele Knodt, Marc Ringel, "Soft' Governance in European Energy Policy. The 'Winter Package' for the Energy Union of the European Commission' (2017) 14 Mainz Papers on International and European Politics (MPIEP) 10, source: <https://international.politics.uni-mainz.de/files/2017/03/MPIEP-14-CEDI-WP-6_2.pdf> [access: 5 June 2020].

71 Knodt (n 4) 186.

rejected in the proposed form on several legal grounds⁷², among others MS' energy rights from Article 194 TFEU.⁷²

Additionally, it appears that in the absence of a penalty system for failure to comply with recommendations, these energy rights can only be infringed indirectly. As mentioned above, Nowacki states that the Union may influence the national energy-mix of the Member States directly and indirectly. Due to the lack of sanctions, according to the author of this article, it can only be considered an indirect impact on the right to choose between different energy sources and the general structure of its energy supply.

As follows from the above considerations on the interpretation of the legal doctrine, Article 194 raises many doubts. Furthermore, the provisions of the Regulation are often ambiguous, and when the EC is granted the right to influence MS Energy rights, they should be more explicit in order to be effective. Thus, we observe a situation in which, on the one hand, greater precision and, consequently, the efficiency of the provisions of the Regulation would be required, while, on the other hand, the rights guaranteed in 194 TFEU should be kept in mind. The Regulation is therefore a kind of compromise – the question is whether in this case the compromise will meet the objectives set out in the Regulation. It may turn out that neither the Regulation is sufficiently effective, nor the MS freedoms under Article 194 TFEU are sufficiently guaranteed.

Due to the fact that also the CJEU did not have a chance to provide guidelines on how to interpret Article 194 TFEU – the EU and the Member States should consider either using a different legal basis for energy secondary legislation (e.g., the harmonization provisions, Article 114 TFEU, that has clearer grounds for derogations) or amending Article 194 TFEU, as it currently raises significant doubts in regard to the autonomy of MS energy rights. While the Treaties ensure MS energy rights, the EC is probably seeking an increasingly strong influence on the Member States' energy choices. However, the current shape of the Regulation (including primary provisions on recommendations) did not lead to a significant infringement of these rights. Mostly because of the legal nature of recommendations. Nevertheless, according to the author a more balanced approach in terms of influencing the rights of the Member States is required.

72 Martin Menner, Götz Reichert, (2017) 17 'Governance of the Energy Union' Policy Brief, Freiburg: Centrum für Europäische Politik <https://www.cep.eu/fileadmin/user_upload/cep.eu/Analysen/COM_2016_759_Governance_der_Energieunion/cepPolicyBrief_Governance_of_the_energy_union.pdf>.

5. CONCLUSION

The second paragraph of Article 194(2) introduces the principle that the Member States have rights to determine the conditions for exploiting their energy resources, their choice between different energy sources and the general structure of their energy supply. EU action shall not prejudice these rights.

The provisions of Article 194 TFEU are considered to be imprecise. The same can be said about the provisions of the Regulation. The scope of integrated national plans is quite wide and while the EC has been granted the right to issue recommendations, their scope is also quite inaccurate and wide. In practice, the lack of sanctions for failing to implement the EC recommendations is decisive for assessing how the recommendations can impact on the Member States' energy rights.

Consequently, the implementation of the recommendations is based on the good will of the Member States. In the context of the energy policy, this solution may not be effective enough. Most of the obligations imposed on the Member States in the Regulation – do not involve a strong sanction system, hence, despite the new instruments being granted to the Commission, the EC may have difficulty enforcing appropriate action from the Member States. Additionally, it is worth noting that 'the Commission acts in a context characterized by (1) a policy field divided by an East-West cleavage, which does not allow for a common understanding of the implementation of European goals but rather enhances conflict; (2) no common agreement on national contributions to the European targets; and (3) limited European competencies.'⁷³ Furthermore, 'energy is an area in which national traditions and prerogatives are deeply rooted.'⁷⁴ So, the situation in the energy field is multidimensional and quite complicated.

Although the EC powers under the Regulation, concerning recommendations, are likely not to be very effective in practice, there is no doubt that the influence of European Commission's on Member States' energy and climate policies is growing.⁷⁵ Doubts in this

73 Knodt (n 4) 176.

74 Bocquillon, Maltby (n 10) 41.

75 Bocquillon and Maltby indicate that 'Governance Regulation reveals the ongoing authority contestation between member states and supranational institutions.' They also take the position that 'this is likely to reopen discussions and contestation on sovereignty delegation if the relatively informal or softer authority conferred to supranational institutions in the Regulation has been insufficient to prevent non-compliance and free riding' – Bocquillon, Maltby (n 10) 51–52.

respect are raised primarily by the regulations on the ambition of the recommendations (the Member States' fear that the recommendations will force the Member States to make their objectives, targets and contributions far too ambitious), as well as by the unclear 'measures and powers at the EU level' that the EC can apply.

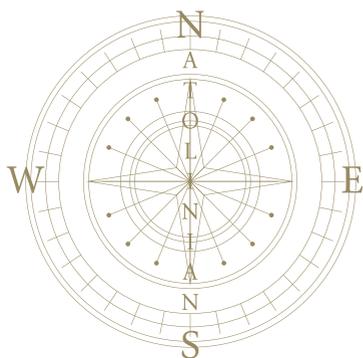
As a side note, it is worth pointing out that according to Glachant and others, the EC's State of the Energy Union reports (see Article 35 of the Regulation), presented every year, will be an additional means of putting pressure on the Member States. They define these reports as 'an extra, informal, pressure mechanism to advance the Union's energy and climate targets.'⁷⁶ 'These public reports provide an opportunity for scrutiny of member state and EU progress on climate and energy matters, which could open the door for 'naming and shaming'-type processes'.⁷⁷ The State of the Energy Union reports will, among other things, include recommendations.⁷⁸ It is also to be expected that the EC will include information on the state of implementation of the recommendations. One publication even points out that the Commission's strong approach to 'naming and shaming' may, in practice, prove a more effective tool than the ultimate sanction of proceedings before, and a judgment by, the Court⁷⁹. Whether the recommendations will be effective, i.e., the extent to which they will affect the Member States, we will only see when the first integrated plans are implemented by the Member States (from 2021, in the first half of the decade).

76 Glachant, Saz-Carranza, Vandendriessche (n 9) 14. More about the Commission's pressure regarding Regulation 2018/1999 – Bocquillon, Maltby (n 10) 52.

77 Glachant, Saz-Carranza, Vandendriessche (n 9) 14.

78 Article 35(2)(b) of the Regulation.

79 Angus Johnston, Eva van der Marel, 'How Binding are the EU's 'Binding' Renewables Targets?' (2016) 18 Cambridge Yearbook of European Legal Studies 208–209.



CHAPTER 5

The Greening of the ECB Monetary Policy: A Legal-Economic Analysis

BY AGNIESZKA SMOLEŃSKA
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1. INTRODUCTION

In recent times, climate change has become an ever more present preoccupation of central banks across the globe. Anticipating the arrival of the “green swan”, monetary authorities have begun to incorporate concerns about the physical, socio-economic and policy consequences of climate change into their activities. A special platform for cooperation – Network for Greening the Financial System (NGFS) – started operating in 2017 to facilitate exchange of best practices and formulation of common approaches to emerging risks. The euro area’s central bank has also become actively concerned with climate change, in particular after the appointment of Christine Lagarde as its President.¹

Such concern stems from the fact that climate change affects the conditions under which economic activity is carried out e.g., due to higher frequency of extreme weather events, but as well through policy action taken to mitigate its effects and pursue green transformation. As such, climate change can have a direct negative impact on monetary policy. This could occur, for example, through supply shocks associated with sudden changes in energy costs or production capacity, e.g., in agriculture, or reduce households’ propensity to consume. Consequently, the overall level of inflation may be affected. In addition, climate change can affect the value of assets, and therefore the stability of the financial sector.² Climate change can be a source of physical risk given extreme weather events such as floods, large fires or hurricanes, result in losses in the value of specific assets, reduce the market value of companies or impact their entire production cycles. In addition, financial institutions are subject to transition risk which relates to the potential costs of establishing the new green economy based on climate neutrality and sustainable green growth, e.g., as a result of changes in the carbon pricing policies. Further, as a result of climate change, specific companies whose business model relies on fossil fuels may prove unsustainable in the future due to changes in consumer preferences or rising costs associated with compensating for environmental damage. Finally, companies are subject to an increased litigation risk as a result of their climate damaging activities. Such risks

1 This chapter has been submitted prior to the publication of the 2021 ECB’s Strategy Review, which includes a climate change action plan for including climate change consideration in the ECB’s monetary policy formulation framework, e.g. with regard to disclosures, collateral policy and corporate asset purchases. Our argument applies to such policy decisions.

2 Margherita Giuzio et al, ‘Climate change and financial stability’ (Financial Stability Review, European Central Bank, May 2019) <https://www.ecb.europa.eu/pub/financial-stability/fsr/special/html/ecb.fsrart201905_1-47cf778cc1.en.html> accessed 10 June 2021; Agnieszka Smoleńska and Thomas Beukers “The European Central Bank and Financial Stability” in Diane Fromage, Giorgio Monti and Thomas Beukers (eds), *The New ECB* (Oxford University Press 2021).

are already being incorporated into the EU's microprudential framework,³ for monetary policy authorities, however, they are relevant from the perspective of assessment of the macroeconomic conditions and policy transmission.

A turning point for central banks involvement in climate change was Mark Carney's speech in London in 2015.⁴ In it he pointed that the "tragedy of the horizon" precludes central banks from adequately incorporating specific risks of climate change for monetary policy. Since then, most of EU central banks have taken an avid interest in climate change action, with specific activities ranging from greening their portfolios to conducting macroprudential stress tests.⁵ However, such a turn has, in particular for the central banks with a defined narrow mandate, also given rise to criticism that such new objectives may compromise monetary authorities' independence and the fulfilment of their core mandate of price stability.⁶ In the light of the strong economic arguments in favour of greening of ECB's monetary policy we discuss in this chapter, however, we consider it is more relevant to ask how to ensure sufficient democratic control of such new tasks. There are those who claim that as a result of the "green swan" greater politicisation of ECB's monetary policy is inevitable. No central bank should take an active role in pursuing policy objectives without greater democratic control. As a consequence, the restrictive approach to ECB's independence should be relaxed. However, there are also strong arguments going in the other direction, namely that lowering the shield of independence will make it impossible for central banks to pursue their primary mandate of price stability.

In this paper we propose a way out of this quandary by focusing on the transparency of the ECB's decision-making procedure. We draw on existing CJEU jurisprudence on the ECB's mandate to formulate a specific set of questions which not only allows us to open up the black box of monetary policy, but also navigate the thinking about its greening.

3 Agnieszka Smoleńska and Jens van't Klooster, 'The Banking Union's risky bet: Should the EU choose a microprudential or a credit guidance approach to climate risk?' (2021) EBI Working Paper.

4 Mark Carney, 'Breaking the tragedy of the horizon – climate change and financial stability' (Speech at Lloyd's of London, Bank of England, 29 September 2015).

5 Bank for International Settlements, 'Green Swan 2021 Global Virtual Conference' (2–4 June 2021).

6 Daniel Gros, 'The Dangerous Allure of Green Central Banking' Project Syndicate, (18 December 2020) <<https://www.project-syndicate.org/commentary/european-central-bank-should-not-go-green-by-daniel-gros-2020-12?barrier=accesspaylog>> accessed 10 June 2021; The Economist, 'The perils of asking central banks to do too much' (London, 21 March 2021) <<https://www.economist.com/finance-and-economics/2021/03/13/the-perils-of-asking-central-banks-to-do-too-much>> accessed 10 June 2021.

Consequently, we explain how a greening of monetary policy could be done in line with its Treaty mandate, as well as point to an array of new questions pertaining to the organisation of the ECB's work in monetary policy greening. The Treaty of Lisbon, which came into force in 2010, provides a crucial backbone to our analysis, where it reinforced the EU's commitment to sustainable development, as a matter of general economic policy.⁷ To this end, Section 2 discusses the ECB's mandate, its limits and flexibility, laying the ground for the approach adopted in the subsequent parts of the chapter. Section 3 analyses which instruments of ECB's action are particularly well-placed to be deployed in the context of climate change-related concerns, given the ECB's mandate to incorporate them in its actions. Section 4 discusses the challenges related to greening of the monetary policy with regard to the calibration of instruments at the disposal of the ECB. In Section 5 we explain the political nature of the balancing exercise which the ECB will have to carry out in greening its policies, which by consequence necessitates further political guidance.

2. THE LIMITS AND FLEXIBILITY OF ECB'S MANDATE

Changes in the theory and practice of monetary policy over the last decade have challenged how we think about the accountability and legitimacy of central banks. The new objectives and tools wielded by these institutions in an increasingly uncertain world – one where the assumptions of many economic models are being called into question – undermine the idea that monetary policy is a technocratic and mechanical instrument, one which must be insulated from politics and political processes. Though the process of transformation has affected central banking globally, it has rattled especially our thinking about the ECB due to its tenuous democratic anchoring and the ambiguous role it played in the last economic crisis. The first step in thinking about adjusting mechanisms of control must begin with acknowledging how the mandate evolved since the Great Financial Crisis.

2.1. Evolution of ECB's mandate since the Great Financial Crisis

The ECB, established at the time when the monetarist approach appears to have been at its peak, was held up as a paragon of independent narrow central banking. Its primary mandate is price stability (Art. 127(1) TFEU), defined by the Governing Council in 2021 to be a 2% symmetric inflation target over a medium term. Since the Great Financial

7 Marta Ballesteros, 'The impact of the Lisbon Treaty on climate and energy policy – an environmental perspective' (ClientEarth legal briefing, January 2010) <<https://www.documents.clientearth.org/wp-content/uploads/library/2010-01-01-the-lisbon-treaty039s-impact-on-climate-change-and-energy-policy-ce-en.pdf>> accessed 10 June 2021.

Crisis of 2008, however, the ECB has broken new ground with regard to its role in the financial sector with the stabilising effects of Mario Draghi's "whatever it takes" in 2012,⁸ followed by the establishment of a centralised system of euro area bank supervision under the ECB (Banking Union). Further, the ECB acquired new responsibilities vis-à-vis the Member States through an array of rescue programs implemented both as part of monetary policy, and also through its role in the euro area's sovereign debt stabilisation programmes in the context of the highly controversial "troika".⁹

At the same time, the ECB's internal perception of its role in the economy changed, as becomes evident considering three examples. The first one concerns "protecting" and "enhancing" the transmission of monetary policy in the context of market turbulence which became omnipresent in the speeches of central bankers and in decisions on individual asset purchase programmes as the key to explaining why the ECB was determined to act. The second one, financial stability, once a contested objective of central banking (or at least one that is substantially shared with other – national – institutions), is now omnipresent in the language of the ECB. Finally, and in tandem with the evolution of the markets more broadly, the ECB reached increasingly for oversight over those financial institutions which were proving to be of critical importance in how (and where) the market operated (eg. Central Clearing Parties (CCPs)).

First, with regard to transmission of monetary policy, expanding scope of considerations relevant from this perspective became a key vehicle through which ECB expanded its crisis toolbox. While transmission of monetary policy was raised by the ECB in its decisions before the crisis,¹⁰ explicit reference to the transmission of monetary policy is found predominantly in ECB Decisions following the onset sovereign debt crisis.¹¹ Such an increase

8 Mario Draghi, 'Speech by Mario Draghi, President of the European Central Bank' (Global Investment Conference, London, 26 July 2012) <<https://www.ecb.europa.eu/press/key/date/2012/html/sp120726.en.html>> accessed 10 June 2021.

9 Michele Chang, 'Sui generis no more? The ECB's second decade' (2020) 42(3) *Journal of European Integration* 311; Pawel Tokarski, 'Die Europäische Zentralbank als politischer Akteur in der Eurokrise: Mandat, Stellung und Handeln der EZB in einer unvollständigen Währungsunion' (2016) SWP-Studie <https://www.swp-berlin.org/fileadmin/contents/products/studien/2016S14_tks.pdf> accessed 10 June 2021.

10 European Central Bank, 'Guideline of the European Central Bank of 30 July 2002 concerning certain statistical reporting requirements of the European Central Bank and the procedures for reporting by the national central banks of statistical information in the field of money and banking statistics' ECB 2002/5.

11 Eg, the ASPP programme in 2014 or SMPP in 2015, Eur-lex search for terms „transmission of monetary policy" under EU legal acts yields 31 documents, 27 of which are taken by the ECB. 25 of these are taken after 2014: 23 decisions and 2 guidelines. The respective Decisions are the legal bases for the various crisis-mitigation open market programs.

in frequency of referring to the term suggests that though the concern for transmission of monetary policy is not new, it was amplified as a result of the crisis. Consequently, such an increased concern with its functioning led to the widening of the scope of considerations of factors which are liable to affect it as an intermediate objective of ECB monetary policy (i.e., sine qua non condition for attaining price stability).

Second, since the crisis financial stability began to feature more prominently on the ECB's agenda. Though it is often argued that financial stability is a natural concern for central bankers, in the EU this is contested given it is equally a concern of micro- and macroprudential bank supervision, which remains shared between the national and EU authorities.¹² However, following the Great Financial Crisis, few would question the special responsibility of the ECB in that regard, with some legal scholars in fact proclaiming that financial stability has become an "overreaching economic objective" of the EU.¹³ Over the course of the Great Financial Crisis, the pursuit of financial stability as an objective of the ECB has been incorporated into the current mandate, as an essential precondition for attaining price stability, and as such warranting intervention e.g. with regard to stabilising the markets through unconventional policy measures.

Finally, the scope of the ECB mandate must also be interpreted through the lens of market evolution, including technological change and innovation which transform market infrastructures. One example here is the increased interest of the ECB in financial market infrastructures such as the Central Counterparties (CCPs), responsible for clearing derivative transactions. The systemic significance of CCPs has increased since the Great Financial Crisis.¹⁴ For the ECB and its ability to impact the market, this presented a problem since most of euro-denominated transactions on the CCPs were made in London. Consequently, the ECB has sought to expand its prerogatives vis-à-vis this market segment, also by introducing a location requirement for euro denominated CCP transactions. The competence of the ECB for such market regulation was denied by the CJEU. The Court

12 Thomaso Padoa-Schioppa, *Regulating finance: balancing freedom and risk* (Oxford University Press 2004); Smoleńska, Beukers (n 2).

13 Giovanni Lo Schiavo, *The Role of Financial Stability in EU Law and Policy* (Wolters Kluwer 2017); Kaarlo Tuori and Klaus Tuori, *The Eurozone Crisis. A Constitutional Analysis* (Cambridge University Press 2014) 183.

14 Eric Helleiner, Stefano Pagliari and Irene Spagna, *Governing the World's Biggest Market* (Oxford University Press 2018); Fabio Bulfone and Agnieszka Smoleńska, 'Power to the ESMA: centralisation of regulatory structures for central counterparties' in Adreienne Heritier and Magnus Schoeller (eds), *Governing Finance in Europe: A Centralisation of Rulemaking?* (Edward Elgar Publishing 2020).

drew such a conclusion by analysing the wording of Art. 127 TFEU as well as secondary EU legislation regarding payment systems which explicitly excludes from its scope transactions in securities.¹⁵ Since then, the role of central banks for crisis management of CCPs, including with regard to specific liquidity provision functions, became increasingly provided for in secondary legislation (eg, European Market Infrastructure Regulation, EMIR). As a consequence, the role of the ECB in oversight of such institutions, but also its significance for the conduct of monetary policy, is likely to increase. Such developments confirm that market structures as well as secondary legislation developments therefore affect ECB mandate, notwithstanding its formal independence.¹⁶

2.2 Judicial and political control of the ECB's mandate and climate change

Such a transformation of the ECB's mandate brought to the fore the question of control, be it judicial or political.¹⁷ Calls for increased transparency and accountability are ever louder, in particular those from the European Parliament.¹⁸ It was judicial accountability, however, which became the control mechanism of choice, and called upon by many interested parties – states, citizens and corporations – to question the legality of the decisions taken by the ECB.

The CJEU in a series of high-profile cases (e.g. examining the legality of the sovereign bond purchase programmes OMT and PSPP) applied a two-step test to determine, first, whether the ECB had competence in a particular area, and second whether the instrument chosen was implemented in a proportionate manner.¹⁹ Yet, even with the test being applied, the deference to the technical knowledge ensconced in Frankfurt has been the hallmark of the jurisprudence of the CJEU in this area. This has provoked a rich debate, not only among EU scholars, but also national courts, ranging from ardent defence of the

15 Paragraph 95, T-496/11 Location Policy ECLI:EU:T:2015:133, see Heikki Marjosola, 'Missing pieces in the patchwork of EU financial stability regime? The Case of Central Counterparties' (2015) 50 (2) Common Market Law Review 115.

16 Agnieszka Smoleńska and Adrienne Héritier, 'Political Accountability and effects: Capital Markets Union' in Adrienne Héritier and Johannes Karremans (eds), *Regulating finance in Europe: Policy effects and political accountability* (Edward Elgar Publishing 2021).

17 See Chang (n 9); Marijn van der Sluis, 'Similar, therefore different: Judicial review of another unconventional monetary policy in Weiss (C-493/17)' (2019) 46 (3) Legal Issues of Economic Integration 263; Dariusz Adamski, *Redefining European Economic Integration* (Cambridge University Press 2018).

18 Deirdre Curtin, '“Accountable independence” of the European central bank: Seeing the logics of transparency' (2017) 23 (1–2) European Law Journal 28.

19 Mattias Wendel, 'Paradoxes of Ultra-Vires Review: A Critical Review of the PSPP Decision and Its Initial Reception' (2020) 21(5) German Law Journal 979–994.

CJEU's cautious approach, to outright criticism, most notably from the German Federal Constitutional Court in Karlsruhe.²⁰

Given this controversial nature of the court's test, what could it ever tell us about the ECB's power to green its monetary policy? So far, the CJEU's approach has been only applied to matters of economic nature – monetary and fiscal policies, financial stability, financial infrastructures. Given the controversies, could we ever expect the test to do any better in the context of climate change action? Such a question appears pertinent as the ECB is clearly preparing itself to take the plunge and take monetary policy action explicitly in light of climate change considerations.²¹ Below we sketch the questions that would arise in the context of an instrument of ECB's monetary policy and which have to be answered to meet the criteria of legality laid down by the CJEU.

There are two prongs to this question. The first looks at the scope of the ECB's mandate, namely whether it allows the ECB to incorporate climate change concerns at all (we explore this question in Section 3). The second looks at how this mandate is exercised. In other words, once the existence of a mandate is confirmed, there are a variety of tools which the ECB may use to pursue it. These range from how the ECB manages its own funds (where greening would raise little controversy) to unconventional measures such as asset purchases (where greening would raise eyebrows due to market impact and how far apart it appears from traditional monetary policy). For any instruments to be deemed in line with the EU Treaties following the CJEU's approach, they need to be appropriate, necessary and proportionate to the aim. In other words, in reviewing the instrument chosen by the ECB the CJEU asks specifically about its appropriateness (is it the right tool?), necessity (is the intervention kept to a minimum?) and proportionality (has it been balanced against other objectives/goals?).

The answer to the first question allows us – external observers of ECB action – a glimpse into the types of proof that the ECB uses to make its decisions and the logic it employs in

20 Isabel Feichtner, 'The German constitutional court's PSPP judgment: Impediment and impetus for the democratization of Europe' (2020) 21(5) German Law Journal 1090; Daniel Sarmiento and Joseph Weiler, 'The EU Judiciary After Weiss: Proposing A New Mixed Chamber of the Court of Justice' (Verfassungsblog, 2 June 2020) <<https://verfassungsblog.de/the-eu-judiciary-after-weiss/>> accessed 10 June 2021; van der Sluis (n 17); Nik de Boer and Jens Van't Klooster 'The ECB, the courts and the issue of democratic legitimacy after Weiss' (2020) 57 (6) Common Market Law Review 1689.

21 Christine Lagarde, 'Climate change and the financial sector' (Speech at the launch of the COP 26 Private Finance Agenda, London, 27 February 2020) <https://www.ecb.europa.eu/press/key/date/2020/html/ecb.sp200227_1-5eac0ce39a.en.html> accessed 10 June 2021.

determining the link between the instrument chosen and the expected results. But what results could be expected in the context of a climate action objective? Could the ECB ever measure its results by how they contribute to keeping the Earth's temperature steady, or to reducing emissions? The appropriateness question drives home the importance of translating climate change concerns into the financial language of risks, but also that of the type of expertise required to identify such aims, namely climate expertise. This in turn raises the question of whether the manner in which monetary policy draws on such areas of science warrant specific scrutiny. We assess which of ECB's instruments are appropriate for addressing climate change in the light of the ECB's mandate in Section 3.

The second question of the CJEU verifies the self-restraint of the ECB by testing whether the intervention in the market was kept to minimum and whether market incentives were kept in place. In other words, this step is oriented at ensuring that the actions taken by the ECB do not go beyond what is necessary to achieve the stated aim, whilst limiting the interference ECB in the market processes. In the past, at this stage, the CJEU assessed the conditions attached to the policy instrument, e.g., those which imposed quantitative or time limitations. Yet, in the context of climate change action, how could the ECB simultaneously remain "neutral" but help steer the market in such a way that it delivers greener outcomes? The necessity test, if it is applied treating the ECB as an intervenor but non-participant in the market, reinforces the principle of "market neutrality" which acts as a significant constraint on ECB action. Arguably, necessity test could only be met in the case of climate change action on the part of the ECB, if a recalibration of the EU's "open market economy" model with regard to objectives such as climate change action is acknowledged. In Section 4, we address this question by considering the impact of potential use of monetary policy instruments for climate change mitigation on the market neutrality principle.

The third question of the CJEU in turn strives to ensure that there is a balancing of interests affected by the instrument chosen by the ECB. So far, the CJEU has limited itself to confirming that the ECB has performed such an exercise and has done so only in the context of fiscal and monetary policies. Introducing the climate change dimension, which has a significant bearing on economic policies at EU and Member State levels, energy policies as well as social (cohesion) ones, will necessarily alter the nature of the task. Therefore, it appears warranted that the balancing the ECB conducts include consideration of the impact of its actions in other areas of EU competence, for example, for the internal market as a whole. The process of balancing and the sources of knowledge for the ECB in acting become paramount here. However, if such a balancing exercise can be

done in a transparent manner, it provides an enormous opportunity for a greater understanding of the distributive effects of choices ECB makes. In other words, the final step is concerned with assessing the risks and benefits from deploying a particular instrument, we look at this question in Section 5.

3. GREEN MANDATE OF THE ECB AND ITS APPROPRIATE TOOLS

Within the scope of EU law, there are two ways in which climate change concerns may enter into the mandate of the ECB. Perhaps the more obvious one leads through the secondary mandate of the ECB, i.e. its general obligation to contribute to the economic policies of the Union).²² Such an obligation should imply that where, in pursuing its primary mandate of price stability, the ECB can choose from an array of instruments which would be equally effective, it should opt for the one which is in line with the EU's other policies, now most notably climate neutrality until 2050 and raised carbon emission reduction targets until 2030.²³ In addition, scholars have argued that Art. 11 TEU imposes a general obligation on the EU institutions to act in accordance with the objective of climate protection.²⁴ However, equally – and this is in fact argued primarily by the ECB's board members themselves – climate change concerns are highly relevant in the context of the primary mandate of price stability. As the Governor of Banque de France argued, climate change may have stagflationary effects i.e., result in both upward pressure on

22 Javier Solana, 'A reminder from the courts for the European Central Bank to take climate change seriously' (LSE, 20 May 2020) <<https://www.lse.ac.uk/granthaminstitute/news/a-reminder-from-the-courts-for-the-european-central-bank-to-take-climate-change-seriously/>> accessed 10 June 2021; Victor de Sérière, 'Idealism or realistic approaches? Regulatory possibilities to require financial institutions to contribute more substantially to achieving climate goals? An overview' (2020) 35 (3) *Journal of International Banking Law and Regulation* 94.

23 European Council, 'European Council meeting (10 and 11 December 2020) – Conclusions' Brussels, 11 December 2020, Although note that some scholars argue that the ECB should not decide on its own how to incorporate climate change concerns into its secondary objective, but rather follow the advice of democratically legitimated institutions, namely the European Parliament; see: Pervenche Béres et al, 'The ECB needs political guidance on secondary objectives' (Bruegel, 22 April 2021) <<https://www.bruegel.org/2021/04/the-ecb-needs-political-guidance-on-secondary-objectives/>> accessed 10 June 2021.

24 To determine whether the action before it was legitimate, the Court applied a proportionality test, which consists in looking at whether the action taken was appropriate, necessary and proportional in a strict sense (see eg, M. Lamandini, D. Ramos and J. Solana, 'The European Central Bank (ECB) as a Catalyst for Change in EU Law. Part 1: The ECB's Mandates' (2016) 23 (2) *Columbia Journal of European Law* 1.

prices and a slowdown in activity.²⁵ Furthermore, climate change considerations must become part of the scenario within which the ECB conducts its monetary policy. The fact that not only climate activists, but increasingly central bankers themselves, argue that the ECB's mandate must include the power to design asset purchase programs in a manner so as to exclude significant CO₂ emitters, suggests that this view is steadily entering mainstream.²⁶ In fact, the ECB itself largely embraced this interpretation first, in the Opinion of 19 March 2021 on the mandate and tasks of the Magyar Nemzeti Bank relating to environmental sustainability. If asked, the Court is therefore likely to confirm such an interpretation of the mandate, given the route which climate considerations have taken into the central banks' areas of interest, namely methods of scenario building and extending the time horizon for considering factors relevant to monetary policy formulation. This is likely all the more so, given the general effort of EU institutions in mitigating climate change through the EU Green Deal.

Consequently, the more pertinent question is what kind of instruments at the disposal of the central bank are appropriate for incorporating climate change-related concerns. Drawing on economic literature and central bank speeches we propose four categories of such mandate-compliant actions. These relate to greening of ECB's balance sheet, analytical approaches and stress tests, verbal interventions and engagement in international cooperation.

3.1. Greening of the ECB balance sheet: Collateral Policy and Asset Purchases

In accordance with its statutory tasks, the Eurosystem provides liquidity to the financial system against collateral. This includes appropriate securities or cash. The Eurosystem has some discretion in determining which collateral it accepts as eligible assets. The ECB accepts as collateral so-called Brown Bonds, which are used to generate funds for investments related to traditional power generation. The problem is that the profitability of such bonds is uncertain, due to the gradual shift in investment preferences towards sustainable technologies. As a result, this gives the ECB more room for manoeuvre to justify the need to support climate policy objectives that go beyond a well-defined monetary policy dimension based on price stability. On the other hand, investments in green tech-

25 François Villeroy de Galhau, 'The role of central banks in the greening of the economy' (Speech at the 5th edition of the Rencontres on "Climate Change and Sustainable Finance", Banque de France, 11 February 2021) <<https://www.bis.org/review/r210211g.htm>> accessed 10 June 2021.

26 Intervention by Isabel Schnabel, Member of the Executive Board of the ECB, at the "Greening Monetary Policy – Central Banking and Climate Change" online seminar, organized as part of the "Cleveland Fed Conversations on Central Banking", 3 March 2021.

nologies are often high risk and require higher capital buffers.²⁷ The ECB could support climate objectives more strongly through appropriate collateral policies. Firstly, the ECB could significantly increase the amount of collateral that would have a smaller carbon footprint. Depending on the risk level of a given collateral, the ECB imposes an appropriate haircut. Another way to support green objectives would be to increase the haircut against the collateral associated with a larger carbon footprint. As a result, the cost of raising capital for economic activities related to the stronger coal footprint would be increased facilitating the investment for green projects. On the other hand, such an approach would mean moving away from the principle of risk-based valuation of collateral. Another solution would be to set a minimum share of “green collateral” of a counterparty’s underlying assets. This could increase the attractiveness and reduce the capital cost of green investments.²⁸

The purchase of assets is undoubtedly the strongest monetary policy instrument because of the market impact. Much more significant than, for example, collateral policy. In its asset purchases, the ECB and Eurosystem bought both public and private assets, but the latter are more relevant when it comes to supporting climate objectives. Under both the CSPP and the PSPP, the ECB purchased so-called green bonds, which were defined as “debt securities whose proceeds are used to finance investment projects with an environmental benefit”.²⁹ At present, however, the share of green bonds in the CSPP is small and amounts to around 6% of the value of green bonds holdings.³⁰ Although there has been a huge increase in the issuance of these assets in recent years, they still represent a very small part of the assets issued in the euro area. Moreover, the purchase of green assets does not stem from the deliberative aim of supporting the fight against climate change, but only from a specific approach to asset purchases which is based on market neutrality. It means the ECB does not want to discriminate against any type of issuer in its purchases in order to avoid any potential distortion of specific market segments. From this point of view, the ECB’s commitment to supporting the green economy by purchasing

27 Markus Brunnermeier and Jean Pierre Landau, ‘Central banks and climate change’ (VOXeu, 15 January 2020) <<https://voxeu.org/article/central-banks-and-climate-change>> accessed 10 June 2021.

28 Martina Anzini and Bert Van Roosebeke, ‘Green ECB Collateral Policy. A proposal for a minimum green share collateral policy’ (2020) 19 *cepInput* 9–10.

29 Roberto de Santis, Katja Hettler, Madelaine Roos and Fabio Tamburrini, ‘Purchases of green bonds under the Eurosystem’s asset purchase programme’ (2018) 7 *ECB Economic Bulletin*.

30 Jana Randow and Piotr Skolimowski, ‘Climate-Focused ECB Strategy Starts to Find Focus’ (Bloomberg news, 13 February 2020) <<https://www.bloomberg.com/news/articles/2020-02-13/lagarde-s-green-agenda-for-ecb-is-starting-to-find-its-focus>> accessed 10 June 2021.

assets can be judged as not meeting the requirement of appropriateness, due to the small volume of such purchases, which cannot produce any measurable effect on fight against climate change. On the other hand, experience with the CSPP shows that mass purchases of corporate assets have also indirectly influenced green corporate bond market and its spreads have steadily declined, facilitating the investments in green projects. Green bonds can be issued not only by the private sector but also by the public sector. In this case, an important feature is the reduced degree of risk sharing between the Eurosystem central banks, which is only 20%.

In assessment of the asset purchases as an instrument of “greening” of the ECB, it has to be taken into account that these operations are always limited in nature and the ECB has to indicate at some point in time through forward guidance the time horizon for the completion of such operations. This is in contrast to green investments, which are generally of a long-term nature, going beyond monetary policy time horizons. Although the ECB is cautious in its announcement of the end of the asset purchase programme, in the case of the largest asset buyback instrument for PEPPs at present, the ECB indicated in its communication of 10 December 2020 that the programme would last at least until March 2022 and that reinvestments from maturing assets would continue until the end of 2023.³¹

3.2. Research, data development and stress tests

Besides asset purchases or verbal interventions, the inclusion of climate risks in its financial models is one of the most significant aspect of the ECB’s greening. A better assessment of climate change risks is essential for the ECB, as it allows for a better valuation of collateral provided by banks in exchange for liquidity from the ECB. There is a rather broad consensus that the ECB needs to better integrate climate change risk into its own models.³² The increasing importance of climate change for the economy and the ECB’s commitment in this area led to the establishment of the dedicated Climate Change Centre inside the ECB in January 2021. The Centre coordinates the work on climate change within the ECB and reports to the ECB President, who oversees climate change and sustainable finance. The ECB sees the impact of climate change on the financial sector in broader dimensions. This is also reflected in the broad thematic focus of the research including financial stability and regulation, supervisory policy, macroeconomic analysis,

31 European Central Bank, ‘Monetary policy decisions’ (ECB, 2020) <<https://www.ecb.europa.eu/press/pr/date/2020/html/ecb.mp201210-8c2778b843.en.html>> accessed 05 November 2021.

32 Martin Arnold, ‘ECB set to disappoint campaigners on climate change’ Financial Times (21 February 2021) <<https://www.ft.com/content/ef64a281-4184-4141-a283-26f12134f322>> accessed 10 June 2021.

financial market risks and corporate sustainability.³³ One of the main problems in testing financial risks related to climate change is data gaps. In order to explore these risks in more depth, the ECB is currently conducting a macroprudential stress test. Its aim is to assess the resilience of the euro zone banking system to the transition to a climate-neutral economy and to provide market participants with information on climate change risks. For this purpose, the banks' exposure to future climate risks is analysed by looking at the resilience of their counterparties under different climate scenarios assuming a long-time horizon of up to 30 years.³⁴

3.3. Verbal interventions

Verbal interventions and guidance are very important instruments of the ECB. They include speeches, press conferences and interviews with the President of the ECB, but also with other members of the Executive Board. By communicating directly with the markets, the President of the ECB can report on further monetary policy developments. The most famous of these interventions was Mario Draghi's speech in London in July 2012, the main element of which was the announcement of the ECB's unlimited intervention on the secondary market of the bonds of the countries in the southern Eurozone.³⁵ This verbal intervention represented a turning point in the euro zone crisis. In the area of climate change, the above-mentioned speech by Mark Carney, then President of the Bank of England, in September 2015, has played a major role in drawing attention to the risks to the financial sector that result from climate change.

After the euro zone crisis, the economic and political importance of the ECB has increased significantly. Press conferences of the President of the ECB often attract more media attention than European Council meetings. In public speeches, the ECB President can not only point the way forward for monetary policy, but also indicate the economic policy priorities for individual governments, market participants and the EU as a whole. Since the beginning of her mandate, Christine Lagarde, in her public speeches, treats climate change as one of the key issues and challenges for monetary policy. The ECB, through its verbal interventions as well as in its informal contacts with Heads of State and Government, can also exert pressure to enforce specific actions. These could include, for

33 European Central Bank, 'ECB sets up climate change centre' (ECB Press Release, 25 January 2021) <https://www.ecb.europa.eu/press/pr/date/2021/html/ecb.pr210125_1-3fc4ebb4c6.en.html> accessed 10 June 2021.

34 European Central Bank, 'Financial Stability Review' (ECB, May 2021) 108 <<https://www.ecb.europa.eu/pub/pdf/fsr/ecb.fsr202105-757f727fe4.en.pdf>> accessed 10 June 2021.

35 Draghi (n 8).

example, the adoption by governments of a clear political and legal framework for green investments, which are generally long-term and risky.³⁶ This would help to reduce the uncertainty and risks associated with such investments in the future. On the one hand, at a time when the role of central banks in stabilising the financial systems and stimulating the real economy is growing, the messages coming from these institutions are very carefully analysed. On the other hand, it is difficult to examine the real effectiveness of verbal interventions by market participants or regulators may also be caused by other factors, such as growing social awareness of the problems related to climate change.

3.4. Engagement in International Cooperation against climate change

Climate change is a problem that must be tackled effectively through broad international cooperation and the implementation of the ECB's mandate in the field of combating climate change can also be done by initiating broad international cooperation in this field. The most important international forum in the field of central banking dealing with the involvement of the financial sector in the green transformation of the economy is the Network for Greening the Financial System (NGFS). It was first established at the Paris One Planet Summit in December 2017 by eight central banks and regulators. In 2021, the network consisted of 83 members and 13 observers. The ECB plays a key role in the work of the NGFS. Frank Elderson, member of the ECB Executive Board, is the Chair of the NGFS. In addition, the ECB and the largest bank in the Eurosystem, the Bundesbank, chair two of the network's five working groups. The secretariat of the main forum for cooperation between central banks and insurers on climate change, the NGFS is run by the Banque de France. Such a strong position of the ECB and other Eurosystem members within the NGFS was also made possible by the late entry of the US Fed into this forum, which only took place in December 2020. However, the Fed's involvement has increased the prestige of the forum and shows that the importance of climate change issues for monetary policy continues to grow.

3.5. Risks of central bank greening

As the previous sections show, there are many tools at the disposal of the ECB, which can be deployed with view of addressing climate change related concerns. Furthermore, there are strong arguments in favour of doings so, both with regard to the primary and secondary mandate of the ECB. However, there are also fears that the ECB's increased burdening with new objectives, including climate change, could undermine the primary mandate and the independence of monetary policy.³⁷ From this point of view, it is argued

36 Brunnermeier, Landau (n 27).

37 Gros (n 6); The Economist (n 6).

that it is not the role of central banks to correct market failures or act in the absence of political decisions concerning proper pricing of the environmental damage but to focus on price stability mandate.³⁸ The most powerful instrument of monetary policy, the purchase of assets on the secondary market, may reinforce inflationary pressures, which could be at odds with the ECB's original objective. Such doubts are evidently well-based, in particular with view to preserve the credibility of central bank action. They may nonetheless be addressed through the correct calibration of ECB's tools, a question we turn to next.

4. CHALLENGES OF GREENING: MARKET NEUTRALITY AND CALIBRATION OF TOOLS

The ECB clearly has at its disposal a number of instruments which allow it to incorporate climate change concerns in its decisions in a meaningful way. In their deployment, the ECB is constrained to ensure that it does not go beyond what is necessary. From this point of view, a key constraint on ECB "green" action may be seen to be the principle of "market neutrality", ie, the idea that the ECB must operate in accordance with "the principle of an open market economy with free competition, favouring an efficient allocation of resources" (Art. 127(1) TFEU). From a monetarist perspective this principle implies that the ECB market interventions (such as asset purchases or collateral policy) must replicate market structure. Otherwise, should ECB action "move" the market, this would constitute a significant interference in the freedom of its functioning. Consequently, the practice so far has been to apply the principle of market neutrality, ie asset purchases that reflect the general structure of the market, without specific preferences that could affect the prices of specific assets.³⁹ However, asset purchases that are intended to reflect the structure of the market are not conducive to the green transition, as a large proportion of the assets available on the market are owned by companies whose business models are harmful to the environment. As a result, the assets of many companies whose business models are environmentally damaging have been included in the PEPP purchase list, which contradicts the stated aim of addressing climate change risks. Thus, the application of the principle of market neutrality leads to a replication of market failure to deal with climate challenges. However, the principle of market neutrality itself has also come under fundamental criticism in recent times. It has been argued that it is a false assumption

38 Jens Weidmann, 'Bundesbank chief: How central banks should address climate change' Financial Times (19 November 2020) <<https://www.ft.com/content/ed270eb2-e5f9-4a2a-8987-41df4eb67418>> accessed 10 June 2021.

39 Ulrich Bindseil, Marco Corsi, Benjamin Sahel and Ad Visser, 'The Eurosystem collateral framework explained' (2017) 189 Occasional Paper Series 12 <<https://www.ecb.europa.eu/pub/pdf/scpops/ecb.op189.en.pdf>> accessed 10 June 2021.

that asset market interventions can be neutral, as these always lead to price distortions.⁴⁰ Therefore, there should be a move away from the concept of market neutrality and central bank independence towards closer democratic control of its objectives and their achievement. Furthermore, ECB's Governing Board Members themselves have argued that given the market failures associated with climate change (ie mispricing of carbon emissions) the Bank's approach to the principle should be amended, as its policies should not act as a negative feedback loop of existing externalities.⁴¹ Clearly therefore the issue of market neutrality with regard to climate change has been one of the most controversial topics in the monetary policy discussion related to climate change without a clear consensus in the ECB Governing Council. Recently, the ECB has treated previous asset purchase rules quite flexibly, including on issuer limits.⁴² This and statements by some members of the ECB's executive management leadership may indicate a change in approach to market neutrality in the near future.⁴³ This also implies that in the future the greening of ECB's instruments will not necessarily be limited by the pre-existing market structures.

The second type of constraint arises in the context of the time constraints imposed on a particular measure and the horizon with which the central bank adopts certain measures. For example, in the Gauweiler case the ECB assessed whether the framework within which the ECB deployed the OMT was conditional in time on the achievement of the objective.⁴⁴ The time horizon with which climate change concerns must be incorporated into central bank action is by definition longer than traditional approach to monetary policy, which defines monetary policy objectives through the medium-term of "between

40 Jens van't Klooster and Clément Fontan, 'The Myth of Market Neutrality: A Comparative Study of the European Central Bank's and the Swiss National Bank's Corporate Security Purchases' (2019) 25 (6) *New Political Economy* 873–974.

41 Schnabel (n 26); Cf William Oman and Romain Svartzman, 'Sustainable Finance: Current Needs, Measures and Impact' (CESifo Forum, Vol. 22, May 2021) <https://www.cesifo.org/DocDL/CESifo-forum-2021-3-oman-svartzman-what-justifies-sustainable-finance-measures_0.pdf> accessed 10 June 2021.

42 European Central Bank, Decision (EU) 2020/440 of the European Central Bank of 24 March 2020 on a temporary pandemic emergency purchase programme (ECB/2020/17).

43 Danae Kyriakopoulou, 'ECB market neutrality crumbling' (OMFIF, 16 February 2021) <<https://www.omfif.org/2021/02/ecb-market-neutrality-crumbling/>> accessed 10 June 2021.

44 Judgment of the Court (Grand Chamber) of 16 June 2015, Peter Gauweiler and Others v Deutscher Bundestag, Case C-62/14, para. 82, see Phoebus Athanassiou, 'The institutional architecture and tasks of the European Central Bank', in Federico Fabbrini and Marco Ventoruzzo (eds), *Research Handbook on EU Economic Law* (Edward Elgar Publishing 2018) 143.

18 months and three years.”⁴⁵ As in the case of market neutrality, thinking about climate change necessitates that the central bank change its analytical framework, including its horizon of action with the redistributive effects this may entail. We return to these questions in the next section.

What the ECB’s investment strategy could look like in the future is illustrated by the example of the Eurosystem’s second largest bank, Banque de France, which, when publishing its Responsible Investment Charter in 2018, committed to respecting climate objectives in the management of its assets.⁴⁶ The Banque de France bases its responsible investment strategy on three pillars, which concern aligning equity and bond purchases with France’s climate commitments, integrating environmental, social and governance (ESG) criteria into asset management, and using voting rights as a shareholder.⁴⁷ This strategy has been effectively implemented. Since 2018, the Bank of France has gradually excluded from its investments companies whose revenues related to mining or coal-based energy production exceeded 20% and plans to exclude by the end of 2024 all companies that are related to the hydrocarbon sector. The bank is also requiring companies to disclose the environmental impact of their activities.⁴⁸ This shows that diversifying central bank operational strategies in support of a specific climate protection objective can be effectively implemented by one of the key members of the Eurosystem.

5. ECB’S BALANCING EXERCISES AND DEMOCRATIC ACCOUNTABILITY

ECB’s greening, however, is likely to have far-reaching effects. Not all will be related directly to the objective of mitigating climate change related risks. For example, there are redistributive effects to ECB’s action across time (higher economic costs to protect the environment for future generations, across economic sectors (e.g., away from traditional

45 Grégory Claeys, Maria Demertzis, Jan Mazza, ‘A monetary policy framework for the European Central Bank to deal with uncertainty’ (Bruegel, Policy Contribution, 22 November 2018) <<https://www.bruegel.org/2018/11/a-monetary-policy-framework-for-the-european-central-bank-to-deal-with-uncertainty/>> accessed 10 June 2021.

46 Banque de France, ‘Responsible Investment Charter of the Banque de France’ (CSR, March 2018) <https://www.banque-france.fr/sites/default/files/media/2018/03/29/818080_-charte-invest_en_2018_03_28_12h12m41.pdf> accessed 10 June 2021.

47 Banque de France, ‘Responsible Investment Report 2020’ (BdF, 2021) <https://www.banque-france.fr/sites/default/files/media/2021/03/30/rapport_ir_2020_angl.pdf> accessed 10 June 2021.

48 Ibid.

(heavy emitting) industrial sectors to new ones) as well as regions (e.g., away from regions with high carbon intensity towards those less emitting). Under the standard test of the ECB's perimeter discussed in Section 2, in assessing the proportionality of its action, the ECB should be expected to conduct such an assessment. Such an exercise is by no means a purely technocratic exercise and may be perceived in terms of a "democratic authorisation gap"⁴⁹. Remedying this gap requires providing further guidance as to how the ECB should understand the climate policy related policies with regard to other socio-economic objectives of EU action.

In other words, climate change policy should not be only technocratic, or incorporated into the ECB's activity through science-based expertise and modelling (though these are naturally warranted). Rather formal guidance with regard to how the ECB should conduct the balancing exercise is needed especially from the European Parliament. Where such guidance concerns the scope of relevant policy considerations and not the choice or calibration of chosen policy instruments, such a move should not be conceived of as being at odds with ECB's formally protected independence.⁵⁰

6. CONCLUSIONS

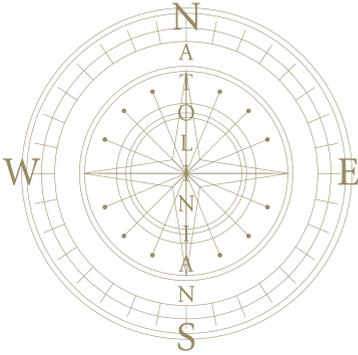
For a long time, central banks and the financial sector as a whole ignored the consequences of climate change. Recent years have seen a very intense process of central banks preparing to support climate targets, a trend further reinforced over the course of the pandemic. The ECB and other central banks had no experts, data or tools to analyse climate risks. Today many of the first movers boast dedicated climate centres drawing on the expertise of climate economists and natural scientists. Central bank instrumentation was not designed taking into account the climate crisis. The strongest monetary policy tools are always limited in nature and the ECB has to indicate at some point in time through forward guidance the time horizon for the completion of such operations. In this chapter, we argued that there is significant scope for incorporation of climate change concerns into the existing mandate of the ECB, both with regard to the primary objective of price stability, as well as ECB's role in supporting general economic policies of the EU, such as the Green Deal. In fact, such an expansion follows on from the transformation of the ECB's mandate over the course of the Great Financial Crisis, and since the Treaty of

49 de Boer, van 't Klooster (n 20).

50 Chiara Zillioli, *'Independence and Legitimacy in the Institutional System of the European Union'*, in *Dominique Riteleng* (ed), *Independence and Legitimacy in the Institutional System of the European Union* (Oxford University Press 2016).

Lisbon has reinforced the sustainability dimension of EU integration. The design of such EU law-compliant “green” monetary policy instruments requires correct understanding of the aims pursued, calibration and justification in terms of possible negative effects with regard to other policy objectives. We have shown that the ECB can calibrate collateral policy as well as asset purchase rules to support the green transition. To this end, it also seems important to depart from the previous interpretation of the principle of market neutrality. When analysing the ECB’s ability to support the green transition, it is important to bear in mind that states and societies play the most important role in this process. Therefore, the possibilities of exerting a strong influence on the public debate through verbal interventions or informal interactions of the ECB’s management may also be of great importance. Such a “green” transformation, however, requires equally further political guidance from the European Parliament and the capitals. Where such guidance redefines the scope of ECB’s independence in a way it complements an important transformation of the institution which begun with the onset of the Great Financial Crisis.

Today, tackling “green swans” through monetary policy action seems inevitable. The new ECB monetary policy strategy, published in July 2021 articulates the Governing Council’s commitment to ensuring, within its mandate, that the Eurosystem fully incorporates the implications of climate change and the need to transition to a low-carbon economy into monetary policy. While the ECB still does not have as clear a mandate to support climate goals as for example the Bank of England, and the announced roadmap may be seen as limited and unclear, it now has a basic framework for climate-friendly monetary policy. The impact of climate change on the ECB’s activities (and vice versa) will become more apparent - with the next review of monetary policy strategy due in 2025.



PART III

THE CHANGING GOVERNANCE OF RENEWABLE ENERGY

CHAPTER 6

Introducing flexible governance for renewable energy: How the EU came to drop nationally binding targets for 2030

BY ARNOLD BRUHIN



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1. INTRODUCTION

In October 2014, the European Council adopted the guiding principles for the EU's new climate and energy policy framework for the period between 2021 and 2030.¹ It then aimed at reducing the EU's greenhouse gas emissions by 40 percent (compared to 1990), improving energy efficiency by a minimum of 32.5 percent (compared to projections) and increasing the share of renewable energy to at least 32 percent of final energy consumption. The 2030 framework maintained in principle the target structure that was established with the EU's prominent climate and energy package for 2020.² Regarding the renewable energy target, however, the new 2030 framework represented a notable evolution. Contrary to the 2020 package, the renewables objective of the new climate and energy framework is no longer translated into nationally binding targets but only "binding at EU level".³

Even though this change seems to be rather minor at first, giving up nationally binding targets in fact "entails a fundamental shift" for the way in which the EU regulates renewable energy, as recognised by the European Commission (hereafter 'the Commission').⁴ Under the 2020 package's renewable energy directive, each Member State had a legal obligation to meet its individual target, conferring the capacity to the Commission to sanction non-compliance through infringement procedures.⁵ In contrast, the proposed revision of the renewables directive of the Commission's 'Clean Energy for All Europeans Package' proposed in November 2016 would give Member States "greater flexibility" for developing renewable energy.⁶ Member States individually decide on their renewable energy objectives while the Commission only ensures that the collective EU goal is reached by means of involving national governments in an "iterative process".⁷ Ultimately, the

1 European Council, 'Conclusions from the European Council of 23 and 24 October 2014', EUCO 169/14, Brussels, 24 October 2014.

2 At the time of submitting, the EU is taking steps to upgrade its climate and energy framework for 2030 with its "Fit for 55" package which will translate into increased renewables and efficiency targets in order to cut greenhouse gas emissions by 55 percent.

3 European Council (n 1) 5.

4 European Commission, Proposal for a directive on the promotion of the use of energy from renewable sources (recast), COM (2016) 767 final, 2016/0382 (COD), 30 November 2016, 8.

5 Article 3.1, 2009/28/EC.

6 European Commission (n 4) recital 8.

7 European Commission, 'A policy framework for climate and energy in the period from 2020 to 2030', Communication, COM (2014) 15 final (22 January 2014) 12–13.

Commission is only able to issue recommendations or propose additional measures should the sum of national contributions fall short of reaching the overall EU objective.⁸ Consequently, the 2030 framework marks a shift in the EU's energy governance, ie in "the way that European Institutions" but also Member States "interact, both formally and informally, in order to set and realise energy policy objectives of the European Union".⁹ The 2030 framework embodies a form of flexible governance based on a bottom-up logic whose focus on deliberative coordination contrasts with the 2020 package's more traditional 'command-and-control' approach to environmental regulation, typically characterised by the 'top-down' adoption of detailed and binding legal standards.¹⁰

This chapter therefore analyses the interactions between the Commission, the European Council and relevant Member States that led to the shift and assesses to what extent it can be attributed to the entrepreneurship of the Commission as the EU's *de jure* legislative agenda setter. The chapter builds on and contributes to the policy analysis literature on policy change, reform and policy entrepreneurship in the context of the EU's institutional landscape. More specifically, the focus of this contribution is on the agenda setting and policy formulation and adoption process. The substance of the implications of the EU evolving renewables regime regarding bindingness, stringency and Europeanisation are examined by Lisse Van Vliet in Chapter 7.

In what follows, I first briefly introduce the concept of policy entrepreneurship and key vectors relevant for the ensuing discussion. The chapter then contextualises the research by retracing the adoption of the EU's 2020 climate and energy package in 2008 in order to provide a better understanding of the scope of the reform in the EU's renewable electricity policy initiated in 2016 with the Commission's 'Clean Energy For all Europeans' package. The 2020 package is understood as the result of a close alliance between the Commission leadership and key Member States whose joint entrepreneurship was crucial to overcome opposition both within the Commission and among more reluctant Mem-

8 European Commission, Proposal for a Regulation on the Governance of the Energy Union, COM (2016) 759 final, 2016/0375 (COD), (30 November 2016).

9 European Parliament, 'EU Energy Governance for the future', Study, Directorate-General for internal policies, IP/A/ITRE/2014-08, January 2015, 1; also Christian Egenhofer et al., 'EU Climate and Energy Governance: There's more to it than meets the eye', Centre for European Policy Studies (14 July 2015) 1.

10 Maria Lee, 'EU Environmental Law, Governance and Decision-Making', (Hart Publishing 2014) 83; Andrew Jordan, Rüdiger Wurzel, Anthony Zito, 'Still the century of 'new' environmental policy instruments? Exploring patterns of innovation and continuity' (2013) 22 (1) Environmental Politics 168.

ber States. The coalition's entrepreneurship notably rested on the appealing framing of the package as a way for the EU to become a global leader and a model for other countries to follow in the fight against climate change.

Then, turning to the elaboration of the new governance framework of the EU's post-2020 renewable energy policy, I argue that the shift towards flexible governance was largely driven by Member States' increased opposition against binding commitments. A number of governments successfully resisted a new separate target for renewable energy and could not be aligned by a weakened coalition of more ambitious Member States. While the idea of making the EU a global model in the fight against climate change lost traction, opponents of binding targets successfully framed renewables as a major driver for increasing electricity costs, notably against the backdrop of the continued economic and budgetary strain in many Member States. Increased divergences between Member States in turn translated into greater internal divisions within the Commission up to the political level. Consequently, the Commission adopted an overall reactive stance while its entrepreneurship was limited to the development of the specific modalities of the new framework.

This chapter's findings are based on official documents of EU institutions and national governments, academic literature, press articles and on semi-structured interviews conducted in 2017 with five officials working at different levels in the Commission and a former Director General, with three stakeholder representatives working for relevant trade associations and a non-governmental organisation, with one policy adviser to a parliamentary group at the European Parliament as well as with a researcher working at a think tank.¹¹

2. CONCEPTUALISING POLICY ENTREPRENEURSHIP

In essence, policy entrepreneurship refers to activities and strategies aimed at promoting "significant policy change".¹² For the present discussion, we can thus conceptualise policy entrepreneurship in broad terms as a political actor's actions to induce and shape policy reform. From the academic literature on agenda-setting and the role of policy entrepreneurs, we can identify three key vectors by which the Commission can use as a policy entrepreneur that are relevant for the ensuing discussion:

11 Given the sensitive nature of their work most respondents wished to remain anonymous.

12 Michael Mintrom, Phillipa Norman, 'Policy Entrepreneurship and Policy Change' (2009) 37 (4) *The Policy Studies Journal* 651.

1. coalition building, notably through alliances and interactions with Member States;¹³
2. continuous advocacy to ‘soften-up’ the policy process for preferred solutions, notably through “innocuous policy instruments”¹⁴, ie, non-legislative initiatives such as communications, green papers, recommendations, guidelines etc.;¹⁵
3. agenda-shaping by framing problems and discourses to justify reforms as adequate solutions,¹⁶ eg, by referring to negative policy feedbacks such as excessive costs, unanticipated consequences or failure to meet stated objectives when a running policy is up for renewal.¹⁷

The subsequent analysis is based on the premise that the Commission does not elaborate its initiatives in a vacuum and should therefore not be considered as an “ivory tower”.¹⁸ In formal consultations but also through informal channels, Member States’ preferences feed into the drafting process of the Commission’s proposals.¹⁹ The Commission’s initiatives are therefore typically supported by at least some Member States.²⁰ Conversely, we can expect that the interest constellation among Member States affects the Commission’s internal decision-making already in the agenda-setting and drafting phases.²¹ Strong engagement of a united group of Member States is thus likely to bolster those actors within the Commission who defend similar causes, notably if they can “frame their position as

13 Tomas Maltby, ‘European Union energy policy integration: A case of European Commission policy entrepreneurship and increasing supranationalism’ (2013) 55 (April) *Energy Policy* 435, 437.

14 Neill Nugent, Mark Rhinard, ‘Is the European Commission Really in Decline?’ (2016) 54 (5) *Journal of Common Market Studies* 1201.

15 Maltby (n 13) 437; David Jacobs, ‘Designing Financing Mechanisms for Electricity from Renewable Energy Sources: The Role of the European Commission as an Agenda Shaper’ in: Jale Tosun, Sophie Biesenbender, Kai Schulze (eds.), *Energy Policy Making in the EU. Building the Agenda*, (London, Springer 2015), 108.

16 Maltby (n 13) 437.

17 John Kingdon, *Agendas, Alternatives, and Public Policies* (HarperCollins College Publishers 2011) 102–103, 186.

18 Anonymous interview 1, Brussels, 6 February 2017.

19 Pierre Bocquillon, Mathias Dobbels, ‘An elephant on the 13th floor of the Berlaymont? European Council and Commission relations in legislative agenda setting’ (2014) 21 (1) *Journal of European Public Policy* 27.

20 Ibid.

21 Alexander Bürgin, ‘National binding renewable energy targets for 2020, but not for 2030 anymore: why the European Commission developed from a supporter to a brakeman’ (2015) 22 (5) *Journal of European Public Policy* 694.

being in line with the position of key member states”.²² Conversely, the room for manoeuvre for the actors within the Commission with diverging views would increase “the more heterogeneous or ambiguous the positions of the Council” are, particularly with regards to the positioning of key Member States.²³

As a result, the Commission’s ability to exercise entrepreneurship is conditioned on the need to take into account the interests of the Member States and, to a lesser extent, of the European Parliament, particularly when elaborating legislative proposals that typically require the co-legislators’ approval.²⁴ In contrast, the Commission enjoys much greater freedom for non-legislative initiatives which do not require such an interinstitutional consensus, as for instance for green and white papers, guidance documents, recommendations or the guidelines informing its state aid decisions.²⁵

3. A LOOK BACK AT THE 2020 PACKAGE: JOINT ENTREPRENEURSHIP OF KEY MEMBER STATES AND THE COMMISSION

The first initiatives for what later became the EU’s prominent 2020 climate and energy package came from an informal meeting of the European Council in October 2005.²⁶ Amongst other things, the national leaders agreed to back Prime Minister Tony Blair’s initiative to develop a stronger EU energy policy which gave the Commission a green light to develop initiatives to enhance the EU’s role in climate and energy policy.²⁷ In the preparation of the meeting, the British presidency and the Commission collaborated closely “to put energy on the European agenda” at a time of strong public support for “an ambitious EU environmental policy agenda”²⁸ due to rising awareness for resource depletion, supply security and global warming.²⁹

22 Ibid.

23 Ibid.

24 Bocquillon, Dobbels (n 19) 22.

25 Jacobs (n 15) 108.

26 Bocquillon, Dobbels (n 19) 29.

27 Ibid.

28 Philipp Thaler, ‘The European Commission and the European Council: Coordinated Agenda setting in European energy policy’ (2016) 38 (5) *Journal of European Integration* 574.

29 Bocquillon, Dobbels (n 19) 29.

The “mutually reinforcing partnership” between the Commission and the European Council³⁰ aimed at fostering a common EU energy policy persisted beyond the initial agenda-setting phase. The first initiatives were concretised at the March 2006 European Council which endorsed the Commission’s green paper and its general objectives of a reinforced EU energy policy as part of a ‘European strategy for sustainable, competitive and secure energy’.³¹ In addition, national leaders gathered at the occasion also tasked the Commission to develop a renewable energy roadmap with a view to examine the possibility of a 15 percent target for renewable energy to be achieved by 2015.³²

In early 2007, the Commission proceeded with a ‘strategic European energy review’ with a view to shape the outcome of the European Council in spring.³³ The Commission closely linked energy and climate policies by compiling the prominent 2020 objectives for the first time, referring to the goal of reducing carbon emissions and energy consumption by 20 percent each and increasing the share of renewables to 20 percent in final energy consumption.³⁴ The review also included the publication of the Commission’s renewable energy roadmap which called state leaders to adopt a legally enforceable renewable target and affirmed the EU’s aspiration to become a world leader in renewable energy.³⁵

The renewable energy roadmap as well as the triple 2020 objectives were subsequently approved with the presidency conclusions of the March 2007 European Council.³⁶ The conclusions already contained some general orientations on how the EU-wide objectives were to be translated into national targets³⁷ which the Commission later used “as a legitimizing device” in the negotiations for allocating the efforts to be made among the Member States.³⁸ On the basis of the conclusions, the Commission then drafted the

30 Bocquillon, Dobbels (n 19) 30.

31 European Commission, *A European Strategy for Sustainable, Competitive and Secure Energy*, Green Paper, 8.3.2006, COM (2006) 105 final.

32 Bürgin (n 21) 696.

33 Bocquillon, Dobbels (n 19) 30.

34 European Commission, ‘An energy policy for Europe, Communication’, COM (2007), 1 final, (10 January 2007) 6, 12, 14.

35 European Commission, ‘Renewable Energy Road Map. Renewable energies in the 21st century: building a more sustainable future’, Communication, COM (2006) 848 final, (10 January 2007) 18.

36 Bocquillon, Dobbels (n 19) 30.

37 European Council, 8/9 March 2007, Presidency Conclusions, 7224/1/07, (2 May 2007) 20–21.

38 Bocquillon, Dobbels (n 19) 30.

proposals for the 2020 package “in record time” since the aim was to influence the international climate negotiations for a post-Kyoto agreement at the UN climate conference in Copenhagen in December 2009.³⁹ Besides the reformed renewable energy directive,⁴⁰ the package also comprised the revision of the Emissions Trading Scheme directive,⁴¹ the effort sharing decision⁴² and the directive on the geological storage of carbon dioxide.⁴³

As advocated by the Commission, Germany and other Member States, the revised renewable energy directive translated the EU’s overall objective into national targets for the first time, thereby imposing a legal obligation on Member States to increase the share of energy generated from renewable sources.⁴⁴ Moreover, the directive also required Member States to set up national action plans and to report biannually to the Commission on the progress made.⁴⁵

The joint entrepreneurship of the Commission leadership and a coalition of ambitious Member States was decisive in overcoming opposition against the introduction of an ambitious objective for renewable energy. Indeed, a number of Member States including the United Kingdom, France, Sweden, Spain and Netherlands were initially sceptical of introducing legally binding targets even if they supported the development of renewable energy in principle.⁴⁶ Eventually, however, France and the United Kingdom rallied with Germany after it was clarified that national targets would be differentiated and their low-carbon nuclear sectors would also be taken into account.⁴⁷ Later, the French government played a key role for the unusually swift adoption of the package when it held the Council presidency in 2008. Its decision to refer the Commission’s proposals for the 2020 package to the European Council for a unanimous decision at the highest political level was instrumental to the swift adoption of the reforms in less than a year’s time.⁴⁸

39 Ibid.

40 2009/28/EC.

41 2009/29/EC.

42 406/2009/EC.

43 2009/31/EC.

44 Article 3, 2009/28/EC.

45 Articles 4 and 22, 2009/29/EC.

46 Bürgin (n 21) 696.

47 Ibid; anonymous interview 7, Brussels, 7 March 2017.

48 Kati Kulovesi, Elisa Morgera, Miquel Muñoz, ‘Environmental Integration and Multi-faceted International Dimensions of EU Law: Unpacking the EU’s 2009 Climate and Energy Package’, (2011) 48 (3) *Common Market Law Review*.

Leveraging its Council presidency during the first semester of 2007, the advocacy of the German government also provided a solid backing for the Commission leadership vis-à-vis dissenting voices in its departments. Opposition against “the German push” for binding renewable targets was *inter alia* voiced in the energy directorate on grounds that policy-makers should principally refrain from interfering in the national energy mix.⁴⁹ Moreover, the detractors of a renewables target argued that the EU should privilege market-based over regulatory instruments in order to lower emissions more cost-effectively.⁵⁰ As such, the Emissions Trading Scheme (ETS) would already spur sufficient investments in renewables and energy efficiency, rendering additional measures obsolete, their argument went.⁵¹

Eventually, however, Commission President Barroso and the Secretary-General managed to “silence[] the sceptical voices” with the backing of the German government.⁵² This was facilitated by the fact that the Commissioners responsible for energy and for the environment, Andris Piebalgs and Stavros Dimas, were both in line with Barroso’s position, even though they would have lacked the “political weight to deviate from the political pre-setting co-ordinated between Barroso and the member states” in any case, as Bürgin argues.⁵³ By supporting a strong renewable energy policy, the Commission leadership was interested in driving European integration forward after the failure of the Constitutional Treaty and strived to enhance the Commission’s competence for energy policy.⁵⁴ In addition, the package was also intended to step up the EU’s international profile⁵⁵ by becoming a “global leader as a low-carbon and energy efficient economy”. The Commission presented the 2020 package as means to “transform Europe into a low-carbon, high energy efficiency economy”⁵⁶. Its aspiration to “make the European economy a model for sustainable development in the 21st century”⁵⁷ provided an effective framing of the package since it gathered widespread support.⁵⁸

49 Bürgin (n 21) 697.

50 *Ibid.*

51 *Ibid.*

52 *Ibid.*

53 *Ibid.* 698.

54 *Ibid.* 696.

55 *Ibid.* 697.

56 European Commission, ‘20 20 by 2020. Europe’s climate change opportunity’, Communication, COM (2008)30 final, (23 January 2008), 2–3.

57 *Ibid.*

58 Thaler (n 28) 574.

However, it is still questionable whether the Commission would have gone ahead with such an ambitious proposal for renewable energy targets had it not received the full support of the Council presidency.⁵⁹ Noticeably, the impact assessment published together with the renewable energy roadmap in 2007 justified the 20 percent target for renewable energies not only in a technical way as “the best balance between cost and benefits” but also as “an expression of the political will of the Council and the EP”.⁶⁰ The resulting costs were, *inter alia*, justified in the light of hidden costs of generating energy from fossil sources.⁶¹ In contrast, mandatory objectives would also enhance legal certainty for planning and investment.⁶²

All in all, the Commission played a strong role in shaping the 2020 climate and energy package collaboratively with the presidency of the European Council, thereby lending support to the idea of a “mutually reinforcing partnership” between the European Council presidency and the Commission.⁶³ The joint entrepreneurship of key Member States and the Commission rested on their close collaboration and interaction which made it easier for the Commission leadership to tame internal opposition. The Commission successfully shaped the reform agenda through the use of deliberative instruments such as green papers, roadmaps etc. and successfully framed the strong promotion of renewables as a means for the EU to lead in the global fight against climate change.

4. 2030 FRAMEWORK: MEMBER STATES’ ENHANCED DIVERGENCES AND INTERNAL DIVISIONS RESTRAIN THE COMMISSION’S ENTREPRENEURSHIP

4.1 Enhanced divergences and weaker entrepreneurship by key Member States

In 2013, the Commission launched the debate on the guiding principles for the EU’s post-2020 climate and energy policy by publishing the green paper for “A 2030 framework for climate and energy policies”.⁶⁴ The Commission thereby set the tone and provided a broad framework for the ensuing policy debate by advocating a “sufficiently ambitious”

59 Bocquillon, Dobbels (n 19) 30.

60 Bürgerin (n 21) 697.

61 *Ibid.*

62 *Ibid* 698

63 Bocquillon, Dobbels (n 19) 29–30.

64 European Commission, ‘A 2030 framework for climate and energy policies’, Communication, COM (2013)169 final, (27 March 2013).

package while emphasising the need to account for certain fundamental evolutions that had set in in after the adoption of the first climate and energy package in 2008-2009, related to:

- the repercussions of the economic crisis, notably with the budgetary problems of Member States and businesses' restricted access to capital;
- the evolution of EU and global energy markets regarding the uptake of renewables and the growth of unconventional gas and oil exploitation;
- the rising concerns about the affordability of energy for households and about businesses' competitiveness;
- the "varying levels of commitment and ambition of international partners in reducing greenhouse gas emissions".⁶⁵

The ensuing public consultation revealed substantial divergences in the appraisal of the existing framework both among stakeholders and Member States.⁶⁶ As it turned out, most actors expressed support for adopting a new target for reducing carbon emissions, with the notable exception of Poland.⁶⁷ However, Member States were now much more divided over the question of whether the EU should maintain a separate target for the deployment of renewable energies.

A number of Member States rallied against promoting renewable energy with an EU-level objective beyond 2020. The members of the 'Visegrad plus Group' – composed of the Czech Republic, Slovakia, Hungary, Poland, Bulgaria and Romania – fervently opposed "any legally binding renewable energy and energy efficiency target at EU or national level".⁶⁸ Crucially, they argued that Member States' right to decide on their energy mix should not be undermined by binding renewables objective.⁶⁹ In general, the governments united in the Visegrad Group defended their positions more assertively when compared to the adoption of the 2020 package.⁷⁰ While they had lacked experience of EU

65 Ibid 2.

66 European Commission, 'Green Paper 2030: Main outcomes of the public consultation', Commission services non paper, undated, <http://ec.europa.eu/energy/sites/ener/files/documents/20130702_green_paper_2030_consultation_results_1.pdf> (retrieved 3 April 2017).

67 Ibid.

68 Visegrad Group, 'Joint Statement of the 21st Meeting of the Ministers of Environment of the Visegrad Group Countries, the Republic of Bulgaria and Romania', 30 September 2014, Bratislava, Slovakia.

69 Ibid.

70 Anonymous interview 7, Brussels, 7 March 2017; interview with Dirk Hendricks, European Renewable Energies Federation, Brussels, 7 March 2017.

decision-making due to their recent EU accession back then, they evolved into “a major stumbling block” according to advocates of a more ambitious renewable energy policy.⁷¹ As the other major proponent of the single-target approach, the United Kingdom underlined the need to grant Member States sufficient flexibility to reach the “overarching” greenhouse gas emission target.⁷² Under Prime Minister Cameron, the British government in particular insisted that Member States should be allowed to rely on non-renewable energy such as nuclear power or shale gas.⁷³ The increased availability and economic viability of shale gas fracking and carbon capture and storage therefore also undermined the support for strong commitments for developing renewables.⁷⁴

The ‘ETS-only’ coalition received strong support from the conventional utilities and the robust lobbying of their CEOs united in the ‘Magritte Group’.⁷⁵ Many of them had originally doubted that the 2020 package would actually deliver and therefore did not embrace the growth of renewable energy for a long time, preferring to stick to their established business models. Only after a few years did they realise that they were losing significant market shares to new players including individuals and energy cooperatives and thus needed to restructure in many cases.⁷⁶ Their strategy for the 2030 framework was therefore to “slow down” the policy-driven expansion of RES-E in order to “catch up” with the energy transition.⁷⁷

On the other hand, the European Parliament remained the most ambitious EU institution regarding the promotion of renewable energy. In a May 2013 resolution, MEPs called for the adoption of a 30 percent minimum target for the share of renewables in 2030 and for introducing additional milestones to be reached until 2050.⁷⁸ In February 2014, the Parliament criticised the Commission’s proposal for the 2030 climate and energy

71 Ibid.

72 James Crisp, ‘UK urged to drop opposition to binding energy efficiency target’ (Euractiv, 16 October 2014) <<http://www.euractiv.com/section/uk-europe/news/uk-urged-to-drop-opposition-to-binding-energy-efficiency-target/>> (retrieved 3 April 2017).

73 Ibid.

74 Bürgin (n 21) 699.

75 Engie et al., ‘Magritte Group calls for immediate measures to safeguard Europe’s energy future’ (Engie, 19 March 2014) <<http://www.engie.com/en/journalists/press-kits/magritte-group-measures-to-safeguard-europes-energy-future/>> (accessed 25 May 2017).

76 Interview with Dirk Hendricks (n 70).

77 Ibid.

78 European Parliament, Resolution of 21 May 2013, ‘Current challenges and opportunities for renewable energy in the European internal energy market’, P7_TA (2013)01.

framework “as short-sighted and unambitious”, reiterating its preference for a 30 percent target for renewable energies to be achieved through nationally binding objectives.⁷⁹ The Parliament continued to defend this position after the 2014 elections, notably in a resolution on the renewable energy progress report of June 2016.⁸⁰ Reiterating their calls to aim for a share of at least 30 percent renewable energy consumption by 2030, they held that “a significantly higher ambition is desirable” in light of the Paris Agreement.⁸¹ Finally, the Parliament also emphasised the benefits of nationally binding targets beyond 2020 as a means to guarantee sufficient legal certainty for investors.⁸²

Yet, despite the Parliament’s continued support for an ambitious renewable energy policy, the coalition of Member States advocating for binding renewable targets remained overall weaker when compared to their role in the adoption of the 2020 package.⁸³ In December 2013, the governments of Germany, France, Italy, Austria, Belgium, Denmark, Ireland and Portugal came out with a joint letter to the climate and energy Commissioners, Hedegaard and Oettinger, calling for a “robust” renewable energy target.⁸⁴ Their argument centred on the gains in competitiveness, the additional jobs and growth that an expanded renewable sector would provide as well as on the need to provide legal certainty for investors.⁸⁵ However, their intervention only came at the time when the compromise position already looked set to be built around the a single target for carbon emissions defended by the opposing alliance. The late timing could be related to the internal disagreements within the German government and the negotiations for a new coalition government that captured all the attention after the September 2013 elections.⁸⁶ In addition, the French government initially took a more cautious stance on the issue, reportedly due to the pressure of the French nuclear industry.⁸⁷

79 European Parliament, ‘A 2030 Framework for climate and energy policies’, European Parliament resolution of 5 February 2014 on a 2030 framework for climate and energy policies (2013/2135(INI)).

80 European Parliament, Report on renewable energy progress report (2016/2041(INI)), A8-0196/2016, 31 May 2016.

81 Ibid 9.

82 European Parliament, A8-0196/2016 (n 80).

83 Interview with Dirk Hendricks (n 70); anonymous interview 7, Brussels, 7 March 2017.

84 Arthur Neslen, ‘Big EU guns fire for ‘crucial’ 2030 renewable targets’ (Euractiv, 7 January 2014) <<http://www.euractiv.com/section/energy/news/big-eu-guns-fire-for-crucial-2030-renewable-targets/>> (retrieved 4 April 2017).

85 Ibid.

86 Bürgin (n 21) 699.

87 Neslen (n 84).

What hampered the ability of the more ambitious Member States to gather support for binding targets was that renewables came to be viewed as a major driver for increasing electricity costs. The “cost explosion” that went along with the unanticipated boom of RES-E generation observed in countries like Spain and Germany also deterred other Member States such as Bulgaria and Romania from pursuing similar policies since their citizens are particularly vulnerable to rising energy costs.⁸⁸ Against the backdrop of persisting economic difficulties in many Member States, “momentum” for an ambitious renewable energy policy was also lost due to the general shift in priorities towards economic growth.⁸⁹ In this light, the ‘environmental agenda’ of EU energy policy came to be seen as too expensive and was thus subordinated to the priority of economic recovery.⁹⁰

Another reason for the erosion of support for a strong EU renewable energy policy can be found in the weakening of the “EU leadership norm”.⁹¹ Compared to the adoption of the 2020 package, the idea of taking strong unilateral commitments to become a global model in the fight against climate change somewhat lost traction after the UN climate conference in Copenhagen showed that only a few countries would actually follow the EU model at the time.⁹² At the same time, the EU had indeed failed to convince major greenhouse gas emitters such as the United States or China to adopt binding commitments, even though the EU was recognised as “leading by doing”.⁹³

However, “the normative pressure to lead the international effort against climate change” did not wane entirely.⁹⁴ Member States notably endorsed the EU’s long term goal to bring down carbon emissions by 80 to 95 percent until 2050.⁹⁵ In 2011, the UN climate conference in Durban provided “another push” for establishing a post-2020 EU target for greenhouse gas emissions since the international community agreed to start negotiations on a new global climate deal to be concluded 2015 in Paris.⁹⁶ The Paris Agreement indeed

88 Anonymous interview 5, Brussels, 17 March 2017.

89 Anonymous interview 4, Brussels, 13 March 2017.

90 Thaler (n 28) 574.

91 Bürgin (n 21) 698–699.

92 Ibid.

93 European Parliament, IP/A/ITRE/2014-08, (n 9) 23–24.

94 Bürgin (n 21) 698.

95 European Council, Conclusions of the European Council of 4.2.2011, EUCO 2/1/11, (8 March 2011) 6.

96 Bürgin (n 21) 698.

proved to be a landmark deal considering the states' commitment to limit the increase in global average temperature to below 2° Celsius compared to pre-industrial levels. Within the EU, the Paris Agreement contributed somewhat to “change the mindset” of those Member States which are traditionally more sceptical of strong climate policies, along with the realisation that “they have to embrace this change”.⁹⁷ Regarding the development of the EU's 2030 framework, however, it appears that the ambition to push international climate negotiations mainly bolstered the target for greenhouse gas emissions while it is less clear how it affected support for the more controversial objectives for renewable energy.

4.2 Internal divisions inhibit the Commission's entrepreneurship

In the elaboration of the 2030 framework, cleavages similar to those manifested in the development of the 2020 package emerged within the Commission. Heterogenous positions were articulated both in DG Climate Action and DG Energy regarding the target structure for greenhouse gas emissions and renewable energy.⁹⁸ Underlining the additional benefits in terms of energy security and employment, parts of DG Energy advocated for setting a higher renewables target than needed to satisfy the objective of 40 percent less greenhouse gas emissions in 2030.⁹⁹ What was finally retained as the guiding principle informing the overall renewables target was the aim to achieve a 50 percent share of renewable energy in electricity consumption by 2050.¹⁰⁰ On the other hand, a large faction in DG Climate Action supported the United Kingdom's preference for abandoning renewable and energy efficiency targets which corresponded with their focus on the Emissions Trading Scheme.¹⁰¹

Intense internal discussions, also within DG Energy, emerged on whether the 2030 framework's renewable energy objective should be translated into nationally binding targets.¹⁰² In fact, the target design became “the real issue” in the internal debates, more than the general question of maintaining a separate renewables objective or not.¹⁰³ This

97 Anonymous interview 1, Brussels, 6 February 2017.

98 Bürgin (n 21) 700.

99 Bürgin (n 21); anonymous interview 1, Brussels, 6 February 2017. The 40 percent target for greenhouse gas emissions was derived from the scenarios of the Commission's energy roadmap 2050 as the most cost-effective pathway, cf. European Commission, Energy Roadmap 2050, Communication, COM (2011) 885 final, 15.12.2011.

100 Anonymous interview 2, Bruges, 3 March 2017.

101 Anonymous interview 4, Brussels, 13 March 2017.

102 Anonymous interview 2, Bruges, 3 March 2017.

103 Ibid.

debate was also mirrored in the impact assessment's ambiguity on the matter, indicating on the one hand that an EU-wide objective without binding national commitments could "potentially [...] lead to development of renewables where the resources are most abundant", thereby "in theory improving EU wide cost-efficiency".¹⁰⁴ On the other hand, it stated that national targets "could better ensure a balanced development of renewables across the EU" since Member States might not have sufficient incentives to reduce administrative barriers and develop their grid infrastructure to foster the uptake of renewables otherwise.¹⁰⁵

In contrast to the drafting process of the 2020 package, the internal debate on the guiding principles of the 2030 framework was now also carried out at the political level. Noticeably, Energy Commissioner Oettinger openly rejected the impact assessment's preferred option to reduce the EU's greenhouse gas output by 40 percent until 2030¹⁰⁶ on grounds that the EU should not overburden its economy with unilateral commitments.¹⁰⁷ Instead, Oettinger and other Commissioners argued for a 35 percent goal to reduce the EU's carbon output¹⁰⁸ which was only slightly above 32 percent savings projected as the business-as-usual scenario.¹⁰⁹ Oettinger also opposed keeping Member-State specific renewables objectives on grounds that the EU should not interfere in the national energy mix.¹¹⁰ Climate Commissioner Hedegaard, on the other hand, defended the 40 percent objective for greenhouse gas emissions as well as nationally binding renewables targets, yet her priority was clearly to maintain a carbon objective.¹¹¹

In the end, the Commission's communication on the 2030 framework reflected the compromise suggested by President Barroso in that it retained the 40 percent GHG reduc-

104 European Commission, Executive summary of the impact assessment accompanying the Communication 'A policy framework for climate and energy in the period from 2020 up to 2030', SWD (2014) 16 final, (22 January 2014) 13.

105 Ibid 13–14.

106 Ibid 15.

107 Arthur Neslen, 'Oettinger rallies opposition to 2030 CO2 target' (Euractiv, 29 January 2014), <<https://www.euractiv.com/section/trade-society/news/oettinger-rallies-opposition-to-2030-co2-target/>> (retrieved 3 April 2017).

108 Ibid.

109 European Commission, SWD (2014) 16 final (n 104) 5.

110 Bürgin (n 21) 702.

111 Ibid 703.

tion goal in exchange for abandoning nationally binding targets for renewable energy.¹¹² Indeed, the Commission suggested to achieve “at least” a 27 percent renewables share of energy consumed which should be binding for the EU as whole but not for individual Member States.¹¹³ As such, it would be based on “clear commitments decided by the Member States themselves which should be guided by the need to deliver collectively the EU-level target and build upon what each Member State should deliver in relation to their current targets for 2020”.¹¹⁴ Hence, the proposed 2030 framework was seen as a typical example of an internal balancing exercise between diverging DG interests within Commission.¹¹⁵

Yet, the Commission’s accentuated internal divisions in the development of the 2030 framework also resulted from the Member States’ more ambivalent interest constellation.¹¹⁶ Contrary to the drafting of the 2020 package, the Commission leadership received no unequivocal support from the Member States. Consequently, President Barroso did not succeed with his strategy to draft the new framework based on the target trajectories proposed in the Commission’s Energy Roadmap 2050 published in 2011, ie, with objectives of 40 percent less greenhouse gases and a 30 percent share of renewable energy which Barroso wanted to make legally binding.¹¹⁷ Individual Commissioners therefore enjoyed greater discretion to depart from the line of the Commission presidency.

As for the European Parliament, its positioning was mainly perceived at the political level of the Commission. The push from MEPs of the Industry, Transport and Energy Committee for higher target ambition was well noted.¹¹⁸ More significantly, a letter from President Schulz to the Commission president had a particularly “positive effect” since it confirmed the general orientation of the Commission’s draft as one that the Parliament was “politically expecting” from the Commission.¹¹⁹ Subsequently, this allowed the Commission leadership “to give confidence to the services to go for it”, notably against the

112 Ibid.

113 European Commission, COM (2014) 15 final (n 7) 6. In the end the co-legislators settled on a 32 percent target.

114 European Commission, COM (2014) 15 final (n 7) 6.

115 Anonymous interview 4, Brussels, 13 March 2017.

116 Bürgin (n 21) 700; Anonymous interview 7, Brussels, 7 March 2017.

117 Bürgin (n 21) 700.

118 Anonymous interview 3, Brussels, 13 March 2017.

119 Ibid.

voices that opposed a post-2020 renewable energy target altogether.¹²⁰ In this view, the Parliament's "political pressure" helped to avoid "pre-diluting" the Commission's proposal before the start of the legislative process.¹²¹ At the working level of the Commission, however, the Parliament's position was only marginally felt whereas the Member States' permanent representations were generally much more present in the drafting phase.¹²²

Regarding the 2030 framework's level of ambition, interviewed officials recognised that the Commission adopted an overall more cautious stance.¹²³ Bearing in mind that the majority of Member States would at best agree to a collective EU target for renewable energy,¹²⁴ this was clearly not seen as the right time to push ahead with an overly ambitious proposal that would virtually stand no chances of approval in the Council.¹²⁵ Indeed, during the drafting process the Commission considered it likely that a Polish-led blocking minority would form in case it would propose nationally binding targets.¹²⁶ Abandoning them was thus presented as a necessary concession to the reluctant Member States.¹²⁷ Ultimately, departing from the conclusions of the European Council of October 2014 regarding the 2030 framework's looser governance scheme for renewables was not seen as an option by Commission officials.¹²⁸

The way in which the Commission framed the "fundamental shift"¹²⁹ towards a collective EU-level target for renewable energy illustrates its increased emphasis on market integration and competitiveness with regards to renewables. Indeed, the Commission argued that while "national targets can drive strong action by the Member States and growth in emerging industries" they "have not always ensured market integration, cost-efficiency

120 Ibid.

121 Ibid.

122 Anonymous interview 4, Brussels, 13 March 2017.

123 Anonymous interview 1, Brussels, 6 February 2017; anonymous interview 4, Brussels, 13 March 2017; interview with Karl Falkenberg, former Director of Directorate-General for the Environment, European Commission, Brussels, 6 February 2017.

124 Anonymous interview 1, Brussels, 6 February 2017.

125 Anonymous interview 4, Brussels, 13 March 2017.

126 Anonymous interview 2, Bruges, 3 March 2017.

127 Anonymous interview 4, Brussels, 13 March 2017.

128 Anonymous interview 1, Brussels, 6 February 2017, Anonymous interview 4, Brussels, 13 March 2017.

129 European Commission, COM (2016) 767 final (n 4) 2.

and undistorted competition”.¹³⁰ In the same vein, reference is made to the impact assessment’s indication that “a main target for greenhouse gas emissions reduction represents the least cost pathway to a low carbon economy which of itself should drive an increased share of renewable energy and energy savings in the Union.”¹³¹ Yet this argument clearly contradicts the mid-term evaluation of the existing renewables directive which found that “national binding targets were the most important driver for renewable energy policies and investments in many Member States”.¹³² The Commission also adopted the argument of the British government that such a framework provides Member States with “greater flexibility” to fulfil their greenhouse gas reduction targets “in accordance with their specific circumstances, energy mixes and capacities to produce renewable energy”.¹³³

4.3 The Commission’s ‘mandated’ drafting of the 2030 governance framework

Not surprisingly given the extent to which the Commission had anticipated Member States’ compromise position, Member States quickly endorsed the Commission’s communication that sketched out the 2030 climate and energy framework. Shortly before the European Council in March 2014, ministers of thirteen Member States, including from the United Kingdom, Germany, France and Italy, formed as the ‘Green Growth Group’ to issue a joint statement which essentially endorsed the Commission’s suggestions.¹³⁴ Yet emphasis was put on the need to give Member States flexibility “to develop their own renewable energy strategies”.¹³⁵

At its October 2014 meeting, the European Council approved the climate and energy policy framework proposed by the Commission.¹³⁶ The heads of states and governments agreed to the 40 percent reduction target for GHG emissions and to the EU-level target

130 European Commission, COM (2014) 15 final (n 7) 4.

131 Ibid.

132 European Commission, ‘REFIT evaluation of the Directive 2009/28/EC accompanying the proposal for a directive on the promotion of the use of energy from renewable sources (recast)’, Staff Working Document, SWD (2016) 416 final, (30 November 2016) 5.

133 European Commission, COM (2014) 15 final (n 7) 6

134 UK Government, ‘Green Growth Group Ministers’ statement on climate and energy framework for 2030’, 3 March 2014, <<https://www.gov.uk/government/news/green-growth-group-ministers-statement-on-climate-and-energy-framework-for-2030>> (retrieved 3 April 2017).

135 Ibid.

136 European Council, EUCO 169/14 (n 1).

of raising the share of renewable energy to 27 percent.¹³⁷ Here again, emphasis was put on giving Member States “the necessary flexibility”¹³⁸ to meet these objectives “while fully respecting the Member States’ freedom to determine their energy mix”.¹³⁹ The European Council also reiterated the importance of the Emissions Trading Scheme as the “main European instrument” to deliver emission cuts.¹⁴⁰ More importantly, the compromise grants Member States with a GDP per capita below 60 percent of the EU average the right to continue allocating free ETS allowances to the energy sector up until 2030.¹⁴¹ This aspect was regarded as the principal concession to overcome the opposition of the Polish-led Visegrad Group against the proposed target framework.¹⁴²

The European Council conclusions spelled out the guiding principles and set the limits for the legislative proposals to be developed by the Commission. Deviations from the agreed framework were simply not considered politically feasible but were also unlikely since it also reflected the Commission’s internal compromise position.¹⁴³ In fact, the conclusions were also viewed as a success in the Commission given the strong initial opposition against any kind of new renewable energy target: “the fact that we have an agreement is already quite something”, as it was perceived.¹⁴⁴ From this perspective, the Commission “managed to strike a very fine balance between the Member States who wanted nothing, even no greenhouse gas reduction targets, and those who want much more”.¹⁴⁵ On the other hand, the overall level of ambition was acknowledged as being rather low¹⁴⁶ since the 27 percent objective for renewables is close to the business-as-usual projections of an RES-E share of 24.3 percent in 2030.¹⁴⁷ The Commission’s overall more cautious approach compared to the drafting of the 2020 package can also be linked to the evolved political

137 Ibid 5. In the end, the co-legislators settled on a 32 percent target.

138 Ibid 9.

139 Ibid 5.

140 Ibid 2.

141 Sonja van Renssen, ‘The EU’s great 2030 energy and climate compromise’ (Energy Post, 24 October 2014), <<http://energypost.eu/eus-great-2030-energy-climate-compromise/>> (retrieved 6 March 2017).

142 Ibid.

143 Anonymous interview 5, Brussels, 17 March 2017.

144 Anonymous interview 1, Brussels, 6 February 2017.

145 Ibid.

146 Ibid.

147 European Commission, COM (2016) 767 final (n 4) 2.

context and a perceived risk of a certain renationalisation of EU policies in the face of rising anti-EU populism in many Member States against the backdrop of the United Kingdom's decision to leave the EU.¹⁴⁸

With regards to renewable energies, the Commission was now confronted with a “strange mandate” since the question arose how the EU-level target could be enforced without fixed national contributions.¹⁴⁹ Inevitably, the Commission would lose its existing enforcement option of infringement procedures in case Member States which missed their targets. Critics argue that this “non-binding bottom-up approach” increases the risk that the overall EU target 2030 may not be fulfilled, also given the fact that some Member States already struggled to meet their 2020 objectives.¹⁵⁰ At the same time, DG Energy also understood the vague mandate as a chance to extend the Commission's supervision powers on the elaboration of national renewable energy policies in order to ensure compliance.¹⁵¹

A central element in the proposed regulation on the governance framework for the Energy Union is the streamlining of Member States' current planning and reporting obligations into one national integrated energy and climate plan for the post-2020 period.¹⁵² Replacing several separate plans ie for the reduction of greenhouse gases or the deployment of renewable energy, the new plans are designed to cover all five dimensions of the Energy Union, ie energy security, internal energy market, energy efficiency, decarbonisation as well as research, innovation and competitiveness. They notably have to include national targets for the reduction of greenhouse gas emissions and for the share of renewable energy production to be achieved.¹⁵³

As recommended by the impact assessment, the governance framework aims at establishing an “iterative process” between Member States and the Commission that covers “both the development (ambition) and implementation (delivery) of national plans”.¹⁵⁴ In this regard, it foresees a consultation process based on the draft national plans, allowing the

148 Interview with Dirk Hendricks (n 70).

149 Anonymous interview 4, Brussels, 13 March 2017.

150 Tomas Wyns, Arianna Khatchadourian and Sebastian Oberthür, ‘EU Governance of Renewable Energy post-2020 – risks and options. A report for the Heinrich-Böll-Stiftung European Union’ (2014) Institute for European Studies – Vrije Universiteit Brussel, 1.

151 Anonymous interview 4, Brussels, 13 March 2017.

152 European Commission, COM (2016) 759 final (n 8) chapter 2.

153 European Commission, COM (2014) 15 final (n 7) 13.

154 European Commission, COM (2016) 759 final (n 8) 6.

Commission to issue recommendations “regarding the level of ambition of objectives, targets and contributions as well as on specific policies and measures”.¹⁵⁵ In this respect, giving the Commission a say on the national energy and climate plans was still resented by certain Member States, as the Commission noted.¹⁵⁶

Member States are also required to devise regular progress reports on the implementation of their integrated plans.¹⁵⁷ This enables the Commission to give “recommendations on how to enhance the ambition of the national plans or regarding the implementation of the plans in order to achieve the objectives already set”.¹⁵⁸ If the assessment of Member States’ progress reveals that the collective objectives will not be reached, the Commission would take action at EU level¹⁵⁹ or encourage governments to take additional measures.¹⁶⁰ In this case, Member States would have to increase the share of renewable energies for instance in the heating and cooling or transport sectors or make financial contributions to an EU renewable energy fund in order to cover the emerging gap.¹⁶¹

In the end, however, the enforcement options in the proposal for the governance regulation to address a potential delivery gap remained overall weaker and less concrete than wished for not only by stakeholders but also by DG Energy.¹⁶² In the public consultation, the majority of respondents had indeed expressed support for stipulating both preventive and corrective measure in the governance regulation.¹⁶³ In the final compromise reached by the co-legislators, the European Parliament led by rapporteur Claude Turmes managed to sharpen the trigger points for the gap filler by including indicative trajectories and reference points for Member States’ contributions to the EU-level target (18 percent by 2022, 43 percent by 2025, 65 percent by 2027).¹⁶⁴

155 European Commission, COM (2016) 759 final (n 8) 9.

156 Anonymous interview 5, Brussels, 17 March 2017.

157 European Commission, COM (2016) 759 final (n 8) article 18.

158 European Commission, COM (2016) 759 final (n 8) chapter 5, 10.

159 *Ibid* article 27.

160 *Ibid* 10–11, also chapter 5.

161 *Ibid* Article 27.4.

162 Anonymous interview 4, Brussels, 13 March 2017.

163 European Commission, COM (2016) 767 final (n 4) 11.

164 Regulation (EU) 2018/2019, chapter 2.

By accommodating its proposal with Member States' interests the Commission opted for a political reading of the present situation, taking into account the fragilised state of the EU with the rise of Eurosceptic populism.¹⁶⁵ From this perspective, the possibility of introducing an automatic sanction mechanism, as advocated by some, would have potentially bolstered anti-EU sentiment but also "send a bad message" on the energy transition as such if it was to be imposed against the will of national governments. The overarching spirit of the Commission's proposal went instead to demonstrate the energy transition's potential to benefits all Member States and participating actors in order to create a "positive momentum".¹⁶⁶ This was also a driver for the Commission to frame its renewable energy policy as an industrial policy contributing to growth, innovation and employment, thereby transcending the mere environmental rationale.¹⁶⁷

5. CONCLUSION

The first section of this chapter reviewed the interactions of the Commission, the European Council and key Member States during the elaboration of the EU's prominent climate and energy package for 2020. The agenda-setting process and the adoption of the 2020 package were analysed as the result of the joint entrepreneurship of the Commission and key Member States. The strong advocacy of Germany, France and the United Kingdom was instrumental in overcoming opposition of more reluctant governments and provided the Commission leadership with the necessary backing to resolve internal divisions. Conversely, the Commission shaped the reform agenda by feeding the European Council with bold green papers and communications, thereby successfully framing a strong renewable energy policy as a way for the EU to become a model in the global fight against climate change.

By contrast, the former 'winning coalition' of pioneering Member States and the Commission leadership could not decisively shape the design of the new governance framework for renewable energies. A significant number of governments backed by conventional power producers fundamentally opposed any quantified post-2020 target for renewable energy. Contrary to the negotiations of the 2020 package, the weakened alliance of more ambitious Member States could not align opposing governments since the latter successfully invoked adverse policy feedbacks of rising electricity costs that were attributed to the promotion of renewable electricity. Faced with the more ambiguous Member State

165 Anonymous interview 3, Brussels, 13 March 2017.

166 Anonymous interview 3, Brussels, 13 March 2017.

167 Ibid.

constellation and increased internal divisions, the Commission leadership was unable to maintain the traditional regulatory approach established with the existing renewables directive. The Commission's entrepreneurship was thus limited to the development of the specific modalities of the new governance framework.

The governance model adopted with the 2030 framework is also reflective of a broader trend towards such iterative schemes. As such, the governance regulation was clearly inspired by the governance scheme established with the European Semester for economic and fiscal coordination which is also explicitly referred to in the Commission's communication on the 2030 framework.¹⁶⁸ This inspiration is reflected in the discursive, bottom-up approach but also in the Commission's efforts to provide an enabling framework, ie to assist Member States in promoting the energy transition also by non-legislative means, eg by providing funding programmes or by former Commission Vice-President Šefčovič's 'Energy Union tour' in the Member States to communicate the benefits of the framework. A similar shift in the governance model was also noticeable on the international scene within the United Nations Framework Convention on Climate Change and the Paris Agreement of 2015 that builds on nationally determined contributions to achieve its global emission reduction objectives – compared to the preceding Kyoto Protocol with fixed country-specific targets. Overall, such more iterative schemes allow to find compromise agreements with more complex and divergent actor constellations.

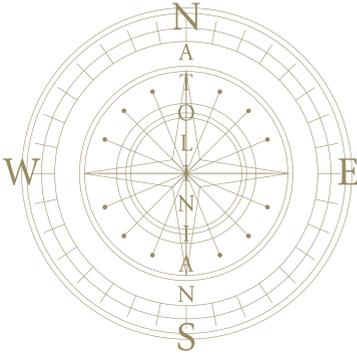
While the long-term effectiveness of the Paris Agreements' governance scheme is yet to be seen, projections are positive that the combined National Energy and Climate Plans will deliver an EU share of over 33 percent renewables by 2030.¹⁶⁹ Importantly, the Energy Union governance also increased the Commission's interaction with national energy policies.¹⁷⁰ With the European Green Deal and its ambition to reduce the EU's greenhouse gas output by 55 instead of 40 percent by 2030 against 1990 levels, the Commission under President Von der Leyen clearly demonstrated again its capacity to shape the agenda and leverage its policy entrepreneurship with such an encompassing endeavour, and whose key legislation including the renewable energy directive is being upgraded at the time of writing. Since the adoption of the 2030 framework, overall acceptance of the need for decarbonisation and renewable energy has clearly grown across the EU. Still, addressing

168 European Commission, COM (2014) 15 final (n 7) 13; Anonymous interview 5, Brussels, 17 March 2017.

169 European Commission, Renewable Energy Progress Report, 14.10.2020, COM (2020) 952 final.

170 see Chapter 7 by Lisse Van Vliet in this volume.

the strain imposed by the COVID-19 pandemic by mobilising significant recovery European funds might well have helped as well facilitated the necessary compromises across the EU in this regard.



CHAPTER 7

There and Back Again? 'Bindingness' and 'Stringency' in Post-Lisbon Renewables Governance in the EU and the Energy Community

BY LISSE VAN VLIET



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1. INTRODUCTION

With the myriad of crises facing the EU, now is perhaps more than ever the time to critically assess the way we govern energy and environmental policy. The potential of target setting and effective enforcement in this process has been emphasized by the recent *Urgenda* case, in which the Dutch constitutional court obliged the national government to comply with its Greenhouse Gas (GHG) emissions target under the Paris Agreement.¹ While enforcement is more complicated on a European Union (EU) level, there has been ample scientific research on how to qualify the shift in Renewable Energy (RE) governance taking place through the operationalization of ‘hard’ and ‘soft’ modes of governance. However, little attention has been paid to the unique link between the EU’s internal energy governance and its external policy dimension through the Energy Community (EnC).

Based on policy analysis and semi-structured interviews, this research goes beyond a popular understanding of the hard-soft governance divide, by measuring how the ‘bindingness’ and ‘stringency’ of RE governance has changed in the EU and the EnC since the adoption of the Lisbon Treaty. Transcending this dichotomy by the hand of an analytical framework build on five analytical parameters, this research challenges the mainstream idea that long-term, binding and ambitious RE targets are a prerequisite for effective RE governance.² It does this through the following research question: “To what extent has the level of ‘bindingness’ and ‘stringency’ in RE governance in the EnC developed congruently with the EU’s internal RE governance since the adoption of the Lisbon Treaty (2009–2020)?” The choice for RE governance, as opposed to GHG or energy efficiency (EE), is especially relevant given the shift from nationally binding targets under the 2020 framework to an overall EU ‘binding’ target in the 2030 framework. Contrarily, from the initiation of the 20/20/20 framework there have only been EU-wide GHG reduction targets, while EE targets have always been indicative and not legally binding.³ For the EU’s internal governance framework, this research will compare the 2020 framework with the 2030 framework. Benchmarks for the EnC will be the framework in place in 2009, the current 2020 framework and the 2021–2030 framework under negotiation, as it adopted the 2009 RE Directive and 2020 RE targets only in 2012.

1 Case HR 19/00135 *The State of the Netherlands v Stichting Urgenda* [2019] ECLI:NL:HR:2019:2007, Art. 8.3.5.

2 Mischa Bechberger, ‘Foreword: EU energy policy and the strategic value of renewable energy promotion’ in Francisc Morata and Israel Solorio Sandoval (eds), *European Energy Policy: An Environmental Approach* (Edward Elgar Publishing 2012), xiii.

3 Nicole Ahner, ‘The Framework for Supporting Renewable Energy in Europe: Implementing Directive 2009/28/EC’ in Martha M. Roggenkamp and Ulf Hammer (eds), *European Energy Law Report VIII* (Intersentia 2011) 94.

Some clarifications concerning the structure of this research are warranted. Following the introduction, the literature review will commence by covering the debate on the change in EU internal RE governance and explaining the link between the EU's internal RE governance and the EnC institutional framework. In the third section, the analytical framework will operationalize the notions of 'stringency' and 'bindingness', based on the following parameters: (1) Legal Status (2) Nature of Obligation, (3) Precision & Prescriptiveness, (4) Accountability and (5) Effective Implementation and Enforcement. In the fourth section, the first of two empirical sections, the change in internal EU governance of renewables since 2009 will be assessed on the basis of the five parameters established in the analytical framework. The fifth section will trace the development of RE governance in the EnC. Finally, the conclusion will establish whether indeed the EU's RE governance framework developed congruently with that of its (South-)Eastern neighbouring countries through the EnC since the adoption of the Lisbon Treaty and what the implications are for the way we think about energy governance. Was the European Commission right in proclaiming energy policy to be the "next great European integration project",⁴ or is the Europeanization of European energy policy already on its way back?

2. EUROPEAN ENERGY GOVERNANCE

To answer our research question the need exists to look at the change in governance after energy policy has become an official EU competence with the 2009 Lisbon Treaty.⁵ 'Governance' in the framework of this research is understood as "the process of interaction and decision-making among the actors involved in a collective problem".⁶ In general, EU energy governance can be classified as a 'multi-level governance' system, which is defined as a "layered system of co-existing levels of authority, consisting of "a complex pattern of transnational, public and private institutional relations with overlapping competences".⁷ All these levels of authority enjoy a degree of autonomy, thereby forcing the actors involved to agree on a common approach to deal with a collective problem, through sharing

4 European Commission, 'Background Paper: Energy Roadmap 2050 – State of Play' (Brussels, 3 May 2011) 2.

5 Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community [2007] OJ C306/01, Art. 194. Hereafter: Treaty of Lisbon.

6 Marc Hufty, 'Investigating Policy Processes: The Governance Analytical Framework in Urs Martin Wiesmann and Hans Hurni (eds), *Research for Sustainable Development: Foundations, Experiences, and Perspectives* (Geographica Bernensia 2011) 405.

7 Liesbet Hooghe and Gary Marks, 'Unravelling the Central State, but How? Types of Multi-level Governance', (2003) 97 (2) *American Political Science Review* 235.

power, agreeing on a common decision making process and assigning responsibility.⁸ The collective problem in this case being the achievement of RE targets.

The adoption of the 2009 Renewable Energy Directive for the first time introduced binding national RE targets of 20% of the total energy production by 2020, to which all Member States were to abide.⁹ With the subsequent adoption of the “Clean energy for all Europeans” legislative package, binding national targets were abandoned for an EU-wide 27% (later revised to 32%) RE target.¹⁰ The Clean Energy Package included, among others, the 2018 recast Renewable Energy Directive¹¹ and the 2018 Governance Regulation.¹² The academic debate on whether EU governance as a result of this switch has either ‘softened’ or ‘hardened’ is still inconclusive.¹³ Also, scholars have noted that the division between soft and hard forms of governance in energy policy has become less binary, with a mixture of elements from both governance modes making up the framework.¹⁴ While some argue that the Member States are re-gaining control over the policy process,¹⁵ others stress that the Commission has gained more monitoring and agenda setting powers.¹⁶

8 Michèle Knodt, ‘Multilevel Coordination in EU Energy Policy: A New Type of “Harder” Soft Governance?’ in Nathalie Behnke, Jörg Broschek and Jared Sonnicksen (eds), *Configurations, Dynamics and Mechanisms of Multilevel Governance* (Palgrave Macmillan 2019) 177.

9 Directive 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 L 140/16, Art. 3(1). Hereafter the 2009 RE Directive.

10 Ibid.

11 Directive EU 2018/2001 of the European Parliament and of the Council of 11 December 2018 on the promotion of the use of energy from renewable sources, OJ L 328/82, Art. 3(1). Hereafter the 2018 recast RE Directive.

12 Regulation EU 2018/1999 of the European Parliament and of the Council of 11 December 2018 on the Governance of the Energy Union and Climate Action, OJ L 328, 21.12.2018, Art. 4 (a) (2). Hereafter the Governance Regulation.

13 Anna Herranz-Surrallés, Israel Solorio and Jenny Fairbrass, ‘Renegotiating authority in the Energy Union: A Framework for Analysis’, (2020) 42 (1) *Journal of European Integration* 8.

14 Paolo R. Graziano and Charlotte Halpern, ‘EU governance in times of crisis: Inclusiveness and effectiveness beyond the ‘hard’ and ‘soft’ law divide’ (2016) 14 *Comparative European Politics* 5.

15 Israel Solorio and Pierre Bocquillon, ‘EU Renewable Energy Policy: A Brief Overview of Its History and Evolution’, in I. Solorio and H. Jorgens (eds), *A Guide to EU Renewable Energy Policy* (Edward Elgar 2017) 34–35.

16 Sebastian Oberthür, ‘Hard or Soft Governance? The EU’s Climate and Energy Policy Framework for 2030’ (2018) 7 (1) *Politics and Governance* 24.

Proponents of the former reading, such as Ringel and Knodt, define the EU's governance model as a case of "harder" soft governance. Stressing that EU energy governance has been traditionally soft, they argue that the 2030 framework as part of the Commission's "Winter Package" has the potential to 'harden' RE governance in the EU.¹⁷ Defenders of the latter analysis, classify the shift from binding to non-binding national targets for RE in the 2030 Framework and the decision to design a new governance framework for EU energy and climate policy as the reasons for the softening of governance. They criticize the shift towards a "non-binding governance system that is based on political commitments and which resembles the Open Method of Coordination (OMC)".¹⁸ The OMC is considered to be a 'soft' legal instrument, which does not create binding obligations or new legislation. It depends on peer pressure with an oversight role for the European Commission, based on joint objective setting in the European Council, the joint establishment of measuring instruments and benchmarking. The OMC was introduced to solidify EU-wide economic and social reforms, both areas without a strong EU mandate. Respecting diversification among Member States, it was designed to facilitate the attainment of commonly defined objectives, without explicitly harmonizing national regulations.¹⁹

The EU through the EnC applies a multilateral approach remarkably similar to its European Neighbourhood Policy (ENP).²⁰ There is no single explanation for the voluntary compliance by non-EU Contracting Parties (CPs) with the Treaty of the Energy Community (TEnc), who at most have a vague membership perspective. Some attribute the process to 'role attribution': presented with the opportunity to become part of a stable, open and competitive European energy market, the EU's neighbours are induced to become part of a framework based on a "common idea of Europeanness".²¹ The EU as norm-ex-

17 Marc Ringel, Michèle Knodt, 'The governance of the European Energy Union: Efficiency, effectiveness and acceptance of the winter package 2016' (2018) 112 *Energy Policy* 219.

18 Nils Meyer-Ohlendorf, 'An effective governance system for 2030 EU climate and energy policy: Design and requirements (Discussion paper)', (2015) Ecologic: Berlin 4. <<https://www.ecologic.eu/sites/files/publication/2015/meyer-ohlendorf-15-effective-governance-system-2030.pdf>> (consulted on 23 March 2020).

19 Jonathan Zeitlin, 'Is the Open Method of Coordination an Alternative to the Community Method?' in Renaud Dehousse (ed), *The 'Community Method': Obstinate or Obsolete?*, (Palgrave Macmillan 2011) 136.

20 Carsten Nowak, 'The Energy Community of South East Europe' in Christoph Herrmann and Jorg Philipp Terhechte (eds), *European Yearbook of International Economic Law 2012* (Springer Heidelberg 2012) 438.

21 Heiko Prange-Gstöhl, 'Enlarging the EU's internal energy market: Why would third countries accept EU rule export?' (2009) 39 *Energy Policy* 5296.

porter and policy-entrepreneur, with a vision of an integrated regional energy market and mutual benefits for all the parties involved, is able to maintain its position as exogenous policy-maker and supranational authority without significant resistance from the CPs.²² Besides such an ‘identification motive’, Prange-Gstöhl proposes the ‘independence’ and ‘economic’ compliance motives as explanatory factors for compliance. While the latter focuses on the economic gains believed to flow from increased economic integration with the EU, the former motive seeks greater independence from another hegemonic regional power.²³ Besides the abundance of studies trying to explain voluntary compliance with the TEnC, other studies focus on “the linkage of EU’s external policies and actual application of the EU ‘energy acquis’ by third countries”.²⁴ The extraterritorial extension of the EU’s acquis to the non-EU signatories of the TEnC, has been referred to in the literature as “special case of Europeanization”,²⁵ and/or even as ‘external governance’.²⁶

Taking a bottom-up approach towards Europeanization, this research focuses on the “emergence and the development at the European level of different structures of governance” once national competences and sovereignty have eroded.²⁷ The right lens to study the Europeanization of energy governance is one of political institutionalization, understood as the development of those (in)formal rules, norms, procedures and practices that govern the EU level politics.²⁸ Instead of relying solely on the study of official competences and their effects, this work will go beyond such an understanding and focuses on the processes taking place on an institutionalization level. The integration processes related to energy policy can be correctly classified as ‘indirect Europeanization’, due to the fact

22 Andrea Ciambra, ‘Exporting the good example? European energy policy and socialization in south-east Europe’, in F. Morata and I.S. Sandoval (eds), *European Energy Policy: An Environmental Approach* (Edward Elgar Publishing 2012) 167.

23 Prange-Gstöhl (n 21) 5297.

24 Roman Petrov, ‘Energy Community as a promoter of the European Union’s “energy acquis” to its Neighbourhood’ (2012) 38 (3) *Legal Issues of Economic Integration* 333.

25 Svein S. Andersen, ‘EU Energy Policy: Interest Interaction and Supranational Authority’, *Arena Working Papers WO 00/5* (Oslo, Norway: ARENA Center for European Studies) 1. See also: Anna Herranz-Surrallés, ‘Energy Policy and European Union Politics’, *Oxford Research Encyclopedia of Politics* (30 October 2019) 20.

26 Laura Deitz, Lindsay Stirton and Kathryn Wright, ‘South East Europe’s electricity sector: Attractions, obstacles and challenges of Europeanisation’ (2009) 17 *Utilities Policy* 4.; Sandra Lavenex, ‘EU external governance in ‘wider Europe’ (2004) 11 (4) *JEPP* 680.

27 Thomas Risse et al, ‘Europeanization and domestic change: introduction’ in Thomas Risse, Maria Green Cowles and James Caporaso (eds), *Transforming Europe: Europeanization and Domestic Change* (Cornell University Press 2001) 2.

28 *Ibid.*

that the main drivers for integration were those EU competences that were achieved in other policy areas, such as environment and trade.²⁹ The concept of ‘indirect Europeanization’ will be the starting point for the analysis of the post-Lisbon Treaty development of EU renewables governance and whether we can witness a congruent development of RE governance in the (South-)Eastern Neighbourhood through the EnC. It leads from the above that the broader concept of Europeanization is still a particularly useful tool to analyse the “adaptive process triggered by European regional integration”,³⁰ albeit with a focus on the change in governance.

3. ACCESSING BINDINGNESS AND STRINGENCY: FIVE PARAMETERS

To measure a change in governance, this research focuses on relevant policy frameworks and those features that allow for the successful implementation of stated RE targets. Pivotal for this analysis are the ‘softness’ or ‘hardness’ of both the EU’s 2020 and 2030 framework and the development of the EnC governance frameworks from 2009 to 2020, measured by the level of ‘bindingness’ and ‘stringency’.³¹ It should be emphasized that to measure the ‘softness’ and ‘hardness’ of RE governance, this paper operationalises this division as a non-binary concept, which allows for a gradual classification of the relevant bindingness and stringency elements.³² Originating in political science and governance literature, this analysis will go beyond a narrow ‘legal’ interpretation of bindingness as found in International and European law studies. Such analysis is deemed necessary, as empirical studies on the relation between legal bindingness and effectiveness have not provided us with conclusive answers regarding their complex relationship.³³ Therefore, this study employs a similar operationalization of this relation as can be found in research

29 Israel Solorio Sandoval and Esther Zapater, ‘Redrawing the ‘green Europeanization’ of energy policy’ in Francesc Morata and Israel Solorio Sandoval (eds), *European Energy Policy: An Environmental Approach* (Edward Elgar Publishing 2012) 99.

30 Paolo Graziano and Maarten Vink, ‘Challenges of a new research agenda’ in P. Graziano and M. Vink (eds), *Europeanization: New Research Agendas* (Palgrave Macmillan 2007) 7.

31 Oberthür (n 16) 17–18.

32 Harri Kalimo and Tim Staal, “‘Softness’ in International Instruments: The Case of Transnational Corporations’ (2014) 41 (2) *Syracuse Journal of International Law and Commerce* 273.

33 Robert Stavins et al, ‘International Cooperation: Agreements and Instruments’ in O. Edenhofer et al (eds), *Climate Change. Contribution of Working Group III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge University Press 2014) 1005–1006.

on the 2015 Paris Agreement, distinguishing the various dimensions of bindingness.³⁴ Based on Oberthür's assessment criteria for the bindingness and stringency of Governance and the seven characteristics of legality distinguished by Bogdansky, this research has established its own framework of analysis, consisting of the following five parameters: (1) Legal Status (2) Nature of Obligation, (3) Precision & Prescriptiveness, (4) Accountability and (5) Effective Implementation and Enforcement.

Legal Status. Even though the official legal status is not conclusive for the level of 'bindingness' of an agreement, the Legal Status enjoyed by certain acts indisputably determines to a large extent their bindingness. Deduced from the "Formal Status" and "Obligation" criteria used in earlier research,³⁵ the central question concerning this criterion is whether the legal acts establishing the governance framework are adept to enact formally binding obligations or, put more generally, rights and rules. The Legal Status parameter includes the following three options: (1) Legally Binding (Implemented); (2) Legally Binding (Partially or not Implemented), and (3) Not Legally Binding. First, what the legal status of an agreement is under European or international law, binding or non-binding, has serious implications for the accountability and legal enforcement/implementation, notwithstanding the fact that non-binding acts might constitute a significant political force for change.³⁶ In this context Article 288 TFEU sets the stage for the internal EU governance, determining the Legal Status of regulations, directives, decisions, recommendations and opinions.³⁷ Second, concerning the EnC's governance framework, we have to look at the TEnC and the implementation status of the RE acquis, to analyse whether any change can be witnessed in the Legal Status.

Nature of Obligations. Besides the Legal Status of RE governance, the Nature of Obligations is essential in determining the stringency of the policy frameworks under review. The issue at stake is whether the relevant obligations focus on a behavioural change or merely on the introduction of measures indirectly influencing such behaviour, thereby lacking specific requirements for such a change in behaviour.³⁸ Therefore, the applied

34 Daniel Bogdansky, 'The legal character of the Paris Agreement' (2016) 25 (2) *Review of European, Comparative & International Environmental Law* (Reciel) 142.

35 For "Formal Status" see Oberthür (n 16) 20. For "Obligation" see Kenneth W. Abbott, and Duncan Snidal, 'Hard and soft law in international governance', (2000) 54 (3) *International Organization* 422.

36 Oberthür (n 16) 20.

37 Treaty of Lisbon, Art. 288.

38 Oberthür (n 16) 20.

distinction will be between “significant behavioural adaptations related to the problem at stake” (Substantive Obligations) and measures that only “indirectly encourage behavioural change” (Procedural Obligations).³⁹ The Nature of Obligations parameter ranks the stringency of the framework from low to high based on whether the obligations are Procedural, Substantive or both.

Precision & Prescriptiveness. Following Oberthür’s methodological framework, Precision and Prescriptiveness are incorporated into one single category.⁴⁰ Formulated by Bogdansky through the question “whether the provisions of the agreement are sufficiently precise that they serve to constrain States”,⁴¹ the Precision and Prescriptiveness with which certain obligations are worded significantly affects the “bindingness” of a regulatory framework. The wording of the following four elements will be determining for the level of Precision and Prescriptiveness: (1) the addressee (who); (2) the substance (what); (3) the timeline (by when); and (4) methods (how).⁴² Therefore, this parameter will analyse whether the above mentioned four elements are clearly defined in the agreements making up the regulatory framework and much discretion is left to the signatories to attain the stated targets. The prescriptiveness of an agreement depends on words such as ‘shall’ as legally binding, ‘should/encourage’ as being recommended and ‘may’ as granting a permission.⁴³ To categorically assess the bindingness and stringency of the governance frameworks, the following three levels of Precision and Prescriptiveness are foreseen, based on the four elements mentioned above: (1) Four Elements Clearly Defined; (2) Two/Three Elements Clearly Defined; or (3) One or No Element Defined

Accountability. As a fourth parameter, Accountability will address the question how effectively a state can be held accountable to its Substantive and Procedural obligations under the relevant governance framework. While previously treated as a single criterion, the current analytical framework introduces two separate parameters: Accountability and Effective Implementation (including Enforcement).⁴⁴ The Accountability parameter will, firstly, determine the extent to which the mandated oversight bodies are institutionalized

39 Oberthür (n 16) 20–21.

40 Ibid.

41 Bogdansky (n 34) 142.

42 Oberthür (n 16) 21.

43 Bogdansky (n 34) 145.

44 Oberthür (n 16) 21.

and their (potential) to address (possible) (non-) implementation (bindingness).⁴⁵ Secondly, it will assess the stringency of the statistical data used by the bodies tasked with overseeing the implementation progress. These two aspects taken together determine the bindingness and stringency of the monitoring process, which under the relevant RE frameworks is ought to ensure Accountability.⁴⁶ In the analytical framework, the parameter of Accountability consists of the following three possibilities: (1) Effective Oversight and Reliable Data; (2) Effective Oversight or Reliable Data; or (3) Ineffective Oversight, Unreliable Data.

Effective Implementation and Enforcement. Having analysed the actors mandated with oversight powers and the data used for Accountability, the criterion of Effective Implementation and Enforcement will be assessing the means available to these monitoring bodies to correct possible deficiencies during the implementation process, which include both incentives and/or enforcement measures. While earlier research on the Paris Agreement has identified a range of compliance mechanism types in relation to the implementation of a climate agreement, this research will focus solely on the facilitation, enforcement and informal enforcement by EU institutions of the agreements.⁴⁷ The key question will be to what extent the EU body in charge of monitoring the implementation process is able to incentivize or force the signatories into compliance with the agreed RE agreements. This can be done through: (1) Legal Enforcement Measures; (2) Political Implementation Tools; or (3) Facilitation Measures.

45 Bogdansky (n 34) 142.

46 Robert O. Keohane et al., 'Legalized dispute resolution: Interstate and transnational' (2000) 45 (3) *International Organization* 488.

47 Guri Bang, Jon Hovi and Tora Skodvin, 'The Paris Agreement: Short-term and long-term effectiveness' (2016) 4 (3) *Politics and Governance* 211.

Table 1: Five parameters to assess the ‘bindingness’ and ‘stringency’ of a governance/policy framework.

	High	Medium	Low
Legal Status	Legally Binding (Implemented)	Legally Binding (Partially or not Implemented)	Not Legally Binding
Nature of Obligation	Clear Substantive and Procedural Obligations	Substantive or Procedural Obligations	No Obligations
Precision & Prescriptiveness	Four Elements Clearly Defined	Two/Three Elements Clearly Defined	One or No Element Defined
Accountability	Effective Oversight and Reliable Data	Effective Oversight or Reliable Data	Ineffective Oversight, Unreliable Data
Effective Implementation and Enforcement	Legal Enforcement Measures	Political Implementation Tools	Facilitation Measures

Source: author’s elaboration

4. EU RENEWABLES GOVERNANCE (2009–2020)

4.1. Legal Status

Even though the Lisbon Treaty has introduced shared EU competences in energy policy through article 194 TFEU,⁴⁸ there is no difference in Legal Status between the current 2020 framework and the 2030 framework. While the 2020 framework was adopted based on EU competences in Environmental policy (article 192 TFEU),⁴⁹ the 2030 framework has a dual legal basis, rooted in environmental and energy competences.

4.2. Nature of Obligations

The 2009 RE Directive introduced three specific measures to reach the 20% renewables by 2020 target, these consisted of: (1) mandatory national targets, (2) a cooperation mech-

48 Ibid, Art. 194.

49 Ibid, Art. 192.

anism and (3) obligatory National Renewable Energy Action Plans (NREAPs).⁵⁰ When assessing the Nature of the Obligations in the 2020 framework, we find them to be both Substantive and Procedural.

For the 2030 framework, the balance between Substantive and Procedural Obligations has been struck quite differently. Firstly, the recast RE Directive abandoned nationally binding targets in favour of an overall EU target of ‘at least’ 32% to be reached by 2030.⁵¹ However, the recast RE Directive established several other Substantive Obligations for the Member States to adhere to, such as a mandatory share of renewables in transport of 24% and various requirements concerning RE support schemes, RE self-consumption and communities and renewables in heating and cooling.⁵² Secondly, it was the subsequently adopted Governance Regulation that greatly extended planning, reporting and monitoring obligations for the Member States through their integrated National Energy and Climate Plans (iNECP), in which they are obliged to develop a short term (10 years) and long term (50 years) strategy covering all dimensions of the Energy Union.⁵³ The iNECPs are relevant mainly for the Commission to address the ‘Ambition Gap’ and ‘Delivery Gap’. The Ambition Gap comes into existence when all the proposed individual RE percentages taken together do not seem to add up to the envisioned 32% EU target by 2030. The Delivery Gap exists when a Member State is not on track to achieve its proposed intermediate targets.

4.3. Precision & Prescriptiveness

Concerning the substance (what) and the timeline (when), we find all dates for the drafts and final versions of both the NREAP and iNECPs to be equally precise.⁵⁴ Concerning the how, methods such as cross-border/third country cooperation within ‘joint projects’ were available under both the 2020 and 2030 frameworks. As long as these projects are destined to provide for the EU’s energy supply in the long term, a Member State can take into account the renewable energy produced and consumed towards their own national renewables target.⁵⁵ In comparison, it can be concluded that the abandonment of

50 Ahner (n 3) 98.

51 The 2018 recast RE Directive, Art. 1 and 3.

52 Ibid, Art. 4–6, 21–22, 23 and 25.

53 (i) security of supply, solidarity and trust (ii) a fully integrated energy market (iii) energy efficiency (iv) decarbonisation of the economy and (v) research, innovation and competitiveness.

54 The 2009 RE Directive, Recital 19, Article 4 (3–4); The Governance Regulation, Art. 3.

55 The 2009 RE Directive, Art. 9(2) and (3), Recital 39.

binding national targets for an EU-wide targets seems to be a downgrade from the 2020 framework. This is the case especially since some ambiguities still remain in the field of renewables, such as national contributions being based on “national/relevant circumstances”, according to the Governance Regulation. Furthermore, the definition of “early efforts” to be elaborated on in the iNECPs, the substantive requirements on support schemes for renewables, as well as the increase of RE concerning heating and cooling are still relatively vague.⁵⁶ This means that in the 2030 framework a change in Precision and Prescriptiveness has occurred from Four Elements Clearly Defined to Three Elements Clearly Defined, due to the addressee (who) that has become significantly less binding.

4.4. Accountability

For the 2020 framework, the Commission seems to have effective oversight powers over the Delivery Gap through its analysis of the NREAPs. However, the first NREAPs were considered to entail a number of weaknesses, among others the lack of coordination and the failure to take into account the cross-national dimension of RE policies and the wider EU target when formulating national policies.⁵⁷ For the 2030 framework, the Governance Regulation specifically grants the Commission the right to assess the national contributions towards the 2030 EU renewables target in their iNECPs, granting it specific competences to address both a possible Ambition Gap or Delivery Gap.⁵⁸ Concerning the Ambition Gap, the Commission will issue individual non-binding Recommendations based on objective criteria that adjust the national RE contributions for each Member State to a sufficient level. Member States should take due account of such recommendations and explain in subsequent progress reports how they have done so.⁵⁹ Concerning the Delivery Gap, those states missing their national reference point targets, need to be back on track within a year through the implementation of additional measures or provide justifications for a possible deviation from the Recommendation.⁶⁰ As noted by Ringel and Knodt, “the burden of proof in this case lies with the member states”.⁶¹

Another important change between the 2020 and 2030 framework is the availability of

56 Oberthür (n 16) 23

57 European Commission, ‘Impact Assessment Accompanying the Document Proposal for a Regulation of the European Parliament and the Council on the Governance of the Energy Union’, SWD 394 final (European Commission 2016) 11.

58 The Governance Regulation, Art. 9 and 13.

59 The Governance Regulation, Preamble (54).

60 Ibid, Art. 32.

61 Ringel and Knodt (n 17) 11.

data to ensure the effective Accountability of the various Member State plans. While the assessment methods and availability of reliable data for the 2020 framework were relatively underdeveloped, the setting of the 2030 targets was based on a thorough evaluation of existing data through an impact assessment, including different policy options and different targets.⁶² The combination of increasingly reliable data and the extension of the monitoring process leads to the conclusions that a shift from Medium Accountability to High Accountability can be witnessed.

4.5. Effective Implementation and Enforcement

With no proof of Legal Enforcement Measures being part of the 2030 framework, a shift has taken place to the use of Political Implementation Tools under the Effective Implementation and Enforcement parameter. This is done through the increased visibility of the iNECPs and both the domestic- and international pressure as a result of this. We can witness a certain Politicisation of the Effective Implementation and Enforcement through an increasingly bottom-up approach by the Commission.⁶³ Further proof of increased visibility are the publicly available Recommendations, which are addressed by the Commission's president every year in the report on the State of the Energy Union.⁶⁴ Besides this, the integration of the RE target reporting with reporting on EE and GHG makes the commitment to the iNECPs more binding. The integration of iNECPs enhances "transparency and accountability, and the monitoring and enforcement powers of the Commission have been strengthened".⁶⁵

4.6. Interim Conclusion: Indirect Europeanization of Renewables Governance

In general, the 2030 framework imposes a softening of Precision and Prescriptiveness and Effective Implementation and Enforcement, but a hardening of Accountability when comparing the NREAPs in the 2009 RE Directive and the iNECPs as part of the Governance Regulation. With the Legal Status and the Nature of Obligations unchanged, the stringency and bindingness of the EU's RE governance framework have diminished overall. However, this development is in line with the 'indirect Europeanization' model described in chapter 2, which goes beyond an understanding of these formal competences. Instead, with an increase in Accountability, the EU has institutionalized a new form of RE governance. It has created a new governance framework of which the first results are

62 Interview with A, Commission official (DG ENER), through WebEx, 23.04.2020.

63 Pierre Bocquillon and Tomas Maltby, 'EU energy policy integration as embedded intergovernmentalism: the case of Energy Union governance' (2020) 42 (1) *Journal of European Integration* 52.

64 The Governance Regulation, Art. 35.

65 Oberthür (n 16) 24.

positive, as Member States seem to comply with the Recommendations and the regional RE target.⁶⁶ Besides this, a more direct form of sanctioning might raise the concern of a scenario in which “the Member States could buy themselves free of the obligation”.⁶⁷

Table 2: Overview of the change in bindingness and stringency in the EU Renewables Governance Framework (2009–2020).

	2020	2030
Legal Status	High Legally Binding (Implemented)	High Legally Binding (Implemented)
Nature of Obligations	High Substantive and Procedural Obligations	High Substantive and Procedural Obligations
Precision & Prescriptiveness	High Four Elements Clearly Defined	Medium Three Elements Clearly Defined
Accountability	Medium Effective Oversight or Reliable Data	High Oversight and Reliable Data
Effective Implementation and Enforcement	High Legal Enforcement Measures	Medium Political Implementation Tools

Source: author's elaboration

5. ENC RENEWABLES GOVERNANCE (2009-2020)

5.1. Legal Status

The Legal Status for the EnC framework is a contentious point, as there was no legally binding framework adopted governing RE policy in 2009. Only upon accession the CPs commit to adopting +/-30 EU core energy legislative acts, covering virtually all energy-re-

66 Interview with B, Commission official (DG ENER), through WebEx, 23.04.2020.

67 A. Johnston et al, ‘The Proposed New EU Renewables Directive: Interpretation, Problems and Retrospects’ (2008) European Energy and Environmental Law Review 145.

lated aspects.⁶⁸ Article 20 specifically binds the CPs to the EU's RE legislation.⁶⁹ However, the EnC has only adopted the 2009 RE Directive through Ministerial Council Decision 2012/04/MC-EnC, thereby amending the above-mentioned Article 20 of the TEnC.⁷⁰ Through the adoption of this Directive, the CPs finally committed to individually binding RE targets by 2020.⁷¹

At the time of writing, the 2030 framework including the Governance Regulation together with the recast RE Directive and other relevant legislation, is foreseen to be adopted as a package in 2021.⁷² In the process of negotiating the 2030 targets, the EnC Secretariat had admitted that the CPs are currently not yet prepared for the reforms focused on 'next generation' issues, such as climate change, decarbonisation and re-regulation.⁷³ Therefore, we would have to conclude that for the Legal Status a shift occurred from Not Legally Binding in 2009 to Legally Binding (Partially or not Implemented) under the 2020 framework, back to Not Legally Binding as the 2030 framework is still not adopted.

5.2. Nature of Obligations

Even though a binding legislative framework was lacking in 2009, the Procedural Obligations under the 2020 framework for the EnC are virtually identical to the EU's 2020 framework.⁷⁴ Concerning Substantive Obligations, the EnC Ministerial Decision adopting the 2009 RE Directive abandoned region wide RE targets in exchange for nationally binding targets.⁷⁵ Instead, it proposed individual targets for each individual state, ranging from 11% to 40% of RE in final energy consumption.⁷⁶

68 Energy Community Secretariat, Annual Implementation Report 2018 (Energy Community Secretariat 2018) 18–20.

69 Treaty establishing the Energy Community, Official Journal of the European Communities, [2006] L 198/18, 20.07.2006, Art. 2 (d), 5, 20.

70 Decision of the Ministerial Council of the Energy Community, D/2012/04/MC-EnC: Decision on the implementation of Directive 2009/28/EC and amending Article 20 of the Energy Community Treaty, Budva, October 18, 2012, Art. 1. Hereafter: Decision 2012/04/MC-EnC.

71 Ibid, Art. 4.

72 Interview B (n 67).

73 Energy Community Secretariat, Annual Implementation Report 2019 (Energy Community Secretariat 2019) 7.

74 Interview with C, EnC official, through Skype, 30.04.2020.

75 Decision 2012/04/MC-EnC, Art. 4 (1).

76 See Annex 2 for a specification.

Even though the EnC has not officially adopted the 2030 legislative framework, the Ministerial Council issued a recommendation that urged the CPs to “prepare the analytical, institutional and regulatory preconditions for the development and adoption of integrated national energy and climate plans (‘national plans’) for the period from 2021 to 2030”.⁷⁷

Interestingly, even though the current iNECPs are not yet binding, we do see policy adoption and Recommendations being implemented. For example, Albania voluntarily subscribed to designing and adopting an iNECP.⁷⁸ However, the 2030 framework legislation needs to be transposed into the *acquis* of the EnC before the CPs will be obliged to adhere to this legislation.⁷⁹ Therefore, from an initial absence of Substantive and Procedural Obligations in 2009, the Nature of Obligations increased significantly in ‘bindingness’ and ‘stringency’ when the 2020 framework was adopted. As for the 2030 framework the Substantive and Procedural Obligations are still under negotiation, which is why a weakening in ‘bindingness’ is signified.

5.3. Precision & Prescriptiveness

The period before adoption of the 2009 RE Directive had No Elements Defined concerning Precision & Prescriptiveness. With the subsequent adoption of the 2009 RE Directive in 2012, nationally binding targets were introduced and the Precision and Prescriptiveness became similar to the EU’s 2020 framework, which had all four elements clearly defined. Concerning the submission of NREAPs, the CPs were bound to submit their first plans to the EnC Secretariat by 30 June 2013.⁸⁰ It introduced progress reports that had to be submitted to the EnC Secretariat “by 31 December 2014 and every two years thereafter”, which would submit the overall progress reports again to the Ministerial Council.⁸¹

77 EnC Ministerial Council, ‘Recommendation 201811MC-EnG on preparing for the development of integrated national energy and climate plans by the Contracting Parties of the Energy Community’ Vienna, 3 January 2018, 3.

78 EnC Ministerial Council, ‘Meeting Conclusions of the 15th Ministerial Council Meeting’, Pristina, 14 December 2017, 1.

79 Interview C (n 75).

80 Decision 2012/04/MC-EnC, Art. 5 (1).

81 *Ibid.*, Art. 15.

Concerning the proposed 2030 framework, the main issue for the CPs is to determine what would be the fair share for their contributions towards an overall target and how to implement such a currently non-existent ‘regional target’. Unfortunately, there has not yet been any willingness from the side of the CPs for a regional RE target.⁸² The following three unresolved issues are thereby leading: (1) “What should be the individual level of contribution by the contracting parties?”; (2) “How should enforcement be understood?”, and; (3) “Will there be a similar level of ambition as the EU?”⁸³ With such disagreement in the Ministerial Council over crucial issues such as the who and the what, it seems that currently only the timeline and the methods are clearly defined. Concerning the development of the Precision and Prescriptiveness of the EnC governance, therefore, we find a steady increase in the ‘bindingness’ and ‘stringency’ of the frameworks, albeit with a (potential) relapse from high to medium.

5.4. Accountability

Even though the EnC started considering adopting the 2009 RE Directive at an early stage, there was no Accountability apart from the CPs’ political will.⁸⁴ However, what followed was a constant increase in the bindingness and stringency, initially facilitated through the newly established Renewable Energy Task Force (RETF) inaugurated at the 2009 Ministerial Council meeting.⁸⁵

While the role for the Secretariat and their methods have been identical to the Commission in the EU internal governance framework, the lack of reliable data in the CPs and the initial lack of ownership seem to be the main differences. An EnC official noted that the engagement has changed significantly over the period 2009-2020, stating that “When the RE Task Force was set up the CPs didn’t quite understand the concept of RE”. As RE was relatively new, it was hard for the national Ministries to see the relevance since their economies were still mostly dependent on coal and thermal power. Also, 2020 target setting was difficult due to a lack of knowledge and reliable data.⁸⁶

82 Interview B (n 67).

83 Ibid.

84 EnC Ministerial Council, ‘Meeting Conclusions of the 5th Ministerial Council Meeting’, Tirana, December 2008, 1.

85 EnC Ministerial Council, ‘Meeting Conclusions of the 6th Ministerial Council Meeting’, Sarajevo, June 2009, 1.

86 Interview C (n 75).

The adoption of the 2009 RE Directive granted the EnC Secretariat similar oversight powers as the European Commission under the EU's 2020 framework.⁸⁷ It thereby took over the role to oversee the submission of NREAPs, by making use of the EU's 2020 template.⁸⁸ The Secretariat was imbued with reviewing the CPs' progress reports, after which it reports the progress made in the promotion of RE in the EnC to the Ministerial Council.⁸⁹

The setting of 2030 targets needs to be done very carefully in order to be meaningful, as up until now the CPs' performance was "all over the place" due to the lack of clear parameters and reliable data. As the RE targets are supposed to represent a share of renewables by 2020/2030, it is essential to know what the baseline values are, since some CPs have revised their baseline values.⁹⁰ In the absence of advanced modelling instruments and reliable data (e.g., EUROSTAT) in the CPs, these RE targets are simply less credible than the EU targets. One of the results of unreliable data was the downward revision of Northern Macedonia's 2020 RE target when it suddenly had to adjust its biomass consumption statistics.⁹¹ The new 2030 framework aims to address this problem, through emphasizing (1) modelling, (2) projections and (3) social economic impact studies of the envisioned policies. The goal is to establish credible RE targets that can bind the CPs to their commitments, which has been absent in the 2020 targets.⁹²

Following the adoption of the General Policy Guidelines on 2030 Targets for the Contracting Parties of the Energy Community,⁹³ the Ministerial Council has initiated a new study with the goal of proposing 2030 targets before mid-2021 alongside the adoption of the 2030 legislative framework.⁹⁴ The setting of targets is this time supported by a dele-

87 Decision 2012/04/MC-EnC, Art. 3 (d).

88 Ibid, Art. 5 (1).

89 Ibid, Art. 15.

90 Interview B (n 67).

91 Government of the Republic of Macedonia, 'Action Plan for amendment of the Action Plan for renewable sources of energy in the Republic of Macedonia to 2025 with vision to 2030', No. 44-1445/1 (Skopje, Macedonia: 21 April 2017) 1.

92 Interview with A (n 63).

93 EnC Ministerial Council, 'Meeting Conclusions of the 16th Ministerial Council Meeting' (Skopje, 29 November 2018) 1.

94 EnC Ministerial Council, 'Meeting Conclusions of the 17th Ministerial Council Meeting', (Chisinau, 12 December 2019) 1.

gated study similar to the Impact Assessment conducted by the Commission before the adoption of the EU 2030 target.⁹⁵

Therefore, concerning Accountability we can witness a gradual change towards a 2030 framework with potentially high Accountability, including both reliable data and effective oversight by the EnC Secretariat. Given the fact that in 2009 there was a complete absence of both elements and as part of the 2020 framework there was a lack of reliable data, this is a positive shift.

5.5. Effective Implementation and Enforcement

The EnC developed a unique institutional framework and Dispute Settlement Mechanism (DSM), initiated and shaped by the European Commission.⁹⁶ While the EnC to a certain extent applies a similar infringement procedure as the EU, it does not entail a permanent court and lacks financial sanctioning powers. The absence of these features has been a contentious issue throughout its existence. The Ministerial Council merely has the powers to adopt by unanimity a binding decision confirming a violation and to suspend certain rights of a party to the TEnC. These include “the suspension of voting rights and exclusion from meetings or mechanisms provided for in this Treaty”.⁹⁷ Such a decision has been adopted already in the cases of Albania, Bosnia and Herzegovina and Northern Macedonia due to their failure “to adopt and to notify to the Secretariat, within the prescribed time limit a National Renewable Energy Action Plan”.⁹⁸

In 2014, a High Level Reflection Group (HLRG) found the Treaty’s sanctioning unfit for obliging the CPs to adhere to the decisions taken and for protecting individuals and companies against Ministerial Council decisions.⁹⁹ The subsequent Secretariat’s proposal

95 Interview A (n 63).

96 Ciambra (n 22) 160.

97 The Energy Community Treaty, Art. 92.

98 Decision of the Ministerial Council of the Energy Community, D/2015/03/MC-EnC: on the failure by Albania to comply with certain obligations under the Treaty, Tirana on 16 October 2015, Art. 1. Decision of the Ministerial Council of the Energy Community, D/2015/04/MC-EnC: on the failure by Bosnia and Herzegovina to comply with certain obligations under the Treaty, Tirana on 16 October 2015, Art. 1. Decision of the Ministerial Council of the Energy Community, D/2015/05/MC-EnC: on the failure by former Yugoslav Republic of Macedonia to comply with certain obligations under the Treaty, Tirana on 16 October 2015, Art. 1.

99 High Level Reflection Group of the Energy Community, ‘An Energy Community for the Future’, Vienna, May 2014, 19.

for amendments to its Treaty opted for the introduction of a lump sum and penalty payment for non-compliant CPs based on how grave the violation has been.¹⁰⁰ In the 16th Ministerial Council Meeting, negotiations on a Treaty amendment for the introduction of a reciprocity mechanisms were planned to be finalized by mid-2019, with a proposal to be submitted during the next meeting.¹⁰¹ Concerning the Treaty amendments, the 17th Ministerial Council merely stated that negotiations are ongoing concerning open issues related to the draft proposal, hoping to finalize negotiations by mid-2020. The Ministerial Council agreed that only after a political agreement is reached on the Treaty amendments text, the adoption procedure will be decided on.¹⁰² However, up until this day no significant steps have been achieved. This leaves the enforcement procedure at the level of Political Implementation Tools.

5.6. Interim Conclusion: There and Back Again?

The overall picture for the shift in bindingness and stringency of RE governance looks much more dispersed for the EnC compared to the EU's change in governance. From the initial 'low point' in 2009, a relatively congruent governance framework has developed after the adoption of the 2009 RE Directive and nationally binding targets. Given the similarities between the EU's and EnC's 2020 framework, a similar process of 'indirect Europeanization' seems to have taken place, albeit with some serious caveats concerning the implementation of energy acquis, credibility of data and lack of sanctioning possibilities. However, negotiations for the adoption of the Clean Energy Package legislation and the 2030 target-setting are only slowly moving forward, with a revision of the sanctioning mechanism still stuck in limbo. Currently, due to the various issues discussed in this chapter, the EnC governance of renewables seems to be on the way back to a softer form of governance. As stressed before, this is still up for upward revision in 2021.

100 EnC Secretariat, 'PROPOSAL FOR AMENDMENTS TO THE TREATY', Annex 22 to the 14th Ministerial Council (Vienna, August 2016), 7.

101 EnC Ministerial Council, 'Meeting Conclusions of the 16th Ministerial Council Meeting', (Skopje, 29 November 2018) 1.

102 EnC Ministerial Council, 'Meeting Conclusions of the 17th Ministerial Council Meeting', (Chisinau, 12 December 12) 1.

Table 3: Overview of the change in bindingness and stringency in the EnC Renewables Governance Framework (2009-2020).

	2020	2030	2030
Legal Status	Low Not Legally Binding	Medium Legally Binding (Partially or not Implemented)	Low Not Legally Binding (yet)
Nature of Obligations	Low No Obligations	High Substantive and Procedural Obligations	Medium Substantive or Procedural Obligations
Precision & Prescriptiveness	Low One or No Element Defined	Medium Two Elements Clearly Defined	Low One or No Element Defined
Accountability	Low Ineffective Oversight, Unreliable Data	Medium Effective Oversight or Reliable Data	High Effective Oversight and Reliable Data
Effective Implementation and Enforcement	Low Facilitation Measures	Medium Political Implementation Tools	Medium Political Implementation Tools

Source: author's elaboration

However, this is not the full story. Because just like the EU, the EnC governance framework has seen a gradual increase in the Accountability parameter. It turns out that in the CPs, just like in the EU, policy makers become more aware of the 'energy trinity' problem with which they are faced. Consisting of the trade-off between: (1) fighting climate change through the promotion of environmental sustainability, (2) maintaining competitiveness and ensuring cheap energy; and (3) increasing security of supply.¹⁰³ The idea that there is a constant need to develop, adjust and redevelop energy policy has taken root in the EU's neighbouring countries.¹⁰⁴ As the CPs are more and more involved in the policy making progress through the EnC format, it is becoming increasingly interesting for the CPs to implement the EnC acquis as they see the economic benefits and the con-

103 Burkard Eberlein, 'Inching towards a common energy policy: Entrepreneurship, incrementalism, and windows of opportunity', in J. Richardson (ed) *Constructing a policy-making state? Policy dynamics in the EU* (Oxford University Press 2012) 151.

104 Council of the European Union, 'Action Plan (2007–2009): An Energy Policy for Europe, Presidency Conclusions' (Brussels, 8-9 March 2007) 11.

sequences of pollution (especially in the Balkan).¹⁰⁵ A key role in this process is currently fulfilled by the Renewable Energy Coordination Group (RECG), which offers technical support for the implementation of secondary legislation.¹⁰⁶ The RECG is made up from one representative from each Contracting Party's institution with responsibility over RE and representatives from the EU Commission (DG ENER and DG NEAR).¹⁰⁷

Contrary to governance of renewables in the EU, where the increase in Accountability ties the Member States in a closer relation to the EU, it seems that the increase of Accountability in the EnC brings the CPs in a closer relation with RE policy making. According to an EnC policy maker, it should then be the role of the EnC Secretariat through technical cooperation to help with the implementation of the *acquis* as the ownership the RE policy is growing. As the official stated: "I mainly see that Contracting Party policy makers fear not knowing what they will have to do. What I think is needed are closer cooperation and regular communication about what the needs are for successful implementation (of the *acquis*)".¹⁰⁸

6. CONCLUSION

As it is so often with a complex, multifaceted research question - the answer is never univocal. While the overall picture for the change in governance in the EnC looks much more dispersed in comparison with the EU, both organisations have gradually been able to acquire a more central role in holding their signatories accountable to the respective RE governance frameworks. For the EU, the rise in Accountability has embedded its Member States in an advanced framework of reporting and monitoring on RE policy. For the EnC, this upward shift in Accountability has brought about an increase in ownership of RE policy by the CPs.

This conclusion would not have been possible without an analytical framework going beyond the traditional dichotomy of the hard-soft governance divide. Through the operationalization of the bindingness and stringency concepts, this research has been able to study those governance structures that emerge and develop as part of the political institutionalization of (in)formal rules, norms, procedures and practices at the European level.

105 Interview C (n 75).

106 Ibid.

107 Renewable Energy Coordination Group, 'WORK PROGRAMME 2019 – 2020' (March 2019) 3.

108 Interview C (n 75).

It has found that although the development in RE governance in the EU and the EnC are not fully synchronized, a similar process of ‘indirect Europeanization’ seems to have taken place in both frameworks. Even though a similar decrease in bindingness and stringency of the ‘harder’ governance elements (Effective Implementation and Enforcement and Precision and Prescriptiveness) occurred, the role of the Commission and the EnC Secretariat in the reporting and monitoring process has simultaneously been cemented. Nonetheless, concerning the EnC there are still a number of caveats. The CPs have still only partially implemented the relevant energy acquis, the Clean Energy Package has not yet been adopted by the Ministerial Council, negotiations on the 2030 targets are still ongoing and the planned revision of the sanctioning mechanism is still stuck in limbo.

Notwithstanding these reservations, the achievement of having a working governance framework and effective format of engagement in place should already be lauded. Now it is crucial to further develop the EnC governance framework building on the increased ownership of RE policy, keeping in mind that our time for change is finite. As the 2030 framework is yet to be introduced in the EnC, a first recommendation for future research would be to revisit this topic in a couple of years to see whether the conclusions still stand. Furthermore, it would be worthwhile to come back to the EU’s targets for renewables at a later stage, to assess whether the change in governance has brought about the expected results and why it has been (in)effective. A completely different research agenda would be needed if one decides to pursue a study of how RE legislation is implemented in the Contracting Parties and how targets are achieved in practice. Highly interesting, but such research would require extensive field work and knowledge of the local language, legal system and national energy networks.

Annex I: Share of Energy from Renewable Sources in European Countries.¹⁰⁹

SHARE OF ENERGY FROM RENEWABLE SOURCES

(in % of gross final energy consumption)

	2014	2015	2016	2017	2018	2020 target
EU	8.5	16.7	17	17.5	18	20
Belgium	1.9	8	8.7	9.1	9.4	13
Bulgaria	9.2	18.3	18.8	18.7	20.5	16
Czechia	6.8	15.1	14.9	14.8	15.1	13
Denmark	14.8	30.9	32	35	36.1	30
Germany	6.2	14.9	14.9	15.5	16.5	18
Estonia	18.4	28.2	28.7	29.1	30	25
Ireland	2.4	9.1	9.3	10.6	11.1	16
Greece	7.2	15.7	15.4	17	18.0*	18
Spain	8.3	16.2	17.4	17.6	17.4	20
France	9.5	15	15.7	16	16.6	23
Croatia	23.4	29	28.3	27.3	28	20
Italy	6.3	17.5	17.4	18.3	17.8	17
Cyprus	3.1	9.9	9.9	10.5	13.9	13
Latvia	32.8	37.5	37.1	39	40.3	40
Lithuania	17.2	25.8	25.6	26	24.4	23
Luxembourg	0.9	5	5.4	6.3	9.1	11
Hungary	4.4	14.5	14.3	13.5	12.5	13
Malta	0.1	5.1	6.2	7.3	8	10
Netherlands	2	5.7	5.8	6.5	7.4	14
Austria	22.6	33.5	33.4	33.1	33.4	34
Poland	6.9	11.7	11.3	11	11.3	15
Portugal	19.2	30.5	30.9	30.6	30.3	31
Romania	16.8	24.8	25	24.5	23.9	24
Slovenia	16.1	21.9	21.3	21.1	21.1	25
Slovakia	6.4	12.9	12	11.5	11.9	14
Finland	29.3	39.3	39	40.9	41.2	38
Sweden	38.7	53	53.4	54.2	54.6	49
United Kingdom	0.9	8.3	9	9.7	11	15
Norway	58.5	69.1	70.2	71.6	72.8	67.5
Montenegro	:	43.1	41.6	39.7	38.8	33
North Macedonia	15.7	19.5	18	19.6	18.1	23
Albania	29.6	34.4	35.5	34.5	34.9	38
Serbia	12.7	22	21.1	20.3	20.3	27
Turkey	16.2	13.6	13.7	12.8	13.7	-
Kosovo**	20.5	18.5	24.5	23.1	24.9	25

: Data not available - Not applicable * Data estimated

** Kosovo, under United Nations Security Council Resolution 1244/99

Annex 2: Mandatory National Targets for the Non-EU EnC Contracting Parties.¹¹⁰

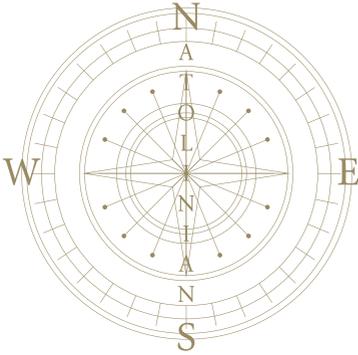
Albania	31,2 % 38 %
Bosnia and Herzegovina	34,0% 40 %
Croatia	12,6 % 20 %
The Former Yugoslav Republic of Macedonia	21,9 % 28 %
Moldova	11,9 % 17 %
Montenegro	26,3 % 33 %
Serbia	21,2 % 27 %
Ukraine	5,5 % 11 %
Kosovo⁴	18,9 % 25 %

The percentage on the left shows the **Target for share of energy from renewable sources in gross final consumption of energy, 2020 (S2020)**

The percentage on the right shows the **Target for share of energy from renewable sources in gross final consumption of energy, 2020 (S2020)**

109 Eurostat, 'Newsrelease – Renewable energy in the EU in 2018', 17/2020 (23 January 2020) 3. <<https://ec.europa.eu/eurostat/documents/2995521/10335438/8-23012020-AP-EN.pdf/292cf2e5-8870-4525-7ad7-188864ba0c29>> (Consulted on 26.04.2020).

110 Decision of the Ministerial Council of the Energy Community, Art. 4 (2).



PART III

MARKETS, CITIZENS AND COURTS IN
THE ENERGY TRANSITION

CHAPTER 8

***Beyond subsidies: Renewables'
missing money dilemma***

BY JOHANNES LEININGER



JOHANNES *LEININGER*

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1. INTRODUCTION

The International Energy Agency (IEA) projects renewables to make up 44% of Europe's electricity system – even 60% in Germany – by 2040 in its base case. In December 2019, the EU's national leaders – except for Poland – pledged to bring the EU to net zero carbon emissions by 2050. This is underpinned by a revised 2030 emissions reduction targets of 55%. A renewable energy in final energy consumption target of at least 32% by 2030 is under scrutiny and is likely to be raised further. This could potentially be supplemented by a target of 65% renewables share in electricity supply, indicating a strategy of accelerated electrification of the economy. Succeeding in this space will be key to deliver on the goals formulated in the Energy Union and the European Green Deal.

Are power markets ready for this drastic change? If history serves as reference, adding massive amounts of renewable energy to European grids has been a major challenge, both technically and economically. The EU has without doubt been the epicentre of massive Variable Renewable Energy (VRE) deployment. Between 2000 and 2019, 265 Gigawatt (GW) have been deployed across Europe. Wind and solar produced 40% of Germany's electricity in 2019; in the EU overall, renewables generated 34.6% of Europe's electricity in 2018.¹ Among renewables,² wind had a share of 39%, followed by hydro (32%) and biomass (18%). Solar contributed 12% to EU-wide RES generation. Wind generation has been the main growth engine of the green electricity revolution.³ This is a significant challenge for the electricity system, as wind generation is not only variable or intermittent (like solar), but also more unpredictable.

While the research community is split over the question whether VRE deployment is expected to lead to lower electricity system costs,⁴ the impact of VRE generation on electricity system is already tangible. Germany has already experienced prolonged periods of

1 Agora Energiewende and Sandbag, 'The European Power Sector in 2019: Up-to-Date Analysis on the Electricity Transition' (2020), available at: <<https://www.agora-energiewende.de/en/publications/the-european-power-sector-in-2019/>>.

2 Besides the main variable renewables (wind and solar), renewables also include hydro and biomass.

3 See above.

4 In the IEA's 2°C scenario – where solar and wind account for 42% of global electricity generation in 2040 and fossil fuels 24% – the average LCOE of VRE would be lower due to much lower fuel and carbon costs, despite higher capital and operating costs. That however is only considering the lifetime project-level costs. From a societal perspective, the costs for renewables support are higher because subsidies for VRE continue to require substantial financial commitments from governments.

negative prices, where renewables have seen their revenues cut because of their own abundance in the market (“self-cannibalisation”). The cost of VRE has declined significantly over the past decade, supported by government subsidies and priority dispatch rules. As a result, VRE are first to dispatch their generation to the grid due to their close-to-zero marginal running costs. Zero-marginal dispatching effectively depresses electricity prices for large swathes of the day. The more renewables come online, the more this effect is aggravated, thereby lowering power prices to unsustainable levels – leading to the (in) famous “missing money” problem of VRE. Moreover, in the current setting, large VRE deployments obliterates the business case for conventional power plants that provide dispatchable electricity⁵ to the grid.

VRE’s impact on electricity systems will only grow in the future. Grids will have to accommodate an increased electricity demand of at least 18% in the wake of the electrification of light-duty transport, the heating sector and, to a lesser extent, green hydrogen production.⁶ Thus, VRE generation must rise by 18% by 2030 just to maintain today’s 35% share in the total energy system in Germany.⁷

Under the current set-up power markets in the EU might be unable to provide the necessary price signal for further investment in the electricity sector. This does not only jeopardize the EU renewables targets achievement, but also the stability of electricity systems and ultimately security of supply. This dilemma showcases the failure of the interaction between the EU’s liberal market principle as set out in the Lisbon Treaty, countries’ energy priorities (clustered around the trilemma of decarbonization, affordability, security of supply) and market forces driven by technology and innovation.

As it stands now, the dynamics in the EU’s electricity markets are unsustainable. This chapter’s working hypothesis is that in the long run, the current market design⁸ will slow down investment levels in renewables. Several solution bundles are explored in this paper. The purpose of the research is (i) to analyse why the current market design is ill-suited to

5 Dispatchable means power plants that can operate continuously and can dispatch generation capacity at any time in the market. These plants include coal, gas, nuclear and biomass power plants.

6 Some analysts even detail an electrification pathway of 85% of final energy demand, see Solar-Power Europe and LUT University, ‘100% Renewable Europe: How to Make Europe’s Energy System Climate-Neutral Before 2050’ (2020), available at: <https://www.solarpowereurope.org/100-renewable-europe/>.

7 Agora Energiewende and Sandbag (n 1) 20.

8 We define market design as a set of rules, standards and regulations that apply to all type of actors involved in electricity market value chains.

provide further incentives for investment into VRE and dispatchable generation and (2) to identify the optimal portfolio of market design adjustments bundled with technology choices to be able to deliver an optimal result on both system stability and decarbonization.

To provide meaningful analysis, this chapter narrows down the scope to the United Kingdom and German power markets.⁹ Both are comparable in size, energy mix and market design rules. Moreover, we assume that both markets are on a firm pathway of 60% VRE electricity within 2030. Moreover, the chapter focuses on the underlying vectors guiding market price formation, and less on EU-wide rules. The aim is to structure a bottom-up analysis of market dynamics, to then inform policy decisions on EU level. These dynamics are also considered through the lens of EU and country theoretical approach to market design rules. The chapter tries to strike a fair balance between conceptual perspectives and empirical evidence. Finally, the chapter works under the assumption of a gradual increase of carbon prices, ie, no changes in carbon price legislation that would make renewables competitive overnight with fossil generation.¹⁰

The first section analyses how liberalized market principles are incorporated into the electricity market design and how they interact with policy priorities of EU member states. The second section then dissects how VRE affect those market dynamics. The last section looks at potential pathways to mitigate those impacts.

2. EU ENERGY MARKET FUNDAMENTALS ARE CHALLENGED BY VARIABLE RENEWABLE GENERATION

2.1. How the EU free market principle guides electricity market design choices

The EU Treaties and secondary legislation give a few hints on how energy markets are to be designed, enjoying the liberal brand most other commodity markets feature – open and efficient markets with high levels of competition, with reduced meddling from member states, robust price signals to spur private investment and lower prices for customers.¹¹ This has been thoroughly applied to the industry in a wave of liberalization measures throughout the 1990s and 2000s.

9 France has a mix mostly reliant on nuclear capacity, changing the dynamics of VRE integration.

10 Energy Intelligence projections assume an increase from today's \$20-\$25 per ton of CO₂ in Europe to a relatively modest \$53/ton in 2050. In the absence of a carbon price, the calculations suggest that solar PV in the US would still become more competitive than CCGTs in 2031.

11 See par. 1 of Directive (EU) 2019/944 (2019).

The fundamentals of a liberalized power market can be summarized along the following lines:

- Electricity is sold on organized wholesale markets operated by independent system operators.
- Electricity markets are set up to ensure that supply meets demand continuously at least costs.
- Wholesale markets are the central price formation tool that allows to create a price signal to private economic agents and spur investment.

We can split this rationale into three main efficiency goals:¹² operating efficiency, allocative efficiency, and dynamic efficiency. The latter matters most in our discussion as it is defined as investment efficiency. The key aim is to transfer investment risk to private investors, and to reduce risks for centrally planned investment that ultimately is passed on to consumers.¹³

The first reality test for the idea of making electricity a marketed commodity is that the rules of physics dictate that supply and demand must be instantaneously matched. Therefore, the primary objective for each electricity market is the optimal dispatch of supply source in quantity and time, without which physical delivery would not function. Therefore, the price is set by last marginal producer against an administratively set demand curve. This system is inherently centralized but features market elements: competing generators bid in dedicated auctions to satisfy demand. To expose generators to some form of competition,¹⁴ regulators pushed the development of competitive markets based on the short-run marginal cost of generation (SRMC). Generators are dispatched along this dispatch curve from the cheapest to the most expensive operating cost, to meet demand¹⁵ at each point in time. The bid of the marginal generator that ensures overall demand is met, sets the price for all generators required to service this system demand.¹⁶ This is called the merit-order principle.

12 Malcolm Keay, David Robinson, 'Limits of auctions - reflections on the role of central purchaser auctions for long-term commitments in electricity systems' (2019) Oxford Institute for Energy Studies 1.

13 Ibid 2.

14 Ibid 1.

15 Demand also includes operating reserves and ancillary network support services at each point in time.

16 Oscar Kraan, Gert Jan Kramera, Igor Nikolic, Emile Chappin, Vinzenz Koninga, 'Why fully liberalised electricity markets will fail to meet deepdecarbonisation targets even with strong carbon pricing' (2019) 131 Energy Policy 109.

Merit order is a price discovery mechanism to ensure economic efficiency.¹⁷ Market actors trade expected supply and demand either on power exchanges or bilaterally. Each hour is characterised by a specific wholesale price, on the basis of which the system operator procures power to keep the system in overall balance. The market logic then goes full circle: price risk exposure encourages plants to be available “at times when the market is likely to be short”.¹⁸

Ultimately, the price discovery serves as an investment signal. All things being equal, we consider that a net present value NPV above zero in investor accounting motivates an investment action. Revenue depends on the estimated future electricity price and on aggregated power generation portfolio in the lifetime of the asset.

2.2. Electricity markets suffer from conflicting policy goals

Electricity markets are the playground for a range of policy priorities. Helm¹⁹ identifies the following policy goals underpinning policy decisions in markets:

- remunerating investment
- ensuring efficient operation
- providing useful signals for consumers
- optimising the power plant mix
- ensuring efficient resource allocation and competitive markets
- providing security of supply
- stimulating low-carbon resource development.²⁰

Inspired by Kraan, we are narrowing down the key policy goals to security of supply, affordability, and low-carbon energy generation for the purpose of this chapter.²¹ They will act as performance indicators for electricity markets.

17 Dieter Helm, ‘Cost of Energy Review’ (2017) Department for Business, Energy & Industrial Strategy 92.

18 Will Steggals, Robert Gross, Philip Heptonstall, ‘Winds of change: How high wind penetrations will affect investment incentives in the GB electricity sector’ (2011) 39 Energy Policy 1395.

19 Helm (n 17).

20 Subsidies are defined as any form of Feed-in-Tariffs and Contract for Differences, Renewable obligations or certificates. For an overview over different regimes in Europe visit: <http://www.res-legal.eu/compare-support-schemes/>.

21 Kraan et al. (n 16) 109.

Resource adequacy as overarching market design rationale

To understand the root causes, one must go back to the societal significance of electricity supply. Resource adequacy exemplifies this role, as it helps ensuring that enough capacity is available to cover demand if needed. To give an example how bad a lack of capacity margin can turn out to be: the South African electricity system chronically suffers from underinvestment and a too slim capacity margin, leading to rolling blackouts with detrimental effects on economic performance and social conditions.²²

Security of supply requires the electricity system to guarantee an overhang of necessary capacity margin. This spare capacity can either be auctioned in a competitive process or treated as a strategic capacity reserve (like in Germany). In both cases it creates a structural overcapacity in the market, making the electricity supply side unresponsive to demand by design. In fact, some authors acknowledge that with excess capacity needed power plants will never recoup their investments.²³

Moreover, system adequacy squares off against the goal of affordability. This is best illustrated by the problem of market caps. Market caps exist because governments want to shield consumer from extreme price fluctuations. On the flipside, market caps make it impossible to send the necessary price signals both to customers (to reduce their consumption) or investors (to invest into generation capacity for high-demand hours). While competition has increased and concentration in the EU electricity sectors has declined significantly,²⁴ end-consumers prices have risen sharply. In addition, the policy goal of decarbonization has put this system to an existential test as we will see in Section 3.

This results into conflicting measures and counteracting goals, forcing governments into a balancing act between incentivizing optimal investor behaviour and societal well-being.²⁵ This tension tempts policymakers to resort to another liberal spectre: state meddling into the supposedly free electricity markets. EU member countries enjoy significant leeway for intervening in their electricity markets.²⁶

22 Hartmut Winkler, 'Why South Africa's electricity blackouts are set to continue for the next five years' (The Conversation, 2021), available at: <<https://theconversation.com/why-south-africas-electricity-blackouts-are-set-to-continue-for-the-next-five-years-155233>>.

23 Helm (n 17) 93.

24 Helm (2017) crafts an interesting counterintuitive angle to that conclusion: Instead, the regulator allowed the generators to vertically integrate, and it was the combination of abandoning the centralized model and vertical integration which increased market power and blocked off merchant entry.

25 Helm (n 17) 95.

26 See article 194 par. 2 TFEU.

A market make-up for regulatory interventions

EU electricity markets are now subject to a range of policy interventions, tools and incentives, each addressing a specific policy priority. These include power purchase agreements, feed-in tariffs, investment subsidies, capacity auctions, strategic reserves, tax incentives etc. These interventions are being continued and extended, further creating inefficiencies.²⁷

Direct market interventions by regulators are being avoided by the set-up of independent market regulators like Ofgem in the UK. Their competences are wide-ranging, including intervening in the case of market power abuse. This, however, does not preclude policy-makers to temper with market design legislation in a way that influences investment signals.

VRE incentives are a case in point. VRE deployment in the electricity market are a policy choice meant as a measure to lower greenhouse gas emissions from a sector that is comparatively easy to decarbonize. Instead of pricing the externality of carbon-intensive generation at an adequate level, policymakers chose to phase in VRE via subsidies. In that respect, subsidies make a lot of sense: green technologies must be forced into a system that disadvantages new technologies. Steggals et al. neatly explain the lock-in problem,²⁸ meaning that new technologies struggle to compete with incumbent ones as electricity is a homogenous commodity and there are very few niche markets in which technology can scale up.²⁹

VRE are likely to require further intervention since the current model is not conducive to spurring further investment. Companies battle for guaranteed income in auctions,³⁰ often bidding with prices that are bets on increasing market revenues in the future. Those in turn are likely to be jeopardized by more hours of near-zero marginal generation hours, ie, depressed prices. Some authors plainly qualify the EU Renewables Directive as a 'very costly way of making marginal reductions in carbon emissions (...)'.³¹

The European Commission (EC) has attempted to counteract these market interventions. Capacity markets are a good example for how the EC has tried to impose some market

27 Helm (n 17) 221.

28 Steggals et al. (n 18) 1390.

29 Ibid.

30 For further readings see Keay, Robinson (n 12) 4.

31 Helm (n 17) 215.

rules.³² But these have addressed merely the issue of creating price competition among generators, and not the issue that price signals are influenced by administratively set targets and capacities are set administratively rather than fully by markets.

If we want to identify a cost-effective portfolio of intermittent and dispatchable generation, storage, etc., how do we deal with the subsidies, mandates and contract procurement preferences given to intermittent renewable generation and storage? How necessary are policy interventions to reach the policy goals, and are there alternatives? The next section takes large-scale VRE deployment as a proxy to highlight the changing dynamics influencing investor investment in electricity markets.

3. VRE IMPACT ON INVESTMENT

3.1. How VRE disrupt the legacy market design

Helm³³ argues that ‘there is enough redundancy in existing systems to absorb some renewables up to around 20%, and only after this level is surpassed are there significant system costs from integration’. The EU is close to this threshold – most EU member states have or are on the verge of achieving their 2020 renewables target.³⁴ System costs can be defined as all additional costs in the non-VRE part of the power system during the generation of VRE. It encompasses subcategories as profile costs, balancing costs and grid-related cost.³⁵ Another measure is the cost of stabilizing the grid because of VRE influx. In 2019, the cost of paying renewable operators compensation for being curtailed³⁶ was €710ml., for a total cost of grid stabilization measures of €1.2bl.³⁷

32 See European Commission, Commission Decision of 29 April 2015 initiating an inquiry on capacity mechanisms in the electricity sector pursuant to Article 20a of Council Regulation (EC) No 659/1999 of 22 March 1999.

33 Helm (n 17) 114.

34 Eurostat, ‘Renewable Energy in the EU in 2018’ (2020), News release, available at: <<https://ec.europa.eu/eurostat/documents/2995521/10335438/8-23012020-AP-EN.pdf/292cf2e5-8870-4525-7ad7-188864ba0c29#:text=The%20increase%20in%20the%20share,at%20least%2032%25%20by%202030>>.

35 Zheng Xu, ‘The electricity market design for decentralized flexibility sources’ (2019) Oxford Institute for Energy Studies’.

36 Curtailment occurs when VRE produce too much electricity and risk to overload the grid. This is especially relevant for wind generation.

37 Federal Network Agency (Bundesnetzagentur), ‘Quartalsbericht zu Netz- und Systemsicherheitsmaßnahmen, Zweites und Drittes Quartal 2019’ (2020).

Power markets have inherited planning models that struggle with matching generation with demand in high VRE penetration environment. VRE undermine this construct in three ways: (1) they are intermittent, meaning they cannot always be dispatched; (2) they generate at near-zero marginal cost and (3) they tend to produce at the same time.³⁸

Intermittency

Intermittency as such does not fit well with the existing market design which is always geared towards ensuring a continuous supply of electricity. The uncertainty VRE generate cannot be underestimated. Since their production depends on sun and wind conditions, which are always not available, sun and wind facilities are not dispatchable in the traditional sense.³⁹ Intermittency can lead to low or high production levels for multiple days, on top of seasonal variation. The priority dispatch of VRE paired with their intermittency means that not only renewables generate variably, but all other generators are subject to their intermittency. In effect, conventional plants must ramp up and down quickly to (1) compensate for the intermittency of renewables and (2) to make up their capital costs in that short window.⁴⁰

Zero marginal cost

VRE are the electricity generation form that tends to be dispatched first because their short-run marginal cost (SRMC) is so low compared to other generators. In fact, renewables generate at near-zero marginal cost. This depresses the wholesale price for the period when large swathes of VRE produce at the same time. There is a positive correlation between hours in which many renewables produce at the same time and thereby reduce wholesale market prices and the deployment rate of VRE. The higher the renewable targets a member state sets for its VRE penetration rate, the lower the wholesale price is likely to be. Some authors have speculated that in a fully decarbonised electricity system, the wholesale price might be zero. Helm points neatly at the implications: 'In a purely zero marginal cost world, there is only capacity. The energy itself is free'.⁴¹

The impact goes beyond mere renewables deployment rates and changes the market dynamic. Markets with large scale deployment of intermittent generation are not favourable to conventional generation sources. As intermittent generation expands, existing

38 Kraan et al. (n 16) 102.

39 Paul L. Joskow, 'Challenges for wholesale electricity markets with intermittent renewable generation at scale: The U.S. Experience' (2018) Massachusetts Institute of Technology Center for Energy and Environmental Policy Research, Working Paper Series 28.

40 Helm (n 17) 93.

41 Ibid 71.

dispatchable generation becomes increasingly unprofitable and eventually retires: '(...) continued build-out of these technologies are pushing less competitive generators out of the supply stack with subsequent downward pressure on prices'.⁴² This further squeezes margins of the necessary dispatchable capacity in the system – which is needed to ensure that when VRE do not generate, they are back-up by flexible generation.⁴³ The consequence for investment signals is detrimental. Price formation is supposed to take place in the operational wholesale market and designed to be the source of investment decisions. This prevents further investment in flexibility capacity, putting resource adequacy at risk.⁴⁴ How did electricity markets cope with VRE deployment up until now? This construct was able to exist to this point because of enough flexible capacity retiring.⁴⁵ This design still works reasonably well for operational (short-term balancing) markets, much due to overcapacity. Policy decisions have been based on a perceived overcapacity in the market, nurtured by lower demand after the financial crises during the 2010s. But this has only shifted the problem in time. The increase in renewables has so far been able to free ride on dispatchable generation on the margin – without the market being designed for spurring investment in overcapacity.

Thus, we can extract 6 principal effects of power markets being impacted by VRE penetration:

1. Lower average wholesale prices as conventional power plants are setting the price in fewer hours of the day.
2. Lower captured prices⁴⁶ for variable renewables such as solar PV and wind as the price will be lower for the hours with relatively more renewables production.
3. Missing money, ie, lower returns for both renewables and required flexible conventional generation capacity.
4. Potential early retirement of plants due to poor economic performance.
5. Assets may not receive the required investment signals for entering the market and/or building a profitable business model, jeopardizing resource adequacy.
6. Disconnect between short-term operational markets and investment markets.

42 Kraan et al. (n 16) 109.

43 Fuel-based technologies (like gas and coal fired generation) are therefore increasingly standing idle because of their higher short-run costs, putting pressure on a system's ability to access the necessary flexibility and back-up.

44 Helm (n 17) 92.

45 Joskow (n 39) 40.

46 Captured prices means realized power prices over a given period of time.

This impedes markets to realize their main functions – and energy supply does not obey price, but availability of energy. As Joskow points out, ‘demand is not rationed by price but is exogenous and intermittent from the perspective of the system operator’.⁴⁷ The amount the availability of energy itself is decided by the number of auctions for guaranteed prices policy makers set up. That is a severe derogation from any form of market-driven principle.

3.2. Missing money investment signal: can the markets deliver in a VRE-dominated electricity system?

The downside to VRE’s low operating costs are their high capital costs. Energy Intelligence has calculated that in the case of onshore wind, 76% are capital costs, of which 36% are used to build the plant and the rest to reimburse lenders and landowners. To put things into perspective, a new combined-cycle gas turbine (CCGT) plant in Europe will spend 67% on operating cost and only 33% on capital.⁴⁸ The brunt of VRE’s capital risk is borne during the project’s development phase in the case of VRE.⁴⁹ The high upfront capital costs mean that (1) VRE are highly dependent on financing conditions and (2) need to have a constant and guaranteed revenue stream to create a profit for investors.

First, the combination low interest rates, lower perceived risk due to VRE not being exposed to commodity prices and the use of project financing have boosted their deployment.

Second, Kaan et al. explain that investors will only invest if the NPV of an investment option is positive for a longer period.⁵⁰ Were EU countries to drop the guaranteed revenues, VRE would be exposed to a risky environment: prices are volatile due to the ‘homogenous nature of electricity, its lack of storability, inelastic demand and the steepness of the supply curve as electricity production nears system capacity’.⁵¹ The underlying uncertainty is likely to deter investors, given that the high upfront capital expenditure (CAPEX) and highly risky development phase would have been recouped over a longer timeframe on the market, effectively lowering the time value of money.

Given the long lead times for capacity investments, investments can end up not being in phase with market cycles. Steggals points out that investment signals might be skewed

47 Joskow (n 39) 13.

48 Energy Intelligence (2020), data extracted from customer subscription offer.

49 Helm (n 17) 122.

50 Kraan et al. (n 16) 105.

51 Steggals et al. (n18) 1390.

in that during a high-price period, ‘a number of companies may simultaneously decide to build new capacity. This may result in overcapacity when these plants come online years later, with consequent price falls’.⁵² This market condition might be exacerbated the more VRE come online. Erratic investment signals from an energy-only market⁵³ in the condition described above, realistic behaviour of investors and assets would severely affect reliability of the overall system due to inefficient investments.

Governments continue to flood the markets with sources that cannot remunerate themselves from those markets and undermine the price signals for all other sources. The operational wholesale market as primary source of investment signals is inadequate. The goal of decarbonizing the electricity mix through VRE via the energy-only market is not achievable on SRMC principles because it won’t incentivize over-investment in cheap, renewable power. So, what should be the basis for remuneration?

This raises deeper questions about whether electricity markets can pursue the diverse policy goals without a central resource planning model.⁵⁴ That would run against the principle of open markets acting as price discovery vehicle. Keay et al. rightfully point out that when opting for the SRMC model, policy makers took ‘the view that there is a duality between the competitive market mechanisms and this idealized central economic dispatch process’.⁵⁵

Helm acknowledges that private markets are not able to satisfy the policy requirements sewed into electricity market design.⁵⁶ Joskow takes a more cautious approach: ‘The jury is still out on whether competitive power markets can stimulate levels of investment in new generating capacity in the right places at the right times consistent with political preferences’.⁵⁷

52 Ibid.

53 Energy-only markets are defined by the fact that they market actors get their revenues solely from the spot market for electricity.

54 Key characteristics would be centrally coordinated and backed auction, investment incentives set from long-term marginal running costs as opposed to SRMC, and regulated returns.

55 Keay, Robinson (n 12) 3.

56 Helm (n 17) 222.

57 Paul L. Joskow, ‘Lessons Learned from Electricity Market Liberalization’ (2008) 29. Special Issue 2, *The Energy Journal* 9–42.

These new conditions also change the nature of the commodity itself. The impact of VRE on the market dynamics is revolutionary – Helm baptizes sees it as the advent of broad-band economics taking over from a market where electricity is a commodity.⁵⁸

The next section tries to identify a good balance between regulatory intervention and market approach to cater for this new type of VRE-dominated market.

4. PATHWAYS TO EFFICIENT VRE MARKETS

The European Commission has reacted and made some adjustments to the existing rules with the market design reform of 2016. For instance, it has introduced some new trading arrangements on wholesale markets that accommodate for VRE generation. Since VRE generation is difficult to predict, trading closer to the time of physical delivery of renewables ensures that the system can be balanced. This highlights the importance of short-term markets and are a sign that markets can help mitigate that risk. While this makes sense from a system perspective, it does not necessarily solve the missing money problem.

4.1. Incremental changes to the current market design

Fully liberalized market model (scarcity pricing)

A recurring suggestion in literature is to remove price caps and allow scarcity pricing. This set-up would address the fundamental problem that energy-only markets “do not yield adequate revenue”⁵⁹ for generators. Indeed, the marginal producers do not earn back their initial investment, since (1) VRE tend to lower prices overall, (2) the number of hours they can recoup prices is lower and (3) prices are capped or regulated. Joskow rightfully explains that wholesale market prices combined with capped prices cannot support a long-run equilibrium allowing generators to recoup their capital costs.⁶⁰

Moreover, a system with price caps cannot accommodate for a fully-VRE system unless the cost for intermittent generation is subsidized outside the market, since prices are too low to generate revenue. In addition, were renewables the only supply source in the market the amount of VRE would have to be redundant enough to ensure resource adequacy,

58 Helm (n 17) 71.

59 Joskow (n 39) 12. Also see p. 41.

60 Ibid 12.

leading to an installed capacity far beyond the maximum peak demand of the grid.⁶¹ This would lead to the need to deploy high amounts of capital dedicated to an VRE capacity overhang without the prospect of recouping revenues on the market. Instead, free price signals enable the coordination of flexible capacities with VRE. Volatility rewards flexible generators. Again, the real value is not in the commodity generated (ie electricity), but in the flexibility provided.⁶² The technology that could supplement such a market arrangement – flexible generation, energy storage and demand-side flexibility is already available.

Market caps avoid any mirroring of consumers price sensitivity and propensity to pay, especially when resource adequacy is low. This would give consumers the decision whether to consume less electricity and pay a price above the SRMC of the marginal producer⁶³ or being subjected to involuntary blackouts.⁶⁴ On the one hand, consumer price sensitivity is difficult to estimate due to the ubiquitous nature of electricity use. Since the electricity system is both a crucial security asset for societies and collectively shared by all its users, consumers willing to consume less electricity might still end up paying in the form of blackouts for other users' decision to not cut their demand. From a societal point of view, it is therefore understandable that policymakers do not want to hand that market power to consumers.

On the other hand, scarcity pricing would reinstate the exposure of generators and investors to price risk. This would solve the issue of security of supply since price volatility in scarcity situations would provide an investment incentive into dispatchable spare capacity to ensure resource adequacy. Prices must rise high enough under these contingencies for decentralized investors to expect that the present discounted value of future prices will be high enough to cover the capital costs as well as the operating costs of an investment in generating capacity.⁶⁵

The flipside is that this model does not solve the decarbonization issue in the absence of a meaningful carbon price. Also, while this model would increase efficiency, it is a very unlikely to be implement due to the political capital needed for it.

61 For a discussion of a hypothetical 100% VRE system; *ibid.*

62 Which Stegals et al. (n 18) 1395 describe as “true value” of energy.

63 Kraan et al. (n 16) 101.

64 Joskow (n 39) 21. This is also referred to as the “value of lost load” to individual consumers.

65 *Ibid* 19. Obviously, under these conditions these prices should be conveyed to consumers and supply and demand balanced by responses on the demand side.

Flexible market model

It is recognized⁶⁶ that by large, European electricity markets today are already divided into two markets.⁶⁷ On the one hand, a (1) fully liberalized energy-only market in which electricity producers are only paid for the electricity produced (the spot market) and (2) a market with capacity remuneration mechanisms.

With a large influx of VRE, the electricity system needs flexibility. In practice, this means generation capacity that can respond to the short-term fluctuations in solar and wind output.⁶⁸ CCGTs are well-suited since they offer the following advantages: (1) quick ramp-up time, (2) lower capital costs (relative to conventional nuclear plants), and (3) flexibility to supply very short-term frequency control, voltage support and balancing services.

A case in favour of rewarding flexibility is the maturity and relative low cost (boosted by low natural gas prices) of the gas-fuelled generators. Combined-cycle gas turbines have a slightly more expensive lifetime cost of generation compared to VRE, and in the case of UK have been exposed to carbon prices, increasing their operational cost and therefore lowering their competitiveness in the merit order (Germany is expected to follow suit with a carbon price rising from €25 per tCO₂ in 2021 to €55 in 2025). If outside-of-market support for VRE continued, the key issue would be to provide sufficient price incentives to invest into dispatchable generation. This would require that fixed costs are included in the remuneration framework – as we have discussed, SRMC is insufficient to remunerate dispatchable generation. In a 50% VRE scenario, it is likely that there would be too many hours with very low or negative prices and too much price volatility from one day to another.⁶⁹ In short, another revenue stream must be created.

Avoiding that gas-fuelled generators are pushed out of the mix means that regulators need to develop a product market that allows for missing production level and ancillary services. To create an investment signal, revenues must reflect the comparatively high operating costs of these plants. Moreover, they must reflect the value of flexibility to the system, which increases with the amount of VRE deployed. It is not clear how to define the value of this flexibility, as it goes beyond mere energy pricing.

66 Ibid 53.

67 Kraan et al. (n 16) 109.

68 Joskow (n 39) 39.

69 Ibid 37.

In the longer run, it is however expected that the business case for CCGT is uneconomical due to the exposure to electricity price risk and, on the base of LCOE,⁷⁰ their lack of competitiveness compared to renewables. In the current setting, it seems that there would be insufficient hours in the market at adequate prices to cover up for lacking renewables generation and to recoup their investment cost. Energy Intelligence⁷¹ has calculated that the load factor only reached 20% in Germany because of adverse market conditions for gas, translating into German CCGTs generating at \$97/MWh instead of the standard \$56/MWh. To comply with the decarbonization requirements, this arrangement would have to be supplemented by carbon prices aligned with government-set climate targets.

Indeed, CCGTs face strong competition. Storage technologies have lower capital costs, allowing them to earn market revenues from short durations of providing capacity to the grid and without needing capacity payments.⁷² Battery storage could help smoothening the impact of VRE by meeting peaks in demand and dampening wholesale price volatility.⁷³ Storing excess power and selling at a later point in time could be a business opportunity for investors. Analysts predict that their operational cost will improve significantly over the next decades.⁷⁴ Another key feature is that they deliver a carbon-free service to the grid, compared to CCGTs.⁷⁵

Doubts over the business model of batteries however exist: (i) batteries can deliver day-to-day storage, but not on seasonal level. Therefore, they could not sustain a back-up capacity high enough to compensate for, say, summers with low wind generation levels;⁷⁶ (2) they suffer from the same self-cannibalization effect as VRE.⁷⁷ Therefore, the best way

70 Levelized Cost of Energy.

71 Energy Intelligence (n 48).

72 Joskow (n 39) 40.

73 Helm (n 17) 71.

74 Energy Intelligence estimates that by 2050, the cost of battery storage could fall by 70% to around \$40 per megawatt hour, down from today's \$145/MWh.

75 That doesn't preclude CCGTs to swap to synthetic gas or biomass if the economics allow it.

76 The biggest demand for storage is between 18-22 hours of the day as the sun sets and household demand peaks before declining.

77 If there is more storage capacity than demand, storage assets will be willing to accept a lower price for the storage service because they expect to sell for a higher price when renewables do not produce. However, this is self-defeating because when VRE are not producing, all battery service suppliers will have the incentive to discharge at the same time, in effect pushing prices down for everyone (including flexible conventional units).

forward might be adding them on-site to VRE instead of a stand-alone business model. Energy Intelligence finds that a combined VRE-battery facility could be cost-competitive with gas-fired generation within the next 10 years in Europe.⁷⁸ In that case renewable generators would not be incentivized to sell whenever meteorological conditions allow them to sell, but when the market price is enough to recoup their investment costs.

This model would work in a market design where VRE are compelled to manage their intermittency on their own and to deliver firm power to the market.⁷⁹ Notwithstanding, to achieve that it needs to be sorted out whether it is more cost-effective for VRE to manage their intermittency on their own (integrated into their project scope, and therefore impacting the design of VRE auctions) or whether policymakers should create an efficient “on demand” market with flexibility products that VRE can procure. The latter is supported by Kaan et al. who point out that ‘centralized storage would be more capital-efficient than separate storage assets that can only store for a local asset’.⁸⁰ However, considering that VRE output variability is both seasonal and daily, there are good odds that the flexibility market itself would be subject to significant volatility as well, and therefore disincentivize large amounts of capacity. Moreover, IHS finds that adding battery storage could improve the LCOE of solar PV by up to 80%.⁸¹

4.2. Disruptive market design changes

Capacity auction model

A solution that was proposed by both UK and Germany has been capacity mechanisms, consisting in remunerating capacity not for the commodity itself.⁸² The principle is that an aggregate capacity is defined by the system operator, against an expected demand curve. Again, this upsets fundamental principles of the open electricity market – revenues are not based on delivered commodity, but on the mere availability. However, it appears

78 Energy Intelligence (2020) estimates that combined with an expected 60% fall in solar PV costs over the same period, down to under \$25/MWh, stored solar electricity would displace gas peakers around 2030 in Europe.

79 Helm (n 17) 94.

80 Kraan et al. (n 16) 106.

81 IHS, ‘Global Renewable Levelized Cost of Electricity Outlook: Part 1’ (12 February 2020) Global Power and Renewables Market Briefing.

82 These mechanisms require establishing a minimum generating capacity target to meet reliability constraints and running a forward market that determines “capacity prices” that generators receive if they can commit to being available to supply energy or ancillary services under “stressed” system conditions.

that the demand for availability is low. In 2015, German TSOs had to recourse to conventional power plants to redispatch their capacity for 17 Terawatt hours (TWh) – total power demand in Germany was 597 TWh.⁸³ That is a redispatch need of 2.8%. That shows that capacity mechanisms are a cost-ineffective tool – governments reward investments in capacity that rely on estimates of future demand curves (most capacity contracts are concluded for 3 years in the future, like in the UK), and not on price signals produced by the actual markets.

In effect, governments now remunerate generators outside of the market in two instances – VRE subsidies and capacity markets. This has led to a further fragmentation of markets and investment signals. Further, it has again strengthened the member states' reflex of intervening in their electricity markets. Capacity mechanisms embody the recognition that wholesale markets cannot provide sufficient price signals to close the gap of reliability constraints in the electricity system. They are therefore the default option for a price signal that in a perfect electricity system would be produced by efficient scarcity pricing. The two markets – energy and capacity – are therefore separated.

There is doubt about the price signal effect of these auctions. UK capacity auctions have been (1) surprisingly low and (2) have reached only a low amount of the existing capacity – hardly a satisfactory investment signal.

Helm provides an interesting spin on the capacity market proposal: he proposes the creation of a single unified capacity auction on an EFP basis.⁸⁴ The construct would bring both VRE and capacity into a single market, in effect combining the existing renewable subsidies and the capacity auctions. It also would be a stand-alone and secondary market.⁸⁵ The elegance of this proposal is that it establishes a market for what is now government-sponsored subsidies and puts a price on intermittency. It also is intended to reduce the amount of policy interventions and regulations.⁸⁶

First consequence is that it would pit VRE against conventional dispatchable generation on equal competitive footing. From a cost-efficiency perspective, this makes sense. Helm justifies that measure on the ground that VRE generators have better insight into their

83 Federal Network Agency (Bundesnetzagentur), '3. Quartalsbericht 2015 zu Netz- und System-sicherheitsmaßnahmen. Viertes Quartal 2015 sowie Gesamtjahresbetrachtung 2015' (2016).

84 Helm (n 17) 115. EFP stands for Exchange of Futures for Physical.

85 Ibid 205.

86 Ibid 119.

technology and costs than the market and more transparent disclosure of the competitive gap between those two forms of generation.⁸⁷

The consequences would be far-reaching. For VRE, this would mean internalizing the costs they create for the system (transmission, distribution and back-up capacity). This is likely to be contentious and could potentially put a break on VRE deployment. VRE generators would face enormous costs for their impact on the grid. While Helm proposes a measure for the flexibility cost (the quantity of firm capacity required to replace generation on the system), implementing it would be challenging. Every wind farm has different seasonal, daily and hourly production profiles, and technology is evolving. Rated capacity factors of wind turbines increased by around 10% within only 10 years. Consequently, it would be unfair for a wind generator that just invested into latest technology to pay the price of flexibility defined by the legacy average rated wind capacity factor, which is naturally much lower.

This leads to a more philosophical question: should not the cost of integrating large amounts of VRE be socialized? Indeed, renewables pushing into the electricity system are the consequence of a policy goal (decarbonization) that goes beyond market logic and tries to address a market externality (climate change).

The binary market solution

A similar proposal comes from Keay et al.:⁸⁸ the two-market solution. The authors envisage a SRMC-based market “on demand” (like the existing wholesale markets) and an “as available” market. VRE would then participate in the latter and be remunerated on the base of the LCOE. The intention is to use the price set via auctions at the investment stage.

The upside of this proposal is to shield electricity markets – including conventional flexible plants – from the combination of subsidized, intermittent generation that pushes them out of the market and inflexible conventional capacity.

The downside of the proposed availability design is that it would lead to significant fluctuation of prices due to: (1) the high incentive for developers to place strategic bids, thereby artificially lowering the winning auction price and (2) the impact of non-energy related factors including financing conditions for renewables. Energy would still not be priced according to demand, but rather according to interest rates and project financing availa-

87 Ibid 206.

88 Keay (n 12) 2.

ble for investors. The price signal therefore would continue to be skewed towards factors independent of demand patterns.

An interesting alternative is to restructure the “availability market” according to the cost structures underpinning the three fundamental plant investment phases (development, construction and decommissioning).⁸⁹ Subsidies would continue to exist but allow for flexibility, involving a focus on capital support and tax concessions in the development phase of the project and then refinance at completion. This is what is already common practice in the market today. In effect, this arrangement would split markets into an SRMC operational market and bilateral contracting markets for long-term VRE investments driven by obligations for reliability and emissions performance.

It is true that consumers would define the price they are willing to put on reliability, removing the need for costly government intervention.⁹⁰ Consumers would choose between the two offers – the assumption being that they would prefer reliable supply and the least costly offer. In addition, it is difficult to envisage how the two markets would interact and influence each other. While it is true that VRE would not be exposed to SRMC pricing (which does not reflect their cost structure), it is unclear what would be the basis of their revenues.

A solution could be to invite the regulator to define the size of these markets – ie defining a goal of having a physical energy mix that is 80% renewable and a residual mix of dispatchable generation and storage⁹¹ (“on demand”). Again, the markets parameters would have to be defined by policymakers. Prices on both markets would be defined by not only demand, but also how much capacity in the respective markets is needed to satisfy the goal.

Empower demand

Better understanding and granularity of demand patterns could offer a solution to the conundrums described above. Some literature looks at the potential of distributed energy resources (DERs), demand response, consumer connectedness and an increasing importance of prosumers. Integrating these resources into the body of the existing market design would mean a fundamentally different market dynamic.

89 Helm (n 17) 127.

90 Ibid 6.

91 See Joskow (n 39) 53.

Corporate power purchase agreements (CPPAs) are a sign of that. They allow VRE generators to secure a guaranteed revenue, that is still oriented at the expected wholesale energy market prices, while being sufficient to allow for cost recovery. It effectively bypasses the separation of wholesale and retail market prices.

A similar approach of uniting wholesale and retail markets has been practiced in the form of smart meters, which give the market agents real-time information on demand and production patterns without having to go through a dispatch model with an administratively set demand curve. That model can only work with scarcity pricing, leading to potentially unpopular high price periods. That would eviscerate the need for back-up capacity to be available, and substantially reduce the prominence of system adequacy and ultimately weaken the security of supply argument. There are doubts however over (1) how acceptable such a model would be for consumers and (2) how agile demand elasticity is in reality – in essence, can consumers reduce their electricity consumption in ways significant enough to respond to price variations? Potentially, consumer responsiveness is estimated to be high⁹² and the benefits to be substantial.⁹³ Modelling of dynamic demand in lower-complexity conditions however indicate that the welfare benefits are significant.⁹⁴

5. CONCLUSION

This chapter showed that the EU is at a crossroads. EU power markets might be unable to provide the necessary price signal for further renewables investment, jeopardizing the EU renewables targets achievement. Moreover, in their current state, electricity markets are incapable of accommodating large amounts of VRE without losing both security of supply and affordability. VRE have challenged the ability of EU member states to plan and design markets as relevant for society in the face of quickly changing demand patterns and generation technologies.

In a larger sense, this also questions the traditional concepts of liberalized standing opposite of centralized market models. While EU member states have been instrumental in phasing in VRE, this also has come at significant cost for public budgets and for electricity systems, for limited gains in decarbonisation. Further auctions will help continue forcing in VRE into a gradually decarbonised electricity system, but the market dynamics make it impossible for investors to recoup any revenues. The consequence is that either

92 Ibid 50.

93 Ibid 48.

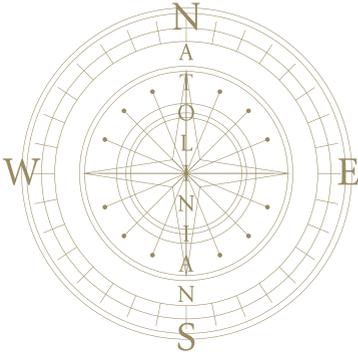
94 Matthias Fripp Imelda, Michael J. Roberts, 'Variable Pricing and the Cost of Renewable Energy' (June 2018) 24712 NBER Working Paper 8.

electricity must exist as a public good outside of any market arrangement or that market design rules must be radically tweaked to reflect this new reality.

Further research is needed to explore the optimum balance between technologies readily available to guarantee market equilibrium. This will involve quantifying the optimal portfolio to incentivize consumer responsiveness and at the same time guarantee both security of supply and decarbonisation. Further insights can be gained from mapping potential technologies, contractual arrangements (like CPPAs) and consumer behaviour. Demand pattern transparency will help overcome the need for administratively setting a demand curve and missing investment signals.

Kaan et al. state that the challenge of solving this problem 'has been transferred from the technological in the political realm'.⁹⁵ That is true in that only policymakers can design rules that adopt the current market structures to the changes that VRE have brought and will continue to bring. First, it is accepting that the true value of electricity rests no more in the amounts produced of the commodity itself, but in the capacity and service delivered. Second, policymakers should help technologies enter the market that support customers in making independent choices themselves about their demand structure. This should produce a more meaningful demand picture that would reduce the need for a central planner to coordinate dispatch patterns.

95 Kraan et al. (n 16) 109.



CHAPTER 9

Climate litigation: A silver bullet for insufficient climate action?

BY ZOFIA ROGUSKA



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1. INTRODUCTION

The Lisbon Treaty introduced a very symbolic modification to the environmental chapter of the Treaty establishing the European Community (TEC). Although the environmental provisions contained in Articles 174 to 176 of the TEC have been transformed into Articles 191 to 193 of the Treaty on the Functioning of the EU almost intact, one significant modification has been made. In the last sentence of Article 191 special reference to climate change has been added which names it a worldwide environmental problem requiring the adoption of international measures.

Although 10 years after the adoption of the Lisbon Treaty climate aspirations of the EU constantly increase, sadly so do the disastrous effects of climate change. As a result, even the leaders of climate action – like the EU – face legal charges for insufficient reduction of greenhouse gases. The purpose of this research is to examine the role of climate change litigation as an effective tool of strengthening global climate ambition. Since climate change is no longer perceived as an abstract phenomenon, it is important to remember that current national and international measures do not amount to a ‘silver bullet’ which would address all climate change-related complexities. Highlighting necessity of urgent climate action, the paper seeks to examine whether courts can provide truly effective protection of current and future generations. Basing on the landmark Dutch case *Urgenda v. the Government of the Netherlands*, *Client Earth v. Enea*, *Carvalho and Others v. the European Parliament and the Council* as well as *Neubauer et. al. v. Federal Climate Change Act*, the paper argues that good response to such a complex problem requires in-depth considerations – unlikely to be conducted by courts.

The issue is both important and topical because of a recent increase in lawsuits brought to both national and EU courts with intent to mobilise climate action by establishing legal responsibility for contribution to climate change.¹ Laying down the implications of climate litigation cases is fundamental for a coherent and effective EU climate policy. In addition, this reflection can support political choices by informing future conceptions in this field, both on the national and supranational level.

The chapter explores the role of courts in moving the EU towards climate neutrality. To this end, it begins with an analysis of the political and regulatory developments in the

¹ Christian Huglo, ‘Global Warming and the National Courts: A Global Legal Revolution?’ in Emilie Gaillard, David M. Forman (ed), *Legal Actions for Future Generations* (Peter Lang 2020) 133–151.

field of climate action. In the middle part the chapter takes four prominent landmark judgements delivered on both national and European level as case-studies and analyses the interplay between the reasoning of the court behind them. Following a short summary of each case, the subsequent section of the chapter examines the common challenges to the climate litigation revealed by the analysed cases before providing a conclusion.

2. IMPORTANCE OF CLIMATE LITIGATION

The need to reflect on the role of climate litigation as a tool of mobilising climate action within the European Union stems from manifold aspects. Out of them three come to the fore. Firstly, climate change, although unnoticeable, is not an abstract phenomenon. It has also real implications on the condition of the environment and thus affects the world which will be inherited by the next generations.² The future impact of the current (allegedly insufficient) climate policy became the subject of significant societal interest in many countries of the world. Remarkably, the climate youth movement “Fridays for Future” has been born in Sweden, one of the most progressive EU Member States in terms of environmental and climate strategies.³ Secondly, the legal landscape of climate change protection adopted by the EU has a well-established reputation of being the most ambitious in the world. However, due to the global characteristics of challenges related to climate change, legal solutions endorsed in this field in order to be effective need to be implemented first and foremost on the global level. This inevitably turns the debate in the direction of the United Nations’ system. However, it is not without flaws. Countless interlinks of globalised world often lead to a watering down of global climate agreements.⁴ And lastly, another fundamental issue is the interplay between the principle of mutual solidarity among the Member States and the margin of possible interference in the sphere of Member States’ sovereignty. Taking into account the fact that the EU climate targets touch the very foundations of Member States’ economy, determining the fair share of climate efforts within the EU requires an in-depth consideration of many conflicting interests, especially in the light of the differences in countries’ starting points in this economic transition.

2 See (among others): Maria Kenig-Witkowska, ‘The European Union Perspective on Cultural Heritage and Climate Change Issues’ (2019) 3 (1) *Journal of Comparative Urban Law and Policy* 63–80.

3 Mattias Wahlström, Piotr Kocyba, Michiel De Vydt, Joost de Moor (eds), ‘Protest for a future: Composition, mobilization and motives of the participants in Fridays For Future climate protests on 15 March 2019 in 13 European cities’, 2019, retrieved 31 May 2021, from: <http://eprints.keele.ac.uk/6571/7/20190709_Protest%20for%20a%20future_GCS%20Descriptive%20Report.pdf>.

4 Peter Lawrence, Daryl Wong, ‘Soft law in the Paris Climate Agreement: Strength or weakness?’ (2017) 26 (3) *Review of European, Comparative and International Environmental Law* 276–286.

3. LEGAL FRAMEWORK OF CLIMATE ACTION

The rudimentary act of international law in the field of combating climate change is the United Nations Framework Convention on Climate Change.⁵ To avoid dangerous anthropogenic climate change, its goal was to stabilize the concentration of greenhouse gases in the atmosphere. However, it did not contain any legally binding emission targets for either party. It was not until 5 years later, in the Kyoto Protocol signed in 1997⁶, that the parties committed themselves to a certain percentage reduction of six greenhouse gases, which was to take place between 2008 and 2012.

Currently the most important act of international law which refers to global actions to combat climate change is the Paris Agreement adopted in December 2015⁷ and operationalized three years later by the Katowice Rulebook⁸. The key objective of the Paris Agreement is to stop the rise of the average global temperature below 2°C compared to the period before the Industrial Revolution, while trying to reach towards 1.5°C, as well as achieving a balance between anthropogenic greenhouse gas emissions and their absorption.⁹ These provisions are operationalized by the obligation to develop, present and implement Nationally Determined Contributions (NDCs) imposed on the Parties to the Paris Agreement. NDCs define the actions by which the Parties want to contain and adapt to the effects of climate change. In addition, the Parties undertook an obligation to periodically review their commitments and undertake more ambitious climate actions.

The Paris Agreement has completely changed the logic of the previously existing international system of climate protection by introducing a common, long-term architecture of actions. It is based on independent determination of national climate policy objec-

5 United Nations Framework Convention on Climate Change, adopted 9 May 1992, entered into force 21 March 1994, 31 ILM 849 (UNFCCC).

6 Kyoto Protocol to the United Nations Framework Convention on Climate Change, adopted 11 December 1997, entered into force 16 February 2005, 37 ILM 32 (Kyoto Protocol).

7 UNFCCC, Decision 1/CP.21 Adoption of the Paris Agreement (29 January 2016) FCCC/CP/2015/10/Add.1, Annex (Paris Agreement).

8 Report of 19 March 2019 of the Conference of the Parties to the UNFCCC on its twenty-fourth session, held in Katowice from 2 to 15 December 2018, FCCC/CP/2018/10/Add.1, retrieved 31 May 2021, from: < <https://unfccc.int/sites/default/files/resource/10a1.pdf>>.

9 See Articles 2 (1) and 4 (1) of the Paris Agreement.

tives and anticipation of their gradual growth.¹⁰ What is especially important, the global nature of the Paris Agreement was possible only thanks to its hybrid legal form.¹¹ This agreement is looking for a kind of a “golden mean” – a solution that will not be too strong (and therefore unacceptable for key players), nor too weak (and therefore inefficient).¹² In order to ensure maximum respect for the national sovereignty of the Parties, the Agreement is based on the bottom-up method, which ensures reflecting actions of individual countries instead of directing them. To promote progressively ambitious activities, regulations regarding national contributions (NDCs) to climate protection are accompanied by legal solutions guaranteeing transparency and accountability of undertaken actions. Moreover, the Agreement constitutes a commitment of the parties to gradually increasing their climate efforts. Nevertheless, the Agreement does not impose on the Parties an obligation to implement measures listed in their nationally determined contributions. In accordance with article 4 (2) of the Paris Agreement, the parties only have the obligation to implement national policies aimed at implementing the NDCs.¹³ The Agreement also does not impose an obligation on developed countries to adopt reduction targets covering all sectors of the economy – Article 4 (4) of the Paris Agreement states that the parties should have this kind of targets but does not oblige them to do so by using the word ‘shall’.¹⁴ Some scholars point out that this regulation of both issues in 2015 became one of the key negotiating topics on the way to adoption of this landmark agreement. It allowed the United States to accede to the Paris Agreement solely by the decision of the US president – without the obligation to achieve a consent of the Senate or the Congress, which was associated with a significant political risk at the time.¹⁵

10 The long-term mechanism set out in the Paris Agreement stipulates that all Parties will jointly assess existing global efforts to achieve goals of the Agreement and submit national emission reduction plans for the next 5 years. See Article 14 of the Paris Agreement.

11 Dann Mitchell, Miles R. Allen, Jim W. Hall, Benito Muller, Lavanya Rajamani, Corinne Le Quéré, ‘The myriad challenges of the Paris Agreement’ (2018) 376 (2119) *Philosophical Transactions of the Royal Society A*, 3.

12 Daniel Bodansky, ‘The Paris Climate Change Agreement: a new hope?’ (2016) 110 (2) *American Journal of International Law* 2.

13 See Article 4 (2) of the Paris Agreement: ‘Each Party shall prepare, communicate and maintain successive nationally determined contributions that it intends to achieve. Parties shall pursue domestic mitigation measures, with the aim of achieving the objectives of such contributions.’

14 See: Article 4 (4) of the Paris Agreement: ‘Developed country Parties should continue taking the lead by undertaking economy-wide absolute emission reduction targets. Developing country Parties should continue enhancing their mitigation efforts and are encouraged to move over time towards economy-wide emission reduction or limitation targets in the light of different national circumstances.’

15 Bodansky (n 13) 13.

The commitment of the European Union to reduce its emissions of greenhouse gases started much earlier than the adoption of the Paris Agreement. In 2008, the EU's pledge of '3x20 by 2020', meaning a 20% reduction in emissions of greenhouse gases (in comparison with 1990 levels), 20% share of renewable energy in energy consumption, and 20% increase in energy efficiency, was embodied in the Climate and Energy package.¹⁶ Later on, in 2014 the EU adopted A policy framework for climate and energy in the period from 2020 to 2030¹⁷ which once again highlighted its climate ambitions. The relevant legislation introduced targets of at least 40% reduction of greenhouse gases emissions (in comparison with 1990 levels) and 27% share of renewable energy in energy consumption, as well as target of 27% improvement in energy efficiency by 2030, which subsequently has been amended to 32.5%. In December 2019, the European Council endorsed the objective of the climate neutral EU by 2050¹⁸, which, according to first rough estimates¹⁹, would require reductions in greenhouse gases emissions by 80-95% by mid-century (as compared to 1990 levels). In order to align the EU policy with the climate neutrality objective, one year later, the European Council endorsed the increase of the 2030 reduction target to at least 55% reductions in greenhouse gas emissions (as compared to 1990 levels).²⁰ Currently, the work on the adoption of the relevant legislation reflecting the updated climate objectives of the EU is ongoing.²¹

The first NDC tabled by the European Commission on behalf of the EU and its Member States reflected the EU 2030 climate goal of at least 40% reduction in greenhouse gas emissions to be achieved by 2030 (as compared to 1990 emission levels) which was based on the conclusions by the European Council of October 2014.²²

16 Commission of the European Communities, '20 20 by 2020 Europe's climate change opportunity' COM (2008) 30 final.

17 See: European Commission, 'A policy framework for climate and energy in the period from 2020 to 2030', COM (2014) 15 final.

18 European Council Conclusions of 12 December 2019 (EUCO 29/19); retrieved from: <<https://data.consilium.europa.eu/doc/document/ST-29-2019-INIT/en/pdf>>.

19 European Commission, 'A Roadmap for moving to a competitive low carbon economy in 2050' COM (2011) 112 final.

20 European Council, 'Conclusions of 11 December 2020' EUCO 22/20.

21 European Commission, 'Fit for 55: delivering the EU's 2030 Climate Target on the way to climate neutrality' COM (2021) 550 final.

22 Submission of 6 March 2015 by Latvia and the European Commission on behalf of the European Union and its member states, retrieved 31 May 2021, from: <<https://www4.unfccc.int/sites/ndcstaging/PublishedDocuments/European%20Union%20First/LV-03-06-EU%20INDC.pdf>>.

In fulfillment of the Paris Agreement obligations which require all UNFCCC parties to present new contributions ahead of the 26th Conference of Parties to the UNFCCC (COP26)²³ and in order to build political momentum in time of the COVID-19 turmoil, the European Commission submitted its second NDCs in December 2020 despite the postponement of the COP26 conference. The submission reflected the objective of at least 55% reduction in greenhouse gas emissions to be achieved jointly by the Member States by 2030 – as endorsed by the European Council only few days earlier.²⁴

4. CLIMATE LITIGATION IN PRACTICE

Such a specific legal framework of the global climate protection system, as well as all complexities related to the issue itself, present a number of new challenges to the courts. At the same time, the increasing level of legal awareness of societies in the Member States of the European Union contributes to initiating further proceedings relating to the issue of climate protection²⁵ which happen to have a real impact on climate policy choices made by both governments and utility companies.

4.1. Urgenda v. the Government of the Netherlands

In 2013, the Urgenda Foundation, a Dutch civil organisation acting on behalf of the present and future generations, filed a lawsuit against the Government of the Netherlands²⁶. Urgenda claimed that Netherlands' climate ambitions (as defined by the EU legislation) are insufficient to effectively combat climate change and thus lead to a violation of Articles 2 and 8 of the European Convention of Human Rights, protecting respectively the rights to life and to private and family life. Urgenda requested the Government to increase the Netherlands' domestic emission reduction targets to

23 UNFCCC Dec. 1/CP.21, 'Adoption of the Paris Agreement' (n 8) para. 24.

24 Submission of 17 December 2020 by Germany and the European Commission on behalf of the European Union and its member states, retrieved 31 May 2021, from: <https://www4.unfccc.int/sites/ndcstaging/PublishedDocuments/European%20Union%20First/EU_NDC_Submission_December%202020.pdf>.

25 Joana Setzer, Rebecca Byrnes, 'Global trends in climate change litigation: 2019 snapshot', Grantham Research Institute on Climate Change and the Environment and Centre for Climate Change Economics and Policy, London School of Economics and Political Science, London, 2019, retrieved 31 May 2021, from: <http://www.lse.ac.uk/GranthamInstitute/wp-content/uploads/2019/07/GRI_Global-trends-in-climate-change-litigation-2019-snapshot.pdf>.

26 Final draft translation of summons in the case Urgenda Foundation v. Kingdom of the Netherlands; retrieved 31 May 2021, from: <<https://www.urgenda.nl/wp-content/uploads/Translation-Summons-in-case-Urgenda-v-Dutch-State-v.25.06.10.pdf>>.

least 25% by the end of 2020, compared to 1990 level, as set in 2007 assessment report issued by the Intergovernmental Panel on Climate Change (IPCC)²⁷.

In the judgement delivered on 20 December 2019, the Dutch Supreme Court agreed with Urgenda that risks caused by climate change are sufficiently real and immediate to be assessed through the prism of human rights standards existing under Articles 2 and 8 of the ECHR.²⁸ In this regard, the court underlined that lack of adequate climate policy may lead to thousands of victims in Western Europe in the second half of this century and found Urgenda's standing on the basis of Dutch Civil Code providing for class action by an interest group.²⁹ Furthermore, the court underlined that the fact that the state's emissions were only a minor contribution to global warming did not mean that it could be exempted from climate obligations as a joint responsibility of the states constitutes a founding principle of the UNFCCC.³⁰

Furthermore, the court upheld Urgenda's request to increase the level of climate ambitions of the Netherlands. In doing so, the Dutch court underlined the obligation to interpret the ECHR taking into account the practice of applying law between European countries,³¹ the 'common ground method' developed by the European Court of Human Rights,³² as well as the existing scientific knowledge and universally recognized standards.³³ Basing on these legal solutions, the court concluded that there is a sufficient consensus among the international community as to the need for developed countries to meet the 2020 target

27 Bert Metz, Ogunlade Davidson, Peter Bosch, Rutu Dave, Leo Meyer (eds), 'Climate Change 2007: Mitigation. Contribution of Working Group III to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change' (Cambridge, New York 2007), retrieved 31 May 2021, from: <https://www.ipcc.ch/site/assets/uploads/2018/03/ar4_wg3_full_report-1.pdf>.

28 Judgement of the Supreme Court of the Netherlands of 20 December 2019 in the case *The State of Netherlands v. Urgenda Foundation* (unofficial translation provided by the Supreme Court of the Netherlands), p. 5.2.4. and 5.3.3.; retrieved 31 May 2021, from: <<https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:HR:2019:2007>>.

29 Ibid 2.1.

30 Ibid 5.7–5.8.

31 Ibid 5.4.2 with reference to following judgements: ECtHR judgement of 12 September 2012, 10593/08 (*Nada v. Switzerland*), ECtHR judgement of 12 November 2008, 34503/97 (*Demir and Baykara v. Turkey*), ECtHR judgement of 27 January 2009, 67021/01 (*Tatar v. Romania*).

32 Ibid with direct reference to p. 85 and 86 of the ECtHR judgement *Demir and Baykara v. Turkey*.

33 Ibid 5.4.3, with reference to following judgements: ECtHR judgement of 17 October 1986, 9532/81 (*Rees*), ECtHR judgement of 30 October 2004, 48939/99 (*Öneryıldız v. Turkey*), ECtHR judgement of 20 May 2010, 61260/08 (*Oluic v. Croatia*).

of 25-40% reduction in emissions, as indicated in one of the scenarios presented in the IPCC's report and as requested in Urgenda's application.

It has to be underlined that an important legal circumstance for the reasoning of the Supreme Court was based on the fact that among the participants of the proceedings, there was a consensus on a number of factual findings, including the severity of the threat posed by climate change to Dutch nationals and the role of the IPCC as the international regulatory scientific institution. Meanwhile, according to the provisions of the Dutch civil procedure, the Supreme Court recognizes them as established circumstances which were undisputed between the parties before the courts of the first and second instance or those which, after being presented by one of the parties, were not sufficiently questioned by the other.³⁴

4.2. Client Earth v. Enea

In October 2018, Client Earth, a non-profit environmental law organization and, at the same time, a shareholder in the Polish utility company Enea S.A., sued this company, seeking the annulment of a resolution of Enea's general meeting which approved construction of new coal-fired power plant Ostrołęka C. According to Client Earth, the case constituted the first shareholder lawsuit in the world in which the plaintiff questioned the profitability of investments in terms of financial risk assessment in the context of climate policy measures. It should be also noted that an analogous lawsuit was filed by Client Earth also against Energa S.A., the second Polish utility company involved in this investment.

The claim was brought under the Polish Commercial Companies Code and – contrary to the Urgenda case – it did not rely on arguments related directly to climate action but rather on those related to the economic viability of the enterprise. Client Earth claimed that the aforementioned resolution of the general meeting, which consented to a construction of the coal power plant, breaches board members' fiduciary duties of due diligence, as well as to act in the best interests of the company and its shareholders because of climate-related financial risks. In support of its claims, plaintiff quoted the findings of an independent economic analytic think tank Carbon Tracker³⁵, as well as rating agencies and energy industry experts expressing strong and multi-faceted criticism of the economic viability of the Ostrołęka C. Among threats to the financial condition of the project the

³⁴ See Article 419 (3) of the Dutch Civil Procedure Code (Wetboek van Burgerlijke Rechtsvordering).

³⁵ 'Burning more money than coal: The asset economics and financial implications of Energa's and Enea's proposed new Ostrołęka coal power plant C', (2018) Report by the Carbon Tracker 9, retrieved 31 May 2021, from: <<https://www.carbontracker.org/reports/burning-more-money-than-coal/>>.

plaintiff listed: the rapid increase of prices of allowances to emit carbon dioxide (CO₂), intense competition from renewable energy sources, and the negative impact of the EU's energy reforms on state subsidies for coal power under the capacity market which significantly limited the possibility of funding the project.³⁶

On 1 August 2019, the Regional Court in Poznań (Sąd Okręgowy w Poznaniu)³⁷ upheld the action brought by Client Earth and found the company's resolution to be legally invalid due to serious formal defects. Full grounds for the judgment have not been made public. Later the same year, serious reservations regarding, inter alia, the lack of reliable assessment of the soundness of this investment were highlighted in the report of the Polish Supreme Audit Office (Najwyższa Izba Kontroli).³⁸ According to the latest press releases by Enea, the Ostrołęka C power plant – instead of coal – will be fired by gas.³⁹

4.3. *Carvalho and Others v. the European Parliament and the Council*

In spring 2018, a group of ten families originating from the EU and third countries, as well as a Swedish youth association, brought an action in the EU General Court under Articles 263 (4) and 340 TFEU,⁴⁰ seeking to compel the EU to adopt more ambitious greenhouse gas emission reduction targets⁴¹. Applicants alleged that the EU's existing climate legislation, introducing the overall target to reduce GHG emissions by 40% by 2030, was insufficient to avoid dangerous climate change and violated their fundamental rights enshrined in the Charter of Fundamental Rights of the European Union⁴², namely the

36 'Ostrołęka C: Enea's and Enea's Board Members' Fiduciary Duties to the Companies and Shareholders', Briefing by the Client Earth, 2018, retrieved 31 May 2021, from: <<https://www.documents.clientearth.org/wp-content/uploads/library/2018-09-24-clientearth-briefing-ostroleka-c-energia-and-enea-board-members-fiduciary-duties-to-the-companies-and-shareholders-ce-en.pdf>>.

37 Judgement of Regional Court in Poznań of 31 July 2019, IX GC 1118/18; unpublished.

38 Information on results of audit 'Investments in electricity generation capacity in the years 2012–2018 (Inwestycje w moce wytwórcze energii elektrycznej w latach 2012–2018)', (2019) Report by the Supreme Audit Office of Poland, KGP.430.016.2018; retrieved from: <<https://www.nik.gov.pl/plik/id,21644,vp,24294.pdf>>.

39 Andreas Wälstad, 'Ostroleka u-turn shows Poland's energy transition is underway' (Energy Voice, 2020), retrieved 31 May 2021, from: <<https://www.energyvoice.com/otherenergy/241195/ostroleka-u-turn-shows-polands-energy-transition-is-underway/>>.

40 Treaty on the Functioning of the European Union of 13 December 2007, (2012) OJ C 326/47 (TFEU).

41 Application in the case *Armando Ferrão Carvalho and Others v. The European Parliament and the Council (The People's Climate Case)*; retrieved 31 May 2021, from: <<https://peoplesclimatecase.caneu-rope.org/wp-content/uploads/2018/05/application-delivered-to-european-general-court-1.pdf>>.

42 Charter of Fundamental Rights of the European Union, (2012) OJ C 326/391.

right to life (Article 2), the right to the integrity of a person (Article 3), the rights of the child (Article 24), the right to engage in work and to pursue a freely chosen or accepted occupation (Article 15), the freedom to conduct a business (Article 16), the right to property (Article 17) and the right to equal treatment (Articles 20 and 21). The nullification action under Article 263 (4) TFEU was brought against legal acts which are cornerstones of the current EU climate policy framework.⁴³ Additionally, on the ground of Article 340 TFEU, the applicants demanded a relief in the form of injunction to compel EU institutions to adopt more ambitious climate targets.

On 8 May 2019, the case was dismissed by the EU General Court on procedural grounds due to the lack of standing to bring the action on the basis of Article 263 (4) TFEU which requires applicants to be directly and individually concerned by the contested legislation.⁴⁴ The plaintiffs' legal reasoning in this regard was based on the fact that each of them is differently affected by the effects of climate change to which the contested legislative package contributes. By invoking the Plaumann formula⁴⁵, the applicants argued that either their situation should be considered as sufficiently differentiating them from other persons (and thus the formula is met), or – in the alternative – the scope of the Plaumann test should be broadened in order to provide an effective judicial protection against unlawful legal acts of the EU (ie, the formula should be revised). The European General Court rejected the proposed interpretation of case law resulting from the Plaumann judgement by stressing that the diversified effects of climate change do not meet the criterion of 'individual concern' and that such an approach would amount to creation

43 The three challenged EU legal acts were: Directive (EU) 2018/410 amending Directive 2003/87/EC to Enhance Cost-effective Emission Reductions and Low-carbon Investments, and Decision (EU) 2015/1814, (2018) OJ L 76/3 (ETS Directive); Regulation (EU) 2018/842 on Binding Annual Greenhouse Gas Emission Reductions by Member States from 2021 to 2030 Contributing to Climate Action to Meet Commitments under the Paris Agreement and amending Regulation (EU) No 525/2013, (2018) OJ L 156/26 (Effort Sharing Regulation) and Regulation (EU) 2018/841 on the Inclusion of Greenhouse Gas Emissions and Removals from Land Use, Land Use Change and Forestry in the 2030 Climate and Energy Framework, and amending Regulation (EU) No 525/2013 and Decision No 529/2013/EU, (2018) OJ L 156/1 (LULUCF Regulation).

44 Order of the General Court of 8 May 2019, T-330/18, Armando Ferrão Carvalho and Others v. The European Parliament and the Council of the European Union, ECLI:EU:T:2019:324.

45 'Persons other than those to whom a decision is addressed may only claim to be individually concerned if that decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons or [if the act] by virtue of these factors distinguishes them individually just as in the case of the person addressed.' Case C-25/62, *Plaumann v. Commission*, ECLI:EU:C:1963:17, 107.

of locus standi for all – contrary to the provision of Article 263 (4) TFEU.⁴⁶ Additionally, in this regard the plaintiffs referred also to the Codorniu case law⁴⁷, where ‘the applicant established individual concern because it had an individual right that was adversely affected by the legislative act (notwithstanding the act being of general application)’. The European General Court did not follow this line of reasoning either, finding that – contrary to the Codorniu case which concerned the loss of a specific acquired right, namely the right to use the word ‘crémant’ in a registered trademark – the case at hand did not involve a loss of a specific acquired right.⁴⁸ In consequence, also the claim for damages brought under Article 340 TFEU was deemed inadmissible.⁴⁹

The Court of Justice upheld the General Court’s order and in its judgement from 25 March 2021 dismissed the appeal⁵⁰ following the same line of reasoning as in the first instance. The Court stressed that the applicants were not individually concerned by the contested legal acts and thus they did not satisfy the locus standi criteria laid down in Article 263 (4) TFEU.⁵¹ More specifically, the Court noted that although this provision must be interpreted in the light of the fundamental right to effective judiciary protection, such an interpretation must not alter the conditions expressly laid down in the Treaty.⁵² Accordingly, the Court of Justice rejected the claim for damages under Article 340 TFEU.⁵³

4.4. Neubauer et. al. v. Federal Climate Change Act

Following the success of the Urgenda case, in February 2020 several groups of German citizens, including minors, filed constitutional complaints against key German legislation on climate protection. They argued that the Federal Climate Protection Act (Bundesklimaschutzgesetz, KSG), which introduces the target of 55% GHG reduction by 2030 (as compared to 1990 levels), violates the guarantees provided by the constitution of Germa-

46 Order of the General Court of 8 May 2019, T-330/18, *Armando Ferrão Carvalho and Others v. The European Parliament and the Council of the European Union*, paras 49–50.

47 Judgment of the Court of 18 May 1994, C-309/89, *Codorniu v. Council*, EU:C:1994:197.

48 Order of the General Court of 8 May 2019, T-330/18 *Armando Ferrão Carvalho and Others v. The European Parliament and the Council of the European Union*, para 55.

49 *Ibid*, paras 67–70.

50 Judgment of the Court (Sixth Chamber) of 25 March 2021, C565/19 P *Armando Ferrão Carvalho and Others v. The European Parliament and Council of the European Union*, ECLI: ECLI:EU:C:2021:252.

51 *Ibid*, paras 37–40.

52 *Ibid*, para 78.

53 *Ibid*, paras 105–107.

ny (Grundgesetz, GG), as well as the international obligations under the Paris Agreement to limit global temperature rise to well below 2°C and preferable to 1.5°C above the pre-industrial levels. Relying on the constitutional fundamental rights of human dignity, life and physical integrity derived from Article 1 GG and Article 2 (2) GG, freedom of occupation and guarantee of property derived from Article 12 GG and Article 14 GG, as well as Article 20a GG which imposes on the state an obligation to protect natural foundations of life⁵⁴, the applicants argued that the contested legislation failed to introduce a legal framework sufficient for a swift reduction of GHG and resulted in disproportionate consumption of Germany's CO₂ budget.⁵⁵ Similar to the Urgenda case, the applicants requested injunction which would oblige the government to adopt more stringent climate legislation to keep Germany's GHG emissions as low as possible.⁵⁶

In the order of 24 March 2021, the Federal Constitutional Court of Germany (Bundesverfassungsgericht) partially agreed with the applicants on unconstitutionality of the disputed legislative framework.⁵⁷ It confirmed that GG's protection of life, physical integrity and property encompasses protection against risks caused by climate change – also when it comes to the protection of future generations.⁵⁸ Reiterating the Urgenda judgement, the German constitutional court underlined that the global character of climate change does not mean that the state can evade its own responsibility; to the opposite: the state is obliged to act on the international level and build confidence among international actors within the international framework.⁵⁹ However, the court highlighted that the constitutional obligation to undertake climate action is not granted an absolute priority over other interests and in case of a conflict, it has to be balanced with other constitutional interests.⁶⁰ Reflecting on the calculations of the remaining CO₂ budget both on global and national level (calculated respectively by the IPCC and the German Advisory Council on

54 See Article 20a GG: 'Mindful also of its responsibility towards future generations, the state shall protect the natural foundations of life and animals by legislation and, in accordance with law and justice, by executive and judicial action, all within the framework of the constitutional order.'

55 Application in the case Luisa Neubauer et al. v. Bundesklimaschutzgesetz (BGBl. I (2019) S. 2513 ff) 97–131; retrieved 31 May 2021, from: <https://www.germanwatch.org/sites/germanwatch.org/files/Klimaklage%202020%20-%20Verfassungsbeschwerde_online.pdf>

56 Ibid 131–132.

57 Order of the First Senate of the Federal Constitutional Court of the Federal Republic of Germany of 24 March 2021, 1 BvR 2656/18, ECLI:DE:BVerfG:2021:rs20210324.1bvr265618.

58 Ibid, para 117.

59 Ibid, paras 202–204.

60 Ibid, para 198.

the Environment), the court decided that due to the existing scientific uncertainty, the exact numbers determining national emission reduction targets cannot be verified using the constitutional standard, however, at the same time, stressed that this lack of scientific certainty does not justify postponing climate action.⁶¹ Furthermore, the court did not confirm that limiting global warming to 1.5°C is the only constitutionally acceptable level of climate ambition because in designing relevant solutions, the legislator is granted a leeway in order to protect fundamental rights – also in the future.⁶² Thus, the Federal Constitutional Court decided that by adopting the disputed climate targets, the legislator had not overstepped its margin of appreciation.⁶³

Nevertheless, the Federal Constitutional Court recognized the need for the long-term perspective of climate action. It declared that although the climate targets introduced in KSG do not violate the civil liberties at the time of delivering the judgement, the legislator has to also take into account the interests of future generations which would be left with the legacy of the decisions undertaken now. In this regard, the court decided that the challenged provisions had an advance interference-like effect: the generous emission levels allowed by the KSG until 2030 largely offloaded on the future reduction efforts necessary after this date and thus disproportionately affected fundamental rights after 2031.⁶⁴ Moreover, the court underlined that the protection of future freedom requires that the transition to climate neutrality has to be initiated in good time ahead, according to guidelines which are transparent and extend sufficiently in the future.⁶⁵

The ruling resulted in a swift decision of the German government to amend the unconstitutional legislation. According to the draft adopted on 12 May 2021 the updated GHG reduction targets of Germany are to be 65% by 2030 and 88% by 2040 (compared to 1990 levels). This would result in achieving climate neutrality by 2045.⁶⁶

61 Ibid, paras 220–223, 229.

62 Ibid, paras 158–163.

63 Ibid, para 172.

64 Ibid, paras 243–244.

65 Ibid, paras 252–253.

66 Bill of the Federal Government on the first amendment of the Federal Climate Protection Act, retrieved 31 May 2021, from: <https://www.bmu.de/fileadmin/Daten_BMU/Download_PDF/Glaeserne_Gesetze/19_Lp/ksg_aendg/Entwurf/ksg_aendg_bf.pdf>.

5. CHALLENGES TO CLIMATE LITIGATION

These four cases, although different in many aspects, shed light on some of the most prominent features which can be reflected upon when thinking about the challenges related to combating climate change in courtrooms. After closer examination, the following seven issues can be observed.

First and foremost, in order to provide effective methods of combating climate change the issue of global response is of key importance, as it is the only way to tackle climate-related risks in a sufficiently broad context and thus prevent further damages. As has been rightly pointed out by the courts in both the *Urgenda* and *Neubauer et. al.* judgments, the global character of the challenge must justify inaction. This, on the other hand, leads to the issue of trust in the international mechanisms of combating climate change. Although the EU can legally enforce ambitious climate targets adopted at its own level, the effectiveness of the solutions enshrined in climate agreements adopted globally within the framework of the UNFCCC often face serious difficulties. Stand-alone actions – even the most ambitious ones – undertaken by solely one party without followers cannot amount to common measures aiming at a progressive reduction of emission of greenhouse gases and reaching the temperature goal of the Paris Agreement.

Another important issue in this regard is the role of science, especially when it comes to setting appropriate emission reduction levels. It should be noted that the IPCC – the author of the report which played a pivotal role in providing grounds for both claims: in the reasoning of the Dutch Supreme Court as well as in the *Urgenda* judgement – is a scientific expert body devoid of legislative competence, despite being counted among transnational regulatory scientific institutions.⁶⁷ Although the need to take urgent steps to tackle climate change is undisputed (or at least widely accepted), the IPCC in its reports emphasizes not only a lack of scientific consensus regarding the necessary level of reduction of greenhouse gas emissions, but also the inability to achieve a common understanding in relation to the phenomena as comprehensive as combating climate change.⁶⁸

67 Adi Ayal, Ronen Hareuveny, Oren Perez, ‘Science, Politics and Transnational Regulation: Regulatory Scientific Institutions and the Dilemmas of Hybrid Authority’ (2013) 2 (1) *Transnational Environmental Law*.

68 ‘Defining what is dangerous anthropogenic interference with the climate system and, consequently, the limits to be set for policy purposes are complex tasks that can only be partially based on science, as such definitions inherently involve normative judgments. (...) There is little consensus as to what constitutes anthropogenic interference with the climate system and, thereby, on how to operationalize Article 2 [of the UN Framework Convention on Climate Change].’ Bert Metz, Ogunlade Davidson, Peter Bosch, Rutu Dave, Leo Meyer (eds) (n 28) 97.

Thus, the calculations contained in the IPCC reports merely organize the findings made by scientists, but in no way formulate recommendations as to their implementation, let alone formulating a complex strategy to achieve the described targets, which has also been recognized by the German Constitutional Court in the Neubauer et. al. judgement. The decision on possible ways of adopting them on the national level is left to a sovereign decision of the UNFCCC parties.⁶⁹ All in all, the role of scientists is to inform decision-makers and not to step in their shoes.

Third significant matter, also closely related to the global nature of climate change, is a legal possibility of seeking compensation for harm suffered due to phenomena caused by the emissions of greenhouse gases. The main challenge in this regard is setting a connection between those harmful events and any contributor which could be either a single company, country or even the European co-legislators. As has been demonstrated in the judgements of both instances in the Carvalho and Others case, classic juridical instruments of seeking damages for losses incurred seem to be largely insufficient in this regard. Either they do not allow to recognize a person as directly affected by climate related threats, or they fail to establish a linear causal chain between emissions made and the loss incurred.⁷⁰

On the other hand, another important issue which needs to be reflected upon is the fact that both CO₂ emissions, as demonstrated by the Ostrołęka C case, and emission reductions have significant impact not only on the environment but also on the industry performance and thus the condition of the national and European economy. It is to be remembered that higher environmental standards, including climate ones, lead to higher production costs and might deteriorate one's competitiveness vis-à-vis other less ambitious partners. The risk of carbon leakage (ie moving production to countries with less rigid standards of climate protection) has already been identified by the EU as a serious threat to the European economy and resulted in targeted measures, among others, within the EU ETS system.⁷¹ Another regulatory measure in this context is the Carbon Border

69 IPCC reports are characterized by political neutrality; therefore, they do not contain any statements of an evaluative nature. See: Principles Governing IPCC Work, no. 2; retrieved 31 May 2021, from: <<https://www.ipcc.ch/site/assets/uploads/2018/09/ipcc-principles.pdf>>.

70 As an exemplary case where plaintiff failed to establish a causation between one emitter and climate-related threats see judgement of District Court (Landesgericht) in Essen of 15 December 2016, 2 O 285/15 (Saül Ananias Luciano Lliuya v. RWE AG); retrieved 31 May 2021, from: <http://www.justiz.nrw.de/nrwe/lgs/essen/lg_essen/j2016/2_O_285_15_Urteil_20161215.html>.

71 See eg Commission Delegated Decision (EU) 2019/708 of 15 February 2019 supplementing Directive 2003/87/EC of the European Parliament and of the Council concerning the determination of sectors and subsectors deemed at risk of carbon leakage for the period 2021 to 2030, OJ L 120, 8.5.2019, 20–26.

Adjustment Mechanism (CBAM) announced by the European Commission President Ursula Von der Leyen as one of the key climate initiatives in the European Green Deal.⁷²

Furthermore, combating climate change might result not only in emission reductions. Equally important is the impact of climate action on societies. Any hectic maneuver aiming at a strong surge in reduction of greenhouse gas emissions might lead to deepening of social inequalities. This might be the case especially in the poorer regions, for example those previously dependent on coal extraction. The need for long-term planning of the transformation towards climate neutrality, as rightly mentioned by the German Constitutional Court in the Neubauer et. al. case, together with the reflection on mechanisms of supporting just transition in disadvantaged regions as well as deep impact assessment of the social consequences of the proposed legal solutions is therefore of utmost importance. Dedicated financial tools supporting this endeavor, like the Just Transition Mechanism, rightly echo this issue, especially in light of the challenges to the European economy caused by the COVID-19 turmoil.

Additionally, it is to be remembered that all the policies of combating climate change are closely related to the reduction of emissions from energy production. If, as recognized by the Article 192 (2) TFEU, the choice of energy mix constitutes an issue fundamental to the sovereignty of any country, it is obvious that any coercion to introduce changes might face fierce criticism.⁷³ Wide and inclusive public debate should serve as a mere starting point of any measure undertaken in this field. Creation of a political momentum will not be possible without a full understanding of the challenges faced by all the participants of the debate.

And finally, the most important issue which endangers the credibility of all global efforts relating to tackling climate change – it has to be remembered that in the realm of so many and so profound conflicting interests any hasty decision might undermine social trust to the steps already undertaken. Therefore, findings related to increasing climate ambitions made both by the legislative and judiciary bodies should be based on an in-depth and sound assessment of all the relevant facts. Judicial activism deprived of a solid fact base might prove to be largely counterproductive.

72 European Commission, 'The European Green Deal', COM (2019) 640 final. The relevant legislation introducing CBAM is planned to be introduced until the end of 2025.

73 For more examples of conflicts around this issue see, eg: Chapter 6, 'Introducing Flexible Governance for Renewable Energy: How the EU came to drop Nationally Binding Targets for 2030' by Arnold Bruhin in this volume.

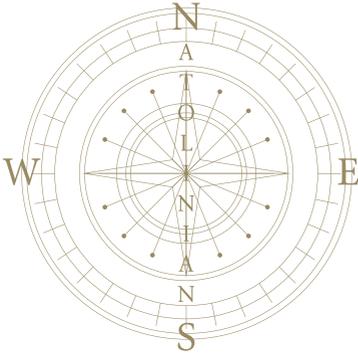
6. CONCLUSION

Answering the question if climate litigation could be the answer to the Lisbon Treaty ambitions and become an effective tool of strengthening climate action on the EU's way to reaching climate neutrality is much more complex than a simple 'yes' or 'no'. Most importantly, what climate action needs is becoming a truly global issue. One of the fundamental ways of achieving this goal is building trust in the international mechanisms, as has been rightly underlined by the Federal Constitutional Court of Germany in the Neubauer et. al. case, the reduction efforts undertaken by a narrow group of countries – even the most ambitious ones – are unable to stop this severe global problem. Thus, a widespread mobilisation of efforts is of key importance and in this regard any awareness raising action deserves positive recognition. Clearly, this is not to say that any 'anecdotal' judgement might influence global actors. Quite the opposite – in order to do so, legal reasoning in climate cases might not raise any doubts regarding their political impartiality.

Secondly, while single judgements might lead to increasing a country's climate reduction targets (as has been proven by the landmark Urgenda case as well as following it Neubauer et. al. judgement), differences in legal systems may provide many unsurmountable obstacles to a transfer of the same reasoning between different jurisdictions, even within the EU. It can already be seen that the Urgenda judgment delivered by the Supreme Court of the Netherlands resonated widely across the EU member states having a profound influence and inspiring multiple similar climate disputes – both on the national and European levels. The final judgement in the Carvahlo case, which was delivered one year after the final decision in the Urgenda case, provided the first testing ground of potential judiciary developments regarding the issue of direct concern by climate change. Although the Court of Justice took a conservative approach, it is still to be seen how both judgements will resonate on the national level in many of the pending proceedings. The success of applicants before the Federal Constitutional Court of Germany – which on several occasions referred to the reasoning in the Urgenda judgement – and the following update of Germany's national emission reduction targets provide a positive example in this regard.

Lastly, climate litigation cases like the Urgenda and Neubauer et. al., which are both successful and directly refer to the importance of climate protection, definitely make the issue of climate protection more vocal. But although important, visibility is not the only thing needed when it comes to effective climate action. Definitely more important is a proper political response from governments' side as it is their responsibility to properly plan

complex economic strategies aiming at deep structural changes. Without a responsible policy coupled with social acceptance as well as readiness to transform citizens, especially those from vulnerable social groups and industry, it will not be possible for them to accept any changes in their current way of living, or for example, rising energy prices. A good response to such a complex problem requires in-depth considerations of political and economic nature – which courts are unlikely to conduct. Nonetheless, it cannot be said that from a judiciary perspective climate protection is irrelevant. Quite the opposite: because it is so important and has such a profound consequence on the quality of people's lives, one cannot look at it merely through the quantitative lens of emission reduction targets.



PART III

TOWARDS A JUST TRANSITION?

CHAPTER 10

*The challenges and stakes of
conceptualising energy poverty
in the EU*

BY ALEXANDRA BLIN



ALEKSANDRA *BLIN*

Alexandra Blin is a young professional with a genuine interest in the European energy policies. She has a background in European law and European studies. During her year at the College of Europe in Natolin she decided to devote her research to the multidimensional issue of energy poverty. Besides, together with her fellow student, she headed the Natolin Energy and Climate Society which organised the first Natolin Energy Conference. After, she joined the European Commission as a Blue Book trainee at the DG Energy. Recently, she joined the French Energy Regulator (CRE) deepening her expertise on the EU energy market and consumer protection.

1. INTRODUCTION

The Treaty of Lisbon introduced energy into EU primary law for the very first time. Yet, the social dimension of EU energy policy is not expressly mentioned in the title and article – Article 194. The Treaty and the subsequent energy packages were aimed at the achievement of an integrated gas and electricity market, pushing Member States to open their domestic markets to competition. Competition – one of the components of the energy triangle – was meant to ensure affordability of energy services. Access to energy services became less a public service than a consumer good. However, access to energy services is not a luxury good, and certainly not a consumption good like other goods. Rather, it is an essential commodity, the shortage of which may have a major impact on the lives of the people experiencing energy poverty. While building its integrated energy market, the EU was setting itself major climate and renewable energy development targets. At a time when the Commission President Ursula von der Leyen supports the achievement of a just energy and climate transition, the EU should address the problem of energy poverty more comprehensively as it has profound social justice implications.¹ Indeed, the uneven distribution of the costs and benefits of this transition is likely to drive vulnerable families into energy poverty.² Yet, according to various studies, 50 to 125 million of Europeans are impacted by energy poverty.³ These figures are indicative of the already widespread occurrence of energy poverty in Europe and the need to address this challenge, not only at local and national levels, but also at the European level. The phenomenon is relevant for European leadership and policy strategy because of its social, economic, political, environmental and health repercussions.

In developed countries, ‘fuel poverty’ refers to the affordability of accessing energy services, in contrast to developing countries where the term ‘energy poverty’ applies to the lack of access to energy. To make things more complicated to understand the terms ‘energy poverty’ and ‘fuel poverty’ can refer to two different realities in developed countries. According to the European Parliament, the EU uses these terms in a completely different way: the first to refer to the inability to obtain the necessary energy in general, and the

1 Stefan Bouzarovski, *Energy Poverty: (Dis)assembling Europe’s infrastructural divide* (Palgrave Macmillan 2018) 3.

2 Jerzy Dudek and Piotr Szlagowski, ‘Challenges ahead for the EU energy policy. Selected issues’ (2019) Polish Economic Institute 24 <<https://pie.net.pl/wp-content/uploads/2019/04/PIE-Energy.pdf>> (accessed on 20.09.2019).

3 Rebecca Bertram and Radostina Primova, ‘Energy Atlas, Facts and figures about renewables in Europe’ (2018) Heinrich Böll Foundation 20 <<https://eu.boell.org/en/2018/04/24/energy-atlas-2018-figures-and-facts-about-renewables-europe>> (accessed on 07.08.2020).

second refers to the internal market for electricity and gas.⁴ Nonetheless, they are often used interchangeably in many institutional documents and academic articles⁵ as it will be the case in this paper.

Energy poverty is a longstanding phenomenon that has been slow to be conceptualised although the issue is probably as old as humankind. The 1973–1974 oil shock strongly impacted the energy prices and, by extension, the share of energy expenditure in a household's budget. This shed new light on the problem of energy poverty. Brenda Boardman,⁶ considered to one of the first academics to conceptualise energy poverty, offered the first quantifiable definition by describing energy poverty as “the inability to obtain sufficient heat due to household inefficiency”.⁷ Initially acknowledged in the UK, the political agenda on fuel poverty has gained momentum in many countries – particularly in Europe over the last 10 years.⁸

In 2010, the European Commission in its working document ‘An Energy Policy for Consumers’ rejects the idea of a common European definition.⁹ To date, there is still no common definition at the European level, which hinders a thorough understanding of the concept of fuel poverty among policymakers.¹⁰ Many definitions exist in the scientific and institutional literature, but there is not a single shared definition. Defining fuel poverty was paramount in understanding the factors that cause energy poverty in households and therefore to define the public policies and instruments needed to alleviate or even eradicate this specific form of poverty. Thus, the lack of common definition and energy poverty metrics to accurately map the situation in Europe is one, not to say the first, challenge

4 European Parliament, ‘Energy poverty – Protecting vulnerable consumers Briefing’ (Brussels 2016) 2 <[https://www.europarl.europa.eu/RegData/etudes/BRIE/2016/583767/EPRS_BRI\(2016\)583767_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2016/583767/EPRS_BRI(2016)583767_EN.pdf)> (accessed on 12.08.2020).

5 In this study, the term ‘fuel poverty’ and ‘energy poverty’ will be used and without any distinction of meaning between the two.

6 Brenda Boardman's thesis in 1988 and her book *Fuel Poverty: From Cold Homes to Affordable Warmth* in 1991.

7 Lenny Koh et al., ‘Fuel Poverty: Perspectives from the front line (2012) Centre for Energy, Environment and Sustainability <https://www.sheffield.ac.uk/polopoly_fs/1.272226!/file/Fuel_Poverty-perspectives_from_the_front_line.pdf> (accessed on 13 August 2020).

8 Bouzarovski (n 1) 2.

9 European Commission, ‘Commission staff working paper an energy policy for consumers’ (Brussels 2010) 11 <[https://ec.europa.eu/energy/sites/ener/files/documents/sec\(2010\)1407.pdf](https://ec.europa.eu/energy/sites/ener/files/documents/sec(2010)1407.pdf)> (accessed on 23 August 2020).

10 Bertram and Primova (n 3) 20.

to be addressed. Given that energy poverty is multidimensional and multifactorial, it is difficult to find a method that encompasses both geographical and state characteristics. Although it is a form of poverty, energy poverty is not only related to the lack of income of the affected households. Therefore, this paper aims at assessing the extent to which the conceptualisation of energy poverty across the EU has enabled the development of a common understanding of the phenomenon.

Following this introduction, the first section focuses on the understanding of the various factors leading households in a situation of energy poverty. Then, the following section elaborates on how difficult it is to accurately map this multifaceted phenomenon and how the chosen indicators influence this mapping. Before concluding, the last section is devoted to the analysis of the consequences of energy poverty both on those experiencing it and more broadly on the Member States.

2. ENERGY POVERTY: SHEDDING A LIGHT ON ITS MULTIPLE DRIVERS

2.1. The link between poverty and energy poverty: low income

Energy poverty is linked to the lack of income among other considerations; this lack of income may be one of the reasons why some families live in so-called energy sieves.¹¹ But energy poverty is a distinct form of poverty. There is a conceptual discord about the nexus between poverty and energy poverty.¹² The Committee of Regions (CoR) “believes that energy poverty should firstly be seen as an aspect of poverty more generally”.¹³ However, noting that the EU has solely coordination competencies in social policy and health whereas it shares the competence in the area of energy, the CoR concluded energy poverty could be addressed through energy policy, climate policy and the Single Market.¹⁴

A study carried out in Scotland by the Scottish Fuel Poverty Forum sheds light on the connections between poverty and energy poverty.¹⁵ From this study, it is interesting to

11 European Parliament (n 4) 3.

12 Bouzarovski (n 1) 9.

13 Committee of the Regions, ‘Affordable Energy for All’ (Brussels 2014) 1 <<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52013IR8068&from=EN>> (accessed on 16 August 2020).

14 Ibid.

15 Scottish Housing and Social Justice Directorate, ‘A new definition of fuel poverty in Scotland: review of recent evidence’ (November 2017), <<https://www.gov.scot/publications/new-definition-fuel-poverty-scotland-review-recent-evidence/pages/9/>> (accessed on 12 August 2020).

note that 57.7% of the energy poor are not income poor compared to 42.3% who are income poor. This can be explained by the fact that two households with income at the same level but living in homes with a distinct difference in isolation standards gap, have considerably different energy consumption levels.¹⁶ As for those who have low incomes, 89.4% of them are also energy poor. The probability of living in energy poverty is higher for those on low incomes. However, energy factors can push them even further into poverty.¹⁷ Consequently, energy poor people are not necessarily income poor, whereas an income poor person is more likely to be energy poor as well.

2.2. High energy costs – the failure of the liberalisation of the internal energy market to deliver on affordability

European households allocate an average of 6.4% of their total consumption expenditure to their energy needs.¹⁸ The characteristics of the dwelling – insulation and type of heating/cooling – and individual factors – individual needs and behaviour – have a major influence on energy needs. These various factors have an impact on a household's energy bill and its ability to pay for it. However, if the cost of energy is too high, a low-income household faces difficulties in meeting its adequate energy needs. The study of the statistical data shows that low-income households spend a higher part of their income on their energy needs (gas, electricity, heating, etc.), and that this share increases more sharply when energy prices rise.¹⁹

Between the second half of 2009 and 2019, the price of electricity increased by 40%.²⁰ The establishment of the energy market was supposed to guarantee the affordability of energy services, but this rise suggests that liberalisation has not quite achieved this objective.

16 European Parliament (n 4) 2.

17 EPEE Consortium, 'Tackling Fuel Poverty in Europe: Recommendations and Guide for Policy Makers' (Brussels 2009) <http://www.finlombarda.it/c/document_library/get_file?p_l_id=1313844&folderId=1327936&name=DLFE-6278.pdf%20> (accessed on 14 August 2020).

18 European Commission, 'Commission staff working paper on Energy prices and costs in Europe' (Brussels 2020) 128 <https://ec.europa.eu/energy/sites/default/files/documents/swd2020_951_-_1_en_autre_document_travail_service_part3_v1.pdf> (accessed on 24 August 2020).

19 European Commission, 'Vulnerable Consumer Working Group Working Paper on Energy Poverty' (Brussels, 2015), 4, available at: <<https://ec.europa.eu/energy/sites/ener/files/documents/Working%20Paper%20on%20Energy%20Poverty.pdf>> (accessed on 09.08.20).

20 Figures generated by me on Eurostat.

The European Parliament has recognised that the liberalisation of national energy markets has led to price increases in the Central and Eastern Europe (CEE) countries.²¹ In a planned economy, the energy sector was heavily subsidised by governments to keep energy prices artificially low. With the fall of communism and the accession to the EU, households in CEE countries experienced a significant jump in energy prices because these prices now reflect the real price of the service (eg, cost recovery), while their income did not increase at the same rate.

Moreover, the costs associated with climate change policies represent an additional risk of energy poverty. Taxes, levies and charges on networks and on renewable energy sources (RES) are the first source of increase in the final prices of energy.²² For example, in Germany, Italy and Portugal, RES fees represent 20.5%, 18.9% and 17% of the electricity price respectively.²³ Consequently, the RES levy for funding the energy transition affects the poor more than those better off. This is why it is necessary to assess the social impact of climate change policies so that they do not lead to more energy poverty.

2.3. Poor thermal efficiency of buildings – and the subsequent effects of climate change

Energy poverty is highly dependent on the type of housing, particularly, its energy efficiency properties. A large part of energy needs is absorbed by heating and/or cooling buildings. Yet, some studies estimate that 75% of Europe's housing stock is not energy efficient.²⁴ People who are not considered poor can nevertheless suffer from energy poverty as a result of living in an energy sieve. This precariousness can result both from the inability to heat or cool their homes. For a very long time, studies only dealt with the inability to heat one's home, the problem of cooling was largely ignored, which explains the lack of data even today. This is why I have chosen to study the cooling more than the heating aspect hereunder.

21 Vera Weghmann, 'A Decarbonised, Affordable and Democratic Energy System for Europe – The failure of energy liberalisation' (July 2019) EPSU 12 <<https://www.epsu.org/article/going-public-decarbonised-affordable-and-democratic-energy-system-europe-new-epsu-report>> (accessed on 10 August 2020).

22 ACER/CEER, 'Annual Report on the Results of Monitoring the Internal Electricity and Natural Gas Markets in 2014' (Ljubljana November 2015) <http://www.acer.europa.eu/Official_documents/Acts_of_the_Agency/Publication/ACER_Market_Monitoring_Report_2015.pdf> (accessed on 18 August 2020).

23 European Parliament (n 4) 6.

24 Marianna Papaglastra, 'EU support for (deep) energy renovation of buildings' (Build Up, 2017) <<http://www.buildup.eu/en/news/overview-eu-support-deep-energy-renovation-buildings-0>> (accessed on 12 August 2020).

The World Health Organization (WHO) considers that a home is adequately heated when it is 21°C in the living room and 18°C in the other rooms.²⁵ The EPEE study found that more than 60% of homes in the UK, Belgium, Italy, Spain, and France were built before any regulations for thermal insulation were applied.²⁶ Yet, people living in energy sieves are forced to consume more energy and therefore pay more to try to adequately heat their homes.

A study has shown that heating a house “whose energy performance certificate is rated G (the least efficient houses) [than a house rated C or higher (the most efficient houses)]”²⁷ costs its occupants €2,000 more per year.²⁸ Therefore, renovating the least efficient houses and replacing their heating systems with efficient technologies that meet current European standards could have a quite immediate effect on the factors of energy poverty, and on the run-off on GHG emissions.

Difficulties in cooling dwellings have rarely been taken into account in the definition of energy poverty, which attempts to focus almost exclusively on heating in winter. Some pan-European studies would like to see this aspect included in the definition and measurement of energy poverty.²⁹

The lack of reliable data is such that it virtually prevents the study of the prevalence of cooling hardships. The 2007 EU-SILC survey took into account this issue through two indicators: (i) Comfortably cool accommodation during the summer (Yes/No); and (ii) Dwelling equipped with air-conditioning (Yes/No).

25 World Health Organisation, ‘Housing and health guidelines’ (Geneva, 2018) 33.

26 EPEE Consortium (n 17) 5.

27 Monique Goyens, ‘COVID-19 means tackling energy poverty is more urgent than ever’ (Euractiv, 2020) <<https://www.euractiv.com/section/energy/opinion/covid-19-means-tackling-energy-poverty-is-more-urgent-than-ever/>> (accessed on 15.08.2020).

28 UK National Statistics, ‘Annual fuel poverty statistics report: 2019’ (June 2019) <<https://www.gov.uk/government/statistics/annual-fuel-poverty-statistics-report-2019>> (accessed on 12.08.20).

29 Stefan Bouzarovski and Harriet Thomson, ‘Transforming energy poverty policies in the European Union: Second annual report of the European Union Energy Poverty Observatory’ (November 2019) European Energy Poverty Observatory 18 <https://www.energy-poverty.eu/sites/default/files/downloads/observatory-documents/20-01/epov_pan-eu_report_2019_final.pdf> (accessed on 02 February 2020).

The first indicator has been reused in the 2012 survey, while the second indicator has been dropped. But the comfortable coolness indicator has not yet been selected by Member States for future data collection exercises, which means that there will be no further data at the EU level on energy poverty issues in summer.³⁰ The EU-SILC survey is the only institutionalised pan-European survey capable of providing reliable and comparable data. Unfortunately, data on summer cooling and on the number of households with air conditioning are not systematically collected nor are there plans to do so in future.³¹ The 2012 survey reported that 10.8% of households in Europe were not comfortably cool during summertime. Large differences between Southern and CEE countries on the one hand and Western and Northern European countries on the other exist.

Nevertheless, this trend is significant enough to warrant the intervention of policymakers in two respects. Firstly, as with the inability to keep warm, the inability to keep cold has consequences for the health and well-being of the occupants.³² Secondly, energy poor people are and will be even more affected by global warming because of the thermal inefficiency of their accommodation.³³ Especially as global warming tends to increase the need for additional energy services to cool down homes, which is inevitably reflected in the amount of the bill.³⁴ They can thus be doubly burdened because of the effects of global warming on them and policies to mitigate climate change. This can create a sense of injustice and reduce social acceptance of the EU's energy and climate transition.

2.4. Other factors of energy poverty

The first factor concerns the individual's profile – some social groups are more at risk of energy poverty than others: the elderly, the disabled, the chronically ill, single parents – mainly women, people on social assistance, people in precarious employment and the unemployed.³⁵ The King Baudouin Foundation states that the risk of energy poverty is

30 Ibid 24.

31 Ibid 25.

32 Harriet Thomson, Neil Simcock, Stefan Bouzarovski and Saska Petrova, 'Energy poverty and indoor cooling: An overlooked issue in Europe' (2019) 196 *Energy and Buildings*.

33 Adrian Joyce, "Time to address Europe's hot and cold homes crisis", Euractiv, 2019, <<https://www.euractiv.com/section/energy/opinion/time-to-address-europes-hot-and-cold-homes-crisis/>> (accessed on 19.08.2020).

34 Bouzarovski (n 1) 68.

35 See: Katalin Csiba, Anna Bajomi, and Akos Gosztonyi, *Energy poverty Handbook*, (MEP Tamás Meszerics Office 2016) <<https://op.europa.eu/en/publication-detail/-/publication/5e2b1b12-c03d-11e6-a6db-01aa75ed71a1/language-en>> (accessed on 10 August 2020) 23, 33; and see also European Parliament (n 4) 2.

25.9% for the unemployed, compared to 8.9% for the working population.³⁶ As far as single-parent families are concerned- those with at least one dependent child are more likely to report their inability to keep home adequately warm – 11.3% against 9.8% for single persons without children.³⁷

Furthermore, the type of tenure – tenant or owner – also has an influence on energy poverty. In Belgium, a study has shown that the risk of energy poverty is twice as high among tenants. Moreover, it reports that “10% of tenants had to limit their energy consumption because of the cost, compared to only 2.4% of owners”.³⁸ Tenants in social housing, although their rent is not as high as normal tenants’, can nevertheless find themselves in a situation of energy poverty due to the energy inefficiency of their housing.

With regard to housing per se other characteristics – individual housing, house, collective or district heating, individual heating – are also of interest to the study in order to determine where to renovate and promote more efficient heating solutions as a priority.³⁹ For example, “there is a strong correlation between the lack of central heating and higher levels of energy poverty”⁴⁰ in some southern European states (Portugal, Cyprus and Romania).

For the targeting of some of the measures to tackle energy poverty – particularly energy efficiency measures – it is of key relevance to consider the type of building, the heating system and the energy consumption of the household in relation to its features and its occupants.

In sum, energy poverty is a type of poverty where low income is a major contributing factor. However, this form of poverty is specific and complex because multiple elements can drive a household into a situation of energy poverty. All European actors involved in the conceptualisation of energy poverty share the common view that high energy costs and living in a thermal sieve are the two other key features of energy poverty. Thus, some people who are not in a poverty situation are in energy poverty and, vice versa, some

36 Csiba, Bajomi and Gosztanyi, (n 35) 23.

37 EU-SILC survey, <<https://appsso.eurostat.ec.europa.eu/nui/submitViewTableAction.do>>.

38 Csiba, Bajomi and Gosztanyi (n 35) 26.

39 Steve Pye et al., ‘Energy poverty and vulnerable consumers in the energy sector across the EU: analysis of policies and measures’, (2015) INSIGHT_E 13, <https://ec.europa.eu/energy/sites/ener/files/documents/INSIGHT_E_Energy%20Poverty-Main%20Report.pdf> (accessed on 13 August 2020).

40 Ibid.

people who fall into the poverty category are not necessarily in a situation of energy poverty. In addition, other drivers come into play such as the type of tenure, social isolation (single mother, disabled people), type of housing. Therefore, the choice of indicators to study this multifaceted phenomenon is crucial and very dependent on the concept of energy poverty of each actor.

3. ENERGY POVERTY METRICS: THE DIFFICULT TASK TO CAPTURE A MULTIFACTOR CONCEPT

In order to acquire an in-depth comprehension of the issue of energy poverty, it is essential to assess the variety of energy poverty metrics approaches and indicators. Measuring fuel poverty as accurately as possible is of key relevance in identifying energy poor households and in understanding the factors that lead to energy poverty. Such data may then be useful in policy formulation and targeting as well as interventions. In addition, regular monitoring of indicators allows assessment of the impact and benefits of the policy on the targeted households.

Energy poverty metrics are first and foremost a tool for the elaboration of an effective policy to address fuel poverty. The fact that there is no specific survey on fuel poverty at the EU level is a challenge for effective benchmarking between EU Member States. As a consequence, it is difficult to grasp the magnitude of the phenomenon at the European level and therefore to define an effective strategy to tackle it.

Energy poverty which manifests in many ways is inherently multidimensional and multifactorial. A single indicator is by no means exhaustive; rather, each indicator is likely to capture a different aspect of fuel poverty.⁴¹ Hence, solely a combination of quantitative and qualitative indicators can adequately reflect the economic, social and technical aspects of energy poverty⁴² while minimising bias in the representations of the results.⁴³ The

41 Stefan Bouzarovski and Harriet Thomson, 'Transforming energy poverty policies in the European Union: Second annual report of the European Union Energy Poverty Observatory' (November 2019) European Energy Poverty Observatory 18 <https://www.energy-poverty.eu/sites/default/files/downloads/observatory-documents/20-01/epov_pan-eu_report_2019_final.pdf> (accessed on 02 February 2020).

42 Koen Rademaekers et al., 'Selecting Indicators to Measure Energy Poverty' (2016) Trinomics 1 <<https://trinomics.eu/project/selecting-indicators-to-measure-energy-poverty/>> (accessed on 08.08.2020).

43 Jakub Sokółowski, Piotr Lewandowski, Aneta Kielczewska and Stefan Bouzarovski, 'Measuring energy poverty in Poland with the Multidimensional Energy Poverty Index' (2019) IBS 3 <<https://ibs.org.pl/en/publications/measuring-energy-poverty-in-poland-with-the-multidimensional-energy-poverty-index/>> (accessed on 20 September 2020).

report ‘Selecting Indicators to Measure Energy Poverty’ carried out by Trinomics for the European Commission identified and assessed 178 indicators.⁴⁴ This illustrates the wide range of indicators and the possible combinations of indicators to measure fuel poverty. Yet, no consensus on which indicator is best, or how to better combine them has been reached within the scientific community.

In literature, there are two main approaches to energy poverty metrics: the objective which is an expenditure-based method and the subjective also known as the declarative method which is a consensus-based method.⁴⁵ The former method uses figurative data such as a household’s energy expenditure and income, while the latter method is based on self-declaration indicators, such as households’ declarations of their ability to adequately heat their dwelling. These two methods can be used in a complementary way in order to enhance the appraisal of fuel poverty.

3.1. The expenditure-based methods: the use of objective indicators

The objective method defines an energy poor household as one that spends an excessive amount of money on energy in relation to its available resources.⁴⁶ Historically, in his seminal work, Boardman suggests that a household is energy poor if its energy needs exceed 10% of its income.⁴⁷ This 10% threshold has been adopted by several national administrations. Scotland has gone further, adding that “If more than 20% of income is needed, then we speak of extreme poverty”.⁴⁸ This way of identifying households in energy poverty is one of the three main expenditure-based ways.

The expenditure-based method observes the level of expenditure by households on the energy they use in relation to a normatively defined threshold in percentage (eg, 10%) or an absolute value (ie, absolute expenditure in monetary terms). A household is in a situation of energy poverty if the share of its energy expenditure in relation to its income is too high (above the threshold), which is measured by the ‘high share of energy cost’ indicator, or too low (below the threshold), or by the ‘insufficient energy spending’ indicator, as defined below.⁴⁹

44 Rademaekers et al (n 42).

45 Julien Damon, ‘Chapitre premier. Richesse(s) et pauvreté(s) de la notion d’exclusion’ in Julien Damon, *L’exclusion, «Que sais-je?»* (Presses Universitaires de France, 2018) 60.

46 Ibid.

47 Ivan Faiella and Luciano Lavecchia, ‘Energy poverty. How can you fight it, if you can’t measure it?’ (2018) 5 <https://www.researchgate.net/publication/327776829_Energy_poverty_How_can_you_fight_it_if_you_cant_measure_it> (accessed on 17 August 2020).

48 Csiba, Bajomi and Gosztonyi (n 35) 22.

49 Rademaekers et al. (n 42) 25.

High Share of Energy Cost. This metric captures the share of income spent on energy needs. A threshold is set. As stated above, several countries have offset this threshold at 10%. If it is exceeded, then the household is identified as energy poor.

Low Available Income. This indicator is not about the budget allocated to energy expenditure per se, but rather measures the income remaining and therefore available for other household expenditure after the household's energy costs have been taken into account. If the household has less disposable income after subtracting energy costs than the threshold then it is considered energy poor.

Insufficient Energy Spending. While the first two indicators are mostly percentage-based, the last two indicators are absolute. The threshold is an absolute value of a household's energy expenditure. If it is below this numerical value, then it is considered to be in energy poverty.

As for the three types of expenditure-based indicators of energy poverty, it is essential to clarify their components determining the threshold and defining the energy expenditure. As discussed below, the methodology chosen for each element of the indicators influences the way in which energy poverty is assessed:

Determining the threshold. A threshold can be defined in two ways – either fixed or relative. The 10% of income threshold for energy expenditure, first proposed by Brenda Boardman, has long been a key metric.⁵⁰ Its simplicity makes reading and reporting easy. Nonetheless, this figure was taken from an estimate of the energy expenditure of the bottom 30% of the lowest-income English households.⁵¹ Yet, it may have been unsuitable for other countries. For example, Thomson and Schnell pointed out that the 10% threshold has been misused in several European studies because it does not take into account national expenditure/income statistics to determine the threshold, which distorts the study of the phenomenon of energy poverty.⁵² Furthermore, the downside of the 10% benchmark and a fixed absolute threshold generally is that it is subject to price fluctuation.⁵³ The

50 Brenda Boardman, *Fuel Poverty: From Cold Homes to Affordable Warmth* (Belhaven Press 1991).

51 Rademaekers et al. (n 42) 26.

52 Harriet Thomson and Carolyn Snell, 'Quantifying the prevalence of fuel poverty across the European Union' (2013) 52, issue C Energy Policy.

53 John Hills, 'Getting the measure of fuel poverty: Final Report of the Fuel Poverty Review' (2012) 72 CASE 6 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/48297/4662-getting-measure-fuel-pov-final-hills-rpt.pdf> (accessed 16 September 2019).

correlation effect means that the share of expenditure devoted to energy increases when energy prices rise, which can give a false impression that energy poverty is increasing.⁵⁴

The other possible definition of the threshold is a relative threshold, ie, the distribution of income and expenses is taken into account according to the group surveyed. There are two main examples of the relative approach: (i) Twice the national median (and other 2M indicators) – if a household's share of income spent on energy expenditure is twice the national median share then it is classified as 'energy poor'; (ii) Low Income High Cost Indicator (LIHC), as theorised by Hills,⁵⁵ combines the two parameters of low income and high energy costs.

Energy poverty metrics based on relative thresholds have the advantage of focusing on needy households since they are based on specific country distribution of income and expenditure. However, when the price increases the indicators solely show the median shifting upwards. Therefore, the relative indicators poorly assess the impact of energy price raises on energy poverty.⁵⁶

Defining energy expenditure. When defining the methodology for measuring a household's energy expenditure, there are two methods: 'estimation of required expenditure' and 'actual energy expenditure'. Households in energy poverty tend to reduce their energy consumption (heating and electricity) to minimise their bills. Consequently, their actual energy expenditure often does not match the expenditure needed because the household's lack of resources prevents it from paying for an adequate energy service.⁵⁷ A report from the UK Department of Energy and Climate Change "highlights that in England, the need for expenditure on energy services was 21% higher than actual expenditure in 2009".⁵⁸

Using an estimation of required expenditure instead of a real one would better target the energy poor.⁵⁹ The energy expenditure required differs amongst households depending on such features as the type of building, size, insulation, type of heating, number of

54 Rademaekers et al. (n 42) 26.

55 Hills (n 53).

56 Rademaekers et al. (n 42) 26.

57 Rademaekers et al. (n 42) 28.

58 Ibid.

59 Christine Liddell, Chris Morris, S.J.P. McKenzie and Gordon Rae, 'Measuring and monitoring fuel poverty in the UK: National and regional perspectives' (2012) 49 Energy Policy.

inhabitants and energy prices. The necessary level of expenditure is met when the family can afford to heat its household properly and has enough electricity for appliances and lighting.⁶⁰ However, due to the lack of data, it is currently difficult to have a solid estimate of the required household expenditure, especially at the EU level.⁶¹

In 2012, a study conducted by Price Waddams compared the results obtained through the objective method with the 10% indicator and the subjective method (self-declaration of a situation of energy poverty).⁶² The outcomes revealed that, on the one hand, households whose energy bill exceeds 10% of their income do not consider themselves to be in a situation of energy poverty; on the other hand, some households that do consider themselves to be energy poor do not spend 10% of their income on energy bills due to a lack of sufficient financial resources. This shows the value of combining expenditure-based indicators with consensus-based indicators.

3.2. The consensus-based methods: the contribution of self-declarative indicators

The subjective method, also known as the declarative method, consists of asking people directly whether they identify themselves as energy poor. They use surveys in which people are asked whether their home is warm enough, for instance. Entirely subjective, the indicators of this energy poverty metrics approach can provide a better understanding of the experience and feelings of people living in energy poverty. Numerous studies base their analysis of energy poverty on the subjective experience and perception of the people interviewed in the surveys, as a complement to expenditure-based indicators.

Consensus indicators are regularly used by researchers to analyse the energy poverty phenomenon. This is made possible by the availability of data. Although there is no survey dedicated to energy poverty at the European level, the Survey on Income and Living Conditions (EU-SILC) is pan-European and provides relevant data for the study of energy poverty in the EU.⁶³ Three questions in the EU-SILC are of particular interest to the energy poverty community: (i) The (in)ability to keep the home warm during winter: this allows the qualitative aspect of energy deprivation to be taken into account. This indicator is used by the European Energy Poverty Observatory (EPOV) as a primary indicator;

60 Sokółowski, Lewandowski, Kielczewska and Bouzarovski (n 43) 18.

61 Harriet Thomson and Carolyn Snell (n 52).

62 Catherine Waddams Price, Karl Brazier and Wenjia Wang, 'Objective and subjective measures of fuel poverty' (2012) 49, issue C Energy Policy.

63 EU-SILC: <<https://ec.europa.eu/eurostat/web/microdata/european-union-statistics-on-income-and-living-conditions>>.

(ii) Arrears on utility bills: it asks about the (in)capacity of a household to pay these energy bills (heating, electricity, gas, water, etc.) on time. This indicator is important for identifying energy poor households that experience cuts in supply; and (iii) Presence of leaks, damp, rot: this indicator indirectly describes the quality of housing and living conditions.⁶⁴

The self-declaration method enables the experience of households in energy poverty and their perceived impact to be captured. However, the weakness of the subjective method is that it is inherently subjective. Indeed, many households self-exclude themselves – as they do not consider themselves to be energy poor.⁶⁵ Furthermore, the weakness of the consensus-based method also relies on the fact that survey participants do not have the same perception of the same phenomenon (eg, ability to keep the dwelling warm).

The EU-SILC survey on which the consensus approach is founded also has weaknesses.⁶⁶ The binary design of the questions (eg, warm enough or not warm enough) limits the appreciation of the intensity of the problem. Moreover, as the EU-SILC was not specifically designed to measure energy poverty, it includes all utility companies. Therefore, the arrears indicator is more an indicator of general poverty than of energy poverty.⁶⁷

Neither method alone can fully capture the extent of energy poverty. The expenditure-based method does not necessarily take into account the real energy needs of householders and favours hidden fuel poverty. The results drawn up using the consensus-based method are not always straightforward to interpret and thus to measure as the sole support for a policy to combat energy poverty because of their subjective nature and the self-exclusion of energy poor households. The two methods presented can also be supported by complementary metrics such as demographic factors, tariff choice, heating/cooling, or type of household in order to refine the understanding of the extent of energy poverty as well as geographical disparities in Europe. The better the representation of energy poverty, the more targeted the public policy can be. The complementary indicator does not always measure energy poverty per se, but it does identify a number of factors related to energy poverty. As we have seen, the pinpointing of factors is the key to an effective public policy formulation. A proxy indicator has an individual character and is

64 Bouzarovski and Thomson (n 29) 45.

65 Rademaekers et al. (n 42) 33.

66 Harriet Thomson and Carolyn Snell (n 52).

67 Bouzarovski and Thomson (n 29) 45.

therefore used in addition to a core indicator in order to provide additional information on the profile of the energy poor.⁶⁸ In this respect, EPOV applies a range of supporting indicators to identify the factors that lead to energy poverty. It classifies some indicators as secondary either because the available data is not comprehensive enough or because it is indirect.

3.3. Shortcomings of indicators

The first hurdle for researchers is having access to sufficient and quality materials. They depend heavily on data collected for various purposes (eg, the Statistics on Income and Living Conditions) in the absence of a pan-European survey dedicated to energy poverty. The limited availability of data hampers attempts at measuring the extent of energy poverty and therefore drafting an appropriate policy to address it.

Moreover, the indicators currently used are binary, ie, they indicate whether a household is in energy poverty or not. This is useful for measuring the extent of the problem, but it does not inform researchers and policy makers about the intensity of the problem. Only expenditure-based measures can assess the severity of energy poverty.⁶⁹ This should lead to a systematic study of the energy poverty gap – the gap between the energy poverty threshold and the energy poverty status of a household. This additional data provides an indication of the cost of lifting the household out of energy poverty.⁷⁰

Lastly, it is worth recalling that there are no one-size-fits-all energy metrics indicators to study this multifactorial phenomenon. Each indicator has its limitations whether it is objective or subjective. Given the multi-dimensional nature of energy poverty, it is essential to cross-reference several indicators of different kinds to better capture this complex phenomenon. At the European level, the problem is not so much the lack of indicators as the EPOV has identified many and some are already collected regularly. The use of different sets of metrics or different thresholds by European actors – among which are Member States – make it harder for the policy maker to compare the phenomenon between countries and therefore to develop a coherent policy response to energy poverty at the European level. Yet, this does not fully prevent a common ground of understanding of how to measure the incidence of energy poverty in the EU to understand its drivers and its consequences. As regards the consequences of energy poverty, they are manifold, both for the individuals living in energy poverty and for the states more broadly. There-

68 Rademaekers et al. (n 42) 21.

69 Rademaekers et al. (n 42) 70.

70 Ibid.

fore, the indicators used are crucial in observing the phenomenon, its consequences, and the steps to be taken to eradicate energy poverty.

4. THE CONSEQUENCES OF ENERGY POVERTY

Energy poverty is often seen as a household's inability to keep its home warm enough. However, energy poverty is not just that, not even with the issue of cooling covered. Indeed, access to energy – particularly electricity – covers other needs: cooking, hot water, internet access and powering essential household appliances. Yet, the energy poor are likely to be unable to do all of this, which inevitably has a serious impact on their health, social life and indebtedness. The consequences of energy poverty, particularly on the health of the energy poor, are a burden on public finances, especially social security. Inefficient housing also hampers climate ambitions and Member States' compliance with EU air quality standards.

4.1. Consequences of energy poverty for those affected

The trap of debt and cut-offs

Energy-poor families confront a double burden. Their dwellings may be inefficient, requiring them to be heated longer and hotter than better-insulated dwellings. And yet, this means an extra cost on the energy bill. We will see this in the next section, but it should be stressed that damp and cold accommodation affects the health of householders and therefore their work performance. It is a vicious circle: the poorer the quality of the housing, the greater the risk of falling ill and therefore of being absent from work, which in turn has an impact on household income.⁷¹ Also, the lack of resources leads to a household having to make difficult choices between meeting energy and other basic needs. However, energy remains vital, and possible savings are minimal due to inefficient housing.⁷² This is why household indebtedness is one of the primary consequences of energy poverty⁷³; although it is rarely mentioned first in literature and institutional documents.

Moreover, the threat of energy cut-offs due to non-payment is a source of stress for households⁷⁴ leading them to prioritise payment of their energy bill rather than meeting other

71 Csiba, Bajomi and Gosztanyi (n 35) 29.

72 Ibid.

73 Ibid.

74 Ibid 31.

needs (food, transport, etc.).⁷⁵ This stress is exacerbated by the fact that in some Member States, households found to be notoriously in arrears can be blacklisted, which prevents them from securing a new tenancy lease.⁷⁶ Nevertheless, households in need of energy sometimes resort to hazardous practices, such as using candles for lighting. There was one such fatality in Spain, where an elderly person died in an incident in their home.⁷⁷

The deterioration of social life

Several studies have noted the negative impact of energy poverty on individuals and their interaction with society. In general, it demonstrated that the mental health and emotional well-being of energy poor people is more likely to be affected than for people without energy poverty.⁷⁸

Living in a dwelling with inadequate heating can cause: (i) anxiety; (ii) social exclusion and isolation: people living in energy poverty prefer not to host people at their place because they do not want to show their struggles and the state of their dwelling;⁷⁹ and (iii) lack of self-esteem.

A curse for the health of energy poor people

Numerous studies – carried out by health and energy actors⁸⁰ – have established a nexus linking energy poverty and the deteriorating health of energy poor people.⁸¹ Lack of affordable access to energy services affects people's physical and mental health. For instance, when the temperature is 18°C and below the blood pressure increases. It

75 European Anti-Poverty Network, 'Working Paper on Energy Poverty' (Brussels 2010) <<https://www.eapn.eu/eapns-working-paper-on-energy-poverty/>> (accessed on 13.08.20).

76 Csiba, Bajomi and Gosztanyi (n 35) 31.

77 Marín Héctor, 'Rosa, la anciana sin luz que murió por una vela (El Mundo, 2016) <<https://www.elmundo.es/cronica/2016/11/20/58301585e5fdeafb748b4581.html>> (accessed on 03 September 2020).

78 Marina Cubedo Vicén, 'Chapter 21 – Vulnerable consumers and energy poverty' in Susanne Nies (ed), *The European Energy Transition: An agenda for the twenties*, European Energy Studies, (2nd ed. Claeys & Casteels 2020) 355.

79 Csiba, Bajomi and Gosztanyi (n 35) 34.

80 Bouzarovski (n 1) 68.

81 Harriet Thomson, Carolyn Snell and Stefan Bouzarovski, 'Health, Well-Being and Energy Poverty in Europe: A Comparative Study of 32 European Countries' (2017) 14 *International journal of environmental research and public health* 584.

increases “the risk of heart attack, heart failure, kidney disease, stroke or dementia”.⁸² The risk of respiratory diseases – especially asthma – is driven by the presence of mould in a damped house.⁸³ In addition, repeated exposure to low temperatures reduces the effectiveness of the immune system, making the energy poor more vulnerable to contracting bronchitis and pneumonia.⁸⁴

In Ireland, the Warmer Homes programme has helped 95,000 vulnerable and energy-poor households with €82 million in funding for energy efficiency measures and guidance. The impact of the programme has been significant as “the number of beneficiaries who suffered from long-term illness or disorder has been reduced by 88%”⁸⁵ and there has been an overall improvement in their health.

Considering all the health risks – cardiovascular and respiratory problems – of living in an inadequately heated home, it is not surprising to see excess winter mortality. Thus, 40% and 33% of excessive deaths in winter are respectively attributed to cardiovascular and respiratory diseases.⁸⁶ According to one study, in 2018, 15,000 people died in the UK due to the lack of heating in their home.⁸⁷ Housing efficiency and heating is therefore an important factor in the winter mortality rate.

Excessive mortality in the winter has long been a well-studied phenomenon. Yet, another problem is also beginning to draw attention: excessive heat damage. Climate change is worsening this problem. The 2003 heat wave showed that excess heat can be fatal, with 3,100 additional summer deaths in Italian cities directly attributable to it.⁸⁸ A study by UK HAP indicates that heat-related deaths due to climate change will increase six-fold by

82 Public Health England, ‘Cold Weather Plan For England - Making the Case: Why long-term strategic planning for cold weather is essential to health and wellbeing’ (London, 2017) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/652568/Cold_Weather_Plan_Making_the_Case_2017.pdf> (accessed on 11 August 2020).

83 Ibid.

84 Ibid.

85 BPIE, ‘Reducing energy poverty with national renovation strategies: a unique opportunity’ 3 <[Http://bpie.eu/wp-content/uploads/2017/04/Factsheet_A-170420v4.compressed.pdf](http://bpie.eu/wp-content/uploads/2017/04/Factsheet_A-170420v4.compressed.pdf)> (accessed on 09 August 2020).

86 Public Health England (n 82).

87 Simon Read, ‘Fuel poverty killed 15,000 people last winter’ (Independent.uk, April 2015) <<https://www.independent.co.uk/news/uk/home-news/fuel-poverty-killed-15-000-people-last-winter-10217215.html>> (accessed on 11 August 2020).

88 Faiella and Lavecchia (n 47) 6.

2080.⁸⁹ To compensate for the lack of knowledge about summer excess mortality, studies on excess mortality due to heat waves – which are likely to be repeated – could be the next research field of energy poverty stakeholders.

4.2. The wider impact of energy poverty: beyond the people, reaching the state level **The impact on Member States' public finances**

As we have just discussed, energy poor people are more likely to have poor physical and mental health. This has an impact on the economic activity and public finances of countries. Indeed, people in poorer health are less productive and even absent from work more regularly. In addition, as mentioned earlier, children who have grown up in energy poverty have less human capital than other children, which also potentially reduces their work productiveness. However, at present there are no estimates of the cost of these negative externalities associated with energy poverty situations.⁹⁰ Yet, studies have shown the burden on countries' health systems of the additional cost of treating health problems related to energy poverty.⁹¹ For example, the estimated annual cost to the National Health Service (NHS) of treating illnesses related to inadequate heating in winter alone is £859 million.⁹² The report also looked at the impact of investing in the prevention of energy poverty (renovation and better insulation).⁹³ It concludes that the NHS can save 42p in health care for every £1 invested.⁹⁴ In addition, a study carried out in the Ile-de-France region confirms the correlation between 'inadequately heated housing' and extra costs to health systems. It estimates that this additional cost is three times higher than the cost of housing rehabilitation measures.⁹⁵ Therefore, energy renovation of at-risk households can kill two birds with one stone at a lower cost to the state: making a vicious circle virtuous.

89 Ibid 7.

90 Ibid 6.

91 UK Department of Health, 'Annual Report of Chief Medical Officer' (2009) 35 <http://www.thc.co.uk/Documents/CMO_Report_2009.pdf> (accessed on 11 August 2020).

92 Ibid.

93 Ibid.

94 Csiba, Bajomi and Gosztanyi (n 35) 34.

95 Sabine Host, Dorothée Grange, Lucile Mettetal and Ute Dubois, 'Précarité énergétique et santé : état des connaissances et situation en Île-de-France' (2014) Observatoire régional de santé Île-de-France 14 <https://www.ors-idf.org/fileadmin/DataStorageKit/ORS/Etudes/Etude_1541/Synth_PE_et_sante_WEB_1_.pdf> (accessed on 28.08.20).

Environmental impact and EU Climate neutrality goals

Households in energy poverty are both green and not green at the same time. Indeed, they often reduce their energy consumption; but the inefficiency of their housing pushes them to consume more energy than more efficient housing. According to Build Up, 75% of the EU's housing stock is not energy efficient.⁹⁶ More energy consumption means more GHG emissions, hence the need to combine the policy to alleviate energy poverty with the climate ambitions of the EU and its Member States.

Moreover, the choice of the heating systems (oil, wood, electric, etc.) has a strong impact on indoor and outdoor air quality. Heating with solid fuels (such as coal and biomass) is responsible for up to 75% of particulate emissions.⁹⁷ The relationship between air pollution and health is well established. So, renovating buildings, installing efficient heating solutions in the households that need them most can also contribute to better health, reducing energy poverty and meeting EU environmental standards.⁹⁸

The fact that various actors are dealing with the conceptualisation of energy poverty, each from their own perspective, has provided a better insight into the consequences of fuel poverty. Energy poverty inevitably has impacts on those who suffer from it. However, the impacts are not limited to the inability to pay their energy bills. Indeed, this is only the starting point of a vicious circle that leads them either to getting into debt or to reducing their consumption, which is detrimental to their health and even their social life. This form of poverty is insidious and intricate, and has multiple consequences, which makes it even more challenging to address through public policy. The states are also indirectly impacted by energy poverty both from the point of view of their public finances and the acceptance of their climate ambitions by a fringe of the population which feels it is paying a higher price for the energy transition.

96 Papaglastra (n 24).

97 Goyens (n 27).

98 Bertram and Primova (n 3) 28.

5. CONCLUSION

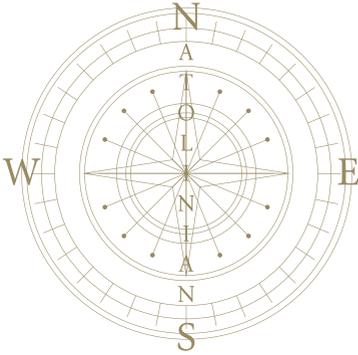
This research paper devotes extensive attention to the very concept of energy poverty. It considers the complexity of this matter as it is multidimensional, multifactorial and has multiple consequences. All these elements make it a complex social problem that is not easily understood and solved. Defining the concept, identifying the different methods of measurement, and studying the consequences of energy poverty should help informed policymaking.

Although the absence of a common and settled definition in legislation may be a major inhibiting factor in the emergence of a policy to address energy poverty in Europe, this paper has sought to highlight that a common understanding exists among European stakeholders and is sufficient to enable them to engage in dialogue by speaking a rather similar language. The European policy on fuel poverty does not necessarily require a set definition – which is likely to be reductive in relation to the diversity of drivers and consequences of fuel poverty. Instead, it would suffer from a lack of coherence/ consistency/ cohesiveness. There is a shared and widespread understanding of the issue of fuel poverty across Europe. For instance, proposals for definitions from studies by the scientific community, NGOs and advocacy groups and institutions share the same underlying basis: lack of income, inefficient housing, and energy service prices too high for these households. Those are the key drivers to energy poverty identified among many other less significant/ impacting factors. The fact that very different actors – with their very different perspectives – have identified the same drivers and consequences of energy poverty may serve as yet another proof that a common understanding has developed even in the absence of a set definition. Yet, when measuring the extent of the situation in Europe and its Member States, that is where the task falls short. As there is no uniform definition, each Member State may have a slightly different approach, which would inevitably lead to a different choice of indicators to assess the prevalence of the phenomenon on its territory. Hence, it is the lack of a uniform agreed set of metrics that makes it difficult to compare Member States and therefore to develop a coherent and comprehensive European public policy to tackle energy poverty.

Nevertheless, the current EU-wide common understanding together with the European tools already existing are a potential that the EU – especially in the context of the Green Deal – should better capitalise on to address energy poverty. As briefly mentioned in the introduction, the EU has been slow in putting energy poverty on its political agenda, without ever making it a priority. Hence, at a time when President von Der Leyen

announced that her slogan is “leave no one behind”, this has to be translated into action. Given that energy poor people can be doubly impacted by climate policies and global warming, the EU has much at stake in supporting its Member States to curb the spread of energy poverty and thus not to put the burden of the climate transition on those most at risk of energy poverty. Today, the EU has a range of legislation, funds, and programmes to support the fight against energy poverty, drawing on its competences in the field of the internal market for electricity and gas, cohesion policy and even the social rights pillars. Nevertheless, each Member State is responsible for reporting the prevalence of energy poverty in their country and for taking the measures they deem appropriate, which can lead to inequalities in the handling of energy poverty across Europe. Consequently, one of the first steps the EU could take is to improve reporting on the prevalence of energy poverty through a commonly agreed set of mandatory indicators with common thresholds plus optional indicators. A better picture of the actual situation on the ground would then allow the EU to deploy its programmes and funds more effectively. In the context of the COVID-19 pandemic crisis and the European recovery plan, it will be interesting to study the impact of this crisis on the prevalence of fuel poverty and to observe whether European measures such as the renovation wave have been up to the challenge of European recovery, the transition to carbon neutrality, and the fight against energy poverty.

Last but not least, to orientate the matter of conceptualising energy poverty towards a more philosophical debate, I would like to mention the recognition of the right to access to energy as a human right in the light of the importance that energy has taken on in our lives. Living in decent housing with a minimum access to energy is essential to ensure people’s well-being and basic needs: feeding and heating themselves, not to mention commuting or even working from home during the pandemic. The question of the cost of this service is at the core of the problem of energy poverty. Being deprived of this service due to a lack of financial resources has very important negative consequences and pushes energy poor people to neglect some of their basic needs. Yet, the Charter of Fundamental Rights of the European Union “recognises and respects the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources, in order to combat social exclusion and poverty”. Thus, it would be instructive to question the inclusion of access to affordable energy as a fundamental human right in future studies.



CHAPTER 11

*Achieving a just transition:
how can the European Pillar
of Social Rights contribute to
re-skilling employees in
fossil-fuel reliant regions?*

BY HEIDI RENAULT



HEIDI *RENAULT*

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1. INTRODUCTION

The Lisbon Treaty introduced key changes into the EU's functioning and policy making by adding new competencies such as the energy policy. The Treaty also provides support and gives due prominence to the social dimension of the internal market by establishing the charter of fundamental rights as legally binding. In this regard, despite the fact that the social policy was already being implemented at the EU level, especially through the development of the European Social Dialogue, the Lisbon Treaty is considered as a key step even though it does not transfer the competence on social policy entirely to the EU. Complemented and reaffirmed in 2017 by the European Pillar of Social Rights (EPSR), this charter introduced several social rights including collective action, but also the right to education and life-long training. Meanwhile, the inclusion of these rights seems to acknowledge the social dimension of the internal market which is affected by the climate and environmental challenges raising new concerns over employment. The required conversion to a low carbon economy to achieve the EU's climate ambitions and objectives firmly ties social issues with energy and environment policies which seem to stand at an important crossroads.

The concept of Just Transition emerged as an illustration of this need and challenge, especially in the energy sector. Several studies already assessed the impact of the transition towards a low carbon economy on job creation, seeing it as an opportunity or threat. For instance, the International Renewable Energy Agency (IRENA) publishes an annual review on job creation in the energy sector demonstrating opportunities, especially in the renewable energy sources sector. However, these job opportunities also require new skills or upskilling from the workforce. Just Transition is a concept which emerged in relation to the recent coal phase-out and elaborates policy instruments to support the conversion and restructuring of industries affected by climate and environmental policies. It generally involves initiatives aiming to develop sustainable activities in regions affected by the energy transition and to change workers' skills accordingly. Throughout history, industrial restructuring and energy transition led to social crises mostly in relation to job losses as illustrated by the coal mining industry decline in the 1980s. The most recent and striking example of a social uprising in relation to climate policies is the Yellow Vests crisis in France that started in 2019. It highlighted the social inequalities, but more specifically the inconsistencies in our political models between environmental and social policies. Yellow Vests were demonstrating against the increase of the French carbon tax that would have impacted most French citizens while keeping the most polluting industries exempted from it. This political choice resulted in a feeling of unfairness among French citizens

who demonstrated against it. It is now considered as a case for understanding social acceptability of climate and environmental policies.

In this context, if the Juncker Commission (2014-2019) has been considered as the re-launch of the European social dimension, the von der Leyen Commission elaborates its political message on the basis of a sustainable and just transition. “Leaving no one behind” now became the motto of this new Commission which proposes a Green Deal for Europe to achieve carbon neutrality by 2050. The social dimension of the ecological transition is a fundamental aspect of this political programme considered as a sustainable growth strategy. As a result, one of the highlights of the Green Deal is the Just Transition Mechanism, relying on EU funds to help targeted European regions in achieving the transition to a carbon neutral economy. Life-long learning and shifting skills are considered essential components of this programme. The need for EU social policy becomes even more acute as a new economic and social crisis arises in Europe following the coronavirus pandemic.

The paper questions the EU’s response to the conversion of jobs in the energy sector as a result of the transition towards a carbon neutral economy, especially under the Just Transition framework. It strives to determine the contribution of the EPSR to managing the skills challenge stemming from the energy transition of fossil-fuel reliant regions. As a result, it will explore the interlinkages between social and environmental policies.

The chapter proceeds as follows. The first section elaborates on the impacts of the energy transition on employment to better understand the challenges at stake in terms of policy making for conducting a just transition. The following section addresses the contribution of the EPSR to the Just Transition Mechanism by analysing the evolution of the EU social policy. The final section offers an analysis of the Green Deal projects associated with the Just Transition Mechanism.

2. THE IMPACTS OF THE ENERGY TRANSITION ON EMPLOYMENT

2.1. Job creation: political leverage to foster social acceptability of the energy transition

In the EU, the energy sector represented 54% of greenhouse gas emissions in 2017. If transport is included, which accounts for 25% of the greenhouse gas emissions of the EU in 2017, it increases the share of the energy sector to 79%. The energy sector is thus acknowledged as one of the most polluting while remaining essential to the function-

ing of the economic system. Due to several interlinkages with other economic activities and its various uses, the energy transition is considered as an essential step towards carbon neutrality. It quickly became a priority at all political levels for the significant contribution to climate change mitigation it can bring, but also for the potentially sustainable economic growth it can trigger. Besides, the competencies granted to the EU in this area, especially after the Lisbon Treaty, certainly also contributed to positioning the energy transition at the core of the EU climate and environmental policy. While some energy industries have to stop their activities leading to job and economic losses, the energy transition also brings new opportunities to companies and their employees regarding the development of renewable energy and the quest for energy efficiency. Studies and scenarios on pathways towards carbon neutrality intend to assess the impacts of the transition towards a low carbon economy on job creation which are seen as both as opportunities and threats.

The IRENA publishes an annual review on employment in the energy sector. It estimates that the global renewable energy sector provided 11 million jobs in 2018 compared to 10.3 million jobs in 2017. While China accounts for 39% of renewable energy jobs, the total number of renewable energy jobs in the EU is estimated at 1.2 million in 2017, with the solid biomass sector accounting for 387 000 jobs, 314 000 jobs in the wind sector, and 96 000 jobs in the solar PV sector. Furthermore, IRENA also estimated that the number of renewable energy sector jobs could rise to around 16.7 million by 2030. More recently, the World Employment and Social Outlook 2018 states that “18 million jobs can be created by achieving sustainability in the energy sector”. Many other studies also intended to assess the level of job creation and job losses of the energy transition. For instance, a loss of 4.45 million jobs worldwide by 2030 is estimated by Almutairi et al. in 2018 as explained by Manish Ram, Arman Aghahesseini and Christian Breyer. Estimations vary depending on the function of the energy mix considered, the time length, the calculation methods, and the geographic scales. The modelling of climate and energy transition is thus a highly competitive activity gathering institutional and economic actors as well as civil society stakeholders.

These assessments contribute to shifting the image of the energy transition from a threat to an opportunity for employment. At the EU level, in particular, it became part of the arguments from competing energy sectors to keep their part or take a bigger one in the energy transition while EU policy makers establish policy tools to support it. Recently, SolarPower Europe published a new long-term energy scenario in which it considers solar power could create 4 million jobs by 2050 in Europe.

To the same extent, the Gas for Climate consortium published its pathways towards 2050, mentioning social benefits of keeping renewable and low carbon gases in the energy mix.

Studies such as the one published in 2019 by ENEA demonstrates the possibilities for assessing positive externalities of energy sources with a more qualitative approach. ENEA highlights the impacts on job creation as well as on regional development of the biomethane deployment in France. Many other pathways towards 2050 are elaborated by companies, consortiums, associations, and NGOs to deliver their messages. The job creation potential is also emphasised by the EU and national institutions as shown in the long-term vision for a climate neutral economy published under the Juncker Commission, where it is stated that “the EU hosts six of the 25 largest renewable energy businesses and employs around 1.5 million people in this sector”. This argument is sustained by a dedicated section on social and economic impacts of the transition emphasising the benefits to the economy it can trigger from job opportunities to regional development. Thus, stressing the social benefits of the transition, especially to employment, is political leverage for ensuring social acceptability of the transition.

However, long-term energy scenarios still have difficulties for modelling the social aspects of these policies, which makes it difficult to deliver a clear overview of the social impacts of the energy transition. The choice of methodology seems to be particularly difficult as social aspects cannot always be monetised. These scenarios mostly focus on the cost-efficiency of technologies and modelling market trends such as supply and demand without fully studying the social impacts of their pathways. During an event organised by IRENA, Sven Teske, the Research Director at the Institute for Sustainable Futures (University of Technology, Sydney), provided an overview of the narratives used in long-term energy scenarios for National Determined Contributions under the Paris Agreement. Among the trends he noticed, the focus on issues related to technologies and market considerations are the most common ones. For example, SolarPower Europe estimates job creation in its industry in Europe, acknowledging “the lack of a skilled EU workforce in clean energy technologies”. Nevertheless, this policy recommendation is not the topic of the further analyses in this scenario. The Gas for Climate pathway neither provides such an analysis on the social impacts whether on energy poverty or on the job market in terms of competence.

However, the analysis of the future skills needed in such scenarios could contribute to the development of more efficient mechanisms for employment. Such shortcomings in long-term energy scenarios unveil the need to focus more on qualitative considerations. More specialised scenarios such as the IRENA Annual Review, focusing on job creation, and

the Green Jobs Assessment from the International Labour Organisation (ILO), allow to deliver a more comprehensive understanding of the need for the transition from a social point of view.

2.2. Present and future skills in the energy sector for a low carbon economy

On the basis of the work led by IRENA, the ILO and also on the analysis provided by the EU on social impact assessments, it is possible to provide an insight into the future skills needed in the transition. Indeed, institutional actors provide an in-depth analysis of the social impacts of climate and environmental policies as they are subject to policy mechanisms requiring such analysis. The inherent role of the ILO drives such an interest for studying the future of labour markets within a carbon neutral economy. At the EU level, social impact assessments have been included in the policy making process, especially in the European Semester that also provides national insights on this topic. However, it should be noted that the institutional actors are not exempt from the methodological problem private entities may face when addressing social impacts of climate and environmental policies. As such, the EU intended to develop various criteria alongside the GDP that are more qualitative to deliver even more precise impact assessments.

The ILO undertakes specific actions on greening the economy through employment policies. For instance, it developed a “Green Jobs Programme” focusing on studying the social dimension of environmental policies, but also on capacity building. Through this programme, the ILO provides expertise on identifying potential for green job creation, disseminating best practices and elaborating strategies for greening jobs. The Green Jobs Assessment Institution Network (GAIN) also intends to help stakeholders meeting these challenges. Several studies and assessments on the future skills needed in a low-carbon economy have been undertaken through these programmes. They cover both a sectoral perspective and a country-specific approach.

The World Employment Social Outlook demonstrates the interlinkages between skills and the transition to a low carbon economy. It notes that a significant mismatch in skills remains at the global stage impeding the achievement of the transition. The synthesis report covering Europe also stresses the need for skill strategies to be developed by governments. The most significant skill shortage identified for the transition appears to be in competences related to sciences, technology, engineering and mathematics. Management skills are also identified as essential for the transition: leadership, environmental awareness, entrepreneurial skills and marketing skills. These are of particular importance for a sector such as energy where technologies are at the core of the

transition to a low carbon economy. The European Commission indicated in its new Industrial Strategy that “70% of companies report that they are delaying investments because they cannot find the people with the right skills”. This figure demonstrates the scale of the skills challenge in the EU labour market. While these analyses underline the potential job creation to be high in the transition, they also demonstrate jobs are rather evolving as a function of the needs for the transition rather than shifting or being new. As a result, the transition does not necessarily require people to shift their skills or be trained for a new occupation, but to upskill by appropriate trainings.

In the context of the Just Transition, these considerations allow to better understand how to plan the shift from a polluting industry to a cleaner alternative. The role of regions is already recognised as essential in the elaboration of skills strategies and is enhanced by policy initiatives related to sustainable development and employment. These elements stress that assessing the skills needs for the transition have been integrated into most countries’ environmental policies. The role of social dialogue and regulatory framework are also key aspects to establish this link between environmental and employment policies.

2.3. The concept of a Just Transition

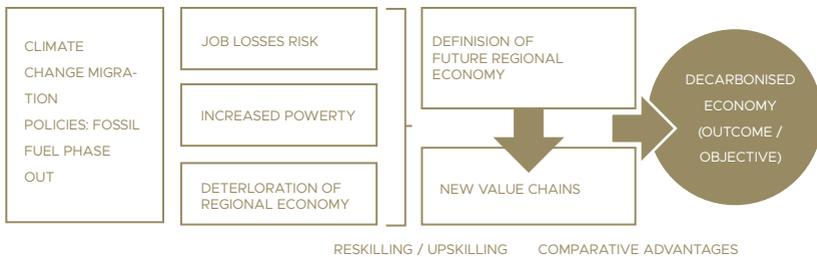
The concept of a Just Transition emerged as an answer to the challenges faced by the regions affected by climate change mitigation policies leading to industrial restructuring. Trade unions played a significant role in supporting this concept. Its inclusion into the Preamble of the Paris Agreement and the adoption of the Silesia Declaration on Solidarity and Just Transition at the COP 24 were milestones for trade union organisations. The ILO also contributed to mainstreaming this concept into the political discourse when publishing its Guidelines on Just Transition in 2015.

The concept of Just Transition as defined by the ITUC (International Trade Union Confederation) entails both national or regional scale and company scale. This definition emphasises the relation between companies, regional development and sustainable development. At the company scale, the trade union considers the Just Transition is “an enterprise-wide process to plan and implement companies’ emissions reductions efforts, based on social dialogue between workers and their unions, and employers”. At the national or regional scale, it is defined as “an economy-wide process that produces the plans, policies and investments that lead to a future where all jobs are green and decent, greenhouse gas emissions are at net-zero, poverty is eradicated, and communities are thriving and resilient”.

It reflects the three challenges of a Just Transition identified by Béla Galgóczi: the impacts of climate change mitigation policies, the impacts on employment and the definition of future regional economy. The author complements it by considering the Just Transition to entail both a process and an outcome. The latter is the objective of a decarbonised economy while the process describes the management of the transition by planning and involving all relevant stakeholders within a social dialogue (figure 1).

Figure 1: the main challenges of a Just Transition for regions

MANAGEMENT OF THE TRANSITION (PROCESS)



Source: author's elaboration

These considerations are broad and can apply to various sectors affected by climate change mitigation efforts or by economic crisis.¹ However, at the EU level, the concept of Just Transition appears to be more specific as it often refers to carbon-intensive regions due to their reliance on fossil energy, especially coal.² The effects of the closure of a coal mine or power plant on a territory can be wide. As described by the JRC (Joint Research Center), the main threat refers to both direct and indirect job losses.³ It also impacts the whole regional economy, as its attractiveness and the attractiveness of other economic

1 ETUC, 'A guide for trade unions: involving unions in climate action to build a just transition' (2018), available at: <https://www.etuc.org/sites/default/files/publication/file/2018-09/Final%20FUPA%20Guide_EN.pdf>.

2 European Commission, 'Coal regions in transition', available at: <https://ec.europa.eu/energy/topics/oil-gas-and-coal/EU-coal-regions/coal-regions-transition_en>.

3 Alves Dias, P. et al., 'EU coal regions: opportunities and challenges ahead', EUR 29292 EN, (Publications Office of the European Union 2018) doi:10.2760/064809, JRC112593, available at: <<https://publications.jrc.ec.europa.eu/repository/handle/JRC112593>>.

sectors such as steel industry are undermined.⁴ In order to manage these impacts, local authorities need to define new regional strategies based on the identification of new value chains, its comparative advantages and reskilling/ upskilling policies (figure 1). As it will be illustrated in the following section, the EU's role in the Just Transition is focusing on these key aspects. The EPSR is fundamental in enabling the elaboration and involvement of the EU in this process.

3. THE EU'S ROLE IN A JUST TRANSITION

3.1. The EU Social Policy in brief

The social dimension of the EU internal market is significantly acknowledged in the Treaty of Amsterdam (1997) where a chapter on employment is included.⁵ This process is associated with the growing importance granted to fundamental rights at the EU level, especially through the reference to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) in the Maastricht Treaty (1992) and the establishment of the Charter of fundamental rights.⁶ The latter affirms several fundamental rights among which the right to education, the right to work, and the right to negotiate and collective action. It also refers to the protection in case of unjustified dismissal and the right to fair and equal working conditions.⁷ Environmental protection is also part of the right defended by the charter reflecting the relation between environmental and social policies.⁸ Proclaimed in 2000 with the Nice Treaty, the charter grants a binding value equivalent to the treaties in 2009 with the Lisbon Treaty.⁹ The Lisbon Treaty also gives new social objectives to the EU such as social progress, the fight against social exclusion and poverty.¹⁰ Moreover, it reinforces the role of social dialogue and social partners while

4 Ibid.

5 Bart Vanhercke, Dalila Ghailani, Slavina Spasova and Philippe Pochet, *Social Policy in the European Union 1999-2019: the long and winding road* (European Trade Union Institute (ETUI) and European Social Observatory (OSE) 2020).

6 European Parliament, 'The protection of fundamental rights in the EU', available at: <<https://www.europarl.europa.eu/factsheets/en/sheet/146/la-protection-des-droits-fondamentaux-dans-l-union>>.

7 Charter of fundamental rights of the European Union [7 December 2000] OJ C364/01.

8 Ibid, Article 37, 17.

9 European Parliament, 'The Treaty of Lisbon', available at: <<https://www.europarl.europa.eu/factsheets/en/sheet/5/le-traite-de-lisbonne>>.

10 Tricart (n 3).

also requiring that social aspects are taken into account in all EU policies.¹¹ Nevertheless, the Lisbon Treaty does not give new competences to the EU on social matters, as it is considered as a shared competence with Member States, reducing the EU's capability to develop an EU social policy.¹²

Yet, the EU social policy advanced with various legislative and non-legislative initiatives throughout the succeeding Commissions. Indeed, these developments in the treaties also translate into and allow the implementation of an EU set of actions related to social policy as a necessity for market integration and economic growth.¹³ With the building of the Single Market, the free movement of workers became a key issue for ensuring the well-functioning of the internal market, and workers' rights and their social protection quickly came at the forefront of the debate.¹⁴ In this respect, the EU settled a social dialogue with trade unions and European-level employer organisations to define labour standards.¹⁵ Alongside this process, soft governance tools were implemented by the EU to take into account social aspects of EU policies: the Open Methods of Coordination and the European Semester are key examples that rely on best practice exchanges and benchmarking.¹⁶

When the Juncker Commission proclaimed the EPSR in 2017, it reasserted the principles that are part of the European integration since the Maastricht Treaty. To the same extent, the von der Leyen Commission also ties its programme with this tradition by striving for a fair and socially acceptable transition, entailed by the concept of a Just Transition.

3.2. The contribution of the European Pillar of Social Rights to deliver a Just Transition

Both the Charter of Fundamental Rights and the EPSR state key principles in relation to the changes triggered by environmental and climate policies in the labour market. The EU's role in social policy is driven by labour market issues associated with market integration as explained above. In relation to the key principles and rights affirmed by the EPSR,

11 Fondation Robert Schuman, 'Le Traité de Lisbonne en matière sociale' (2007), available at: <<https://www.robert-schuman.eu/fr/dossiers-pedagogiques/traite-lisbonne/fiche8.pdf>>.

12 Vanhercke et al. (n 41).

13 Ibid.

14 Ibid.

15 Tricart (n 3).

16 Vanhercke et al. (n 41).

the EU is using competences in other policy areas to support it. The ESPR also gives the EU a legal ground for developing a European Social Model.

The right to education and life-long learning is the first principle of the EPSR.¹⁷ As a supporting competence, education is a policy area where the EU has a limited margin to manoeuvre. In relation with the Single Market, and the development of a Common Research Area, the EU can provide support for enhanced cooperation between Member States. The European cooperation on vocational education and training (VET) is a good example which contributes to enhancing harmonisation of the education systems across the EU. The role of the Cedefop, the European Centre for the Development of Vocational Training, is to provide support in the development and implementation of such training policies.¹⁸ Its contribution to the assessment of the green skills needs for the EU illustrates this role. This agency is thus providing a broad and solid framework for Member States to develop their skills policies, including the ecological and energy transition. The project “Adult learning: empowering adults through upskilling and re-skilling”¹⁹ is an example of this support. It aims to support Member States in elaborating and implementing VET policies for adults in the context of a changing labour market. Through this project, the Cedefop produced an analytical framework for developing upskilling pathways²⁰ that several countries agreed to apply to test them, as part of the project. While this project is not targeted towards specific regions, or the issues of the Just Transition, it demonstrates expertise in terms of capacity building that the EU has built to support its Member States in elaborating upskilling and reskilling programmes. In a report assessing the developments in the VET policy in Europe, several EU Member States stress the importance of the EU support in identifying skills needs and reinforcing their “labour market intelligence”.²¹ Another example of the EU’s role is the Blueprint

17 European Pillar of Social Rights, Gothenburg, Sweden [17 November 2017], Article 1, 11.

18 European Union, ‘European Centre for the Development of Vocational Training (Cedefop)’, available at: <https://europa.eu/european-union/about-eu/agencies/cedefop_en>.

19 Cedefop, ‘Adult learning: empowering adults through upskilling and reskilling’, available at: <<https://www.cedefop.europa.eu/en/events-and-projects/projects/adult-learning-empowering-adults-through-upskilling-and-reskilling>>.

20 Cedefop, Empowering adults through upskilling and reskilling pathways. Volume 2: Cedefop analytical framework for developing coordinated and coherent approaches to upskilling pathways for low-skilled adults (Publications Office of the European Union 2020) Cedefop reference series; No 113, available at: <<http://data.europa.eu/doi/10.2801/61322>>.

21 Cedefop, European cooperation in VET: one process, many steps. Developments in vocational education and training policy 2015-17 (Publications Office 2018) Cedefop reference series, No 110; 79, available at: <<http://data.europa.eu/doi/10.2801/033929>>.

for sectoral cooperation on skills.²² It enables to build up sectoral specific alliances for reinforcing cooperation on skills development within the EU. It covers different sectors from energy to manufacturing and automotive industry with the intention to tackle skills gaps. Partners include trade unions, national and local authorities, businesses, and EU institutions. Assessment of the need for such an alliance in specific sectors is based on the Cedefop's data. This initiative taken as part of the Skills Agenda for Europe in 2016²³ will be expanded in the context of the Pact for Skills of the Updated Skills Agenda 2020 to demonstrate its relevance.

These initiatives can be easily related to other principles of the EPSR: the right to equal opportunities, active support to employment, social dialogue, and protection in case of dismissals.²⁴ They show the extent to which the EU could have a role in supporting Member States to deliver skills strategies and social policy for the ecological transition. In this respect, the initiatives related to restructuring and more specifically to Just Transition can also be put in relation to the EPSR. The launch of the Coal Regions in Transition initiative exemplifies it, especially its dedicated platform created under the Clean Energy for all Europeans packages. This platform gathers relevant stakeholders around the planning of phasing-out of coal energy and fostering best practices exchanges.²⁵ As a result, it fosters social dialogue, but is also an example of active support to employment and protection in case of dismissal. Indeed, it enables the development of pilot projects, such as “regions in industrial transition”²⁶ through which the European Commission provides expertise to local authorities on managing the transition towards a low carbon economy. This initiative intends to increase innovation capacity of twelve test regions²⁷ and can be considered as an extension of the concept of Just Transition to other areas than energy within the EU political framework. Such initiatives and policy tools are concrete applications of the EPSR's principles into the EU's strategy for the Just Tran-

22 European Commission, ‘Blueprint for sectoral cooperation on skills’, available at: <<https://ec.europa.eu/social/main.jsp?catId=1415&langId=en>>.

23 Council recommendation of 19 December 2016 on Upskilling Pathways: New Opportunities for Adults [2016], OJ C 484, 1-6, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:JOC_2016_484_R_0001>.

24 European Pillar of Social Rights (n 53) Articles 3, 4, 7 and 8.

25 European Commission (n 38).

26 European Commission, ‘Structural Support Action for Coal and Carbon Intensive Regions’ (2018), available at: <https://ec.europa.eu/clima/sites/clima/files/docs/pages/initiative_5_support_en_1.pdf>.

27 Ibid.

sition. Figure 2 summarises the relations between the EPSR's principles and these policy initiatives.

They are closely connected with the EU cohesion policy as a means to implement them, especially via EU funding programmes. The EU cohesion policy is elaborated to reduce the disparities between regions as stated in the Article 174 of the TFEU. Its associated funds such as the European Regional Development Fund (ERDF) and the European Social Fund (ESF) contain policy objectives related to social issues, including the challenge of training, education, and sustainable development. The role of regions is particularly relevant for the Just Transition. Indeed, the EU initiatives to support coal regions in transition mostly rely on social dialogue and the EU's financing instruments.²⁸ Besides, the role of regions in employment and skill strategies is recognised by the ILO and Cedefop in their analysis of the green skills needs. It is also the closest policy level to citizens and the one that is directly impacted by the negative effects of climate change but also by the shift in political decisions on environment and climate policies, even though they are more or less independent of national authorities in Member States.

Figure 2: Relations between EPSR's principles and EU's action on skilling

<p>Role of EPSR</p> <p>Policy initiatives</p>	<p>European Pillar of Social Rights – key principles</p>	<p>EU competences</p>
<p>Related to VET</p>		
<p>Adult learning</p>	<p>Right to education and life-long learning</p> <p>Right to equal opportunities</p> <p>Active support to employment</p>	<p>Shared competence:</p> <ul style="list-style-type: none"> - Single market - Employment and social affairs <p>Supporting competence:</p> <ul style="list-style-type: none"> - Education and training, youth and sport
<p>Blueprint for sectoral cooperation</p>	<p>Right to education and life-long learning</p> <p>Secure and adaptable employment</p> <p>Active support to employment</p>	<p>Shared competence:</p> <ul style="list-style-type: none"> - Single market - Employment and social affairs - Transport, Energy, Agriculture, fisheries <p>Supporting competence:</p> <ul style="list-style-type: none"> - Education and training, youth and sport - Industry
<p>Related to Just Transition</p>		
<p>Coal Regions in Transition</p>	<p>Information about employment conditions and protection in case of dismissals</p> <p>Social dialogue and involvement of workers</p> <p>Secure and adaptable employment</p>	<p>Shared competences:</p> <ul style="list-style-type: none"> - Economic, social and territorial cohesion - Employment and social affairs - Energy - Supporting competences - Industry - Education and training, youth and sport <p>Energy solidarity (Article 194 TFEU)</p>
<p>Industrial Regions in Transition</p>	<p>Information about employment conditions and protection in case of dismissals</p> <p>Social dialogue and involvement of workers</p> <p>Secure and adaptable employment</p>	<p>Shared competences:</p> <ul style="list-style-type: none"> - Economic, social and territorial cohesion - Employment and social affairs - Energy - Research <p>Supporting competences</p> <ul style="list-style-type: none"> - Industry - Education and training, youth and sport

European Structural and Investments Funds	Secure and adaptable employment Active support to employment	Shared competences: - Economic, social and territorial cohesion - Employment and social affairs - Energy - Transport - Research
Just Transition Mechanisms	Information about employment conditions and protection in case of dismissals Social dialogue Right to equal opportunities Secure and adaptable employment	Shared competences: - Economic, social and territorial cohesion - Employment and social affairs Energy Energy solidarity (Article 194 TFEU)

Source: author's elaboration

Therefore, the EPSR and associated initiatives, especially on education, are already a strong framework that can support an effective Just Transition through the implementation of adequate measures. It is acknowledged that the EPSR contributed to relaunching the social agenda at the EU level, especially for education and training as illustrated above.²⁹ However, the analysis of green skills in Europe also suggested disparities among Member States in the planning and implementation of appropriate skills responses for the energy transition.³⁰ In the European Semester Country Report of France, the European Commission reiterates the challenge of a skills shortage in the green economy and considers “the main measures to address sectoral and macro-economic skills shortages are just at a preliminary stage”.³¹ This example epitomises the limits of the EU’s framework whose success is dependent on the implementation led by Member States. The ILO and Cedefop’s assessments underline the need for a stronger coordination of the skills responses and consider the lack of coordination to be caused by disparities among regions and institutions Member States can rely on.³² These elements demonstrate the limits of the implementation of the EPSR.

29 Sebastiano Sabato, Dalila Ghailani, Ramón Peña-Casas, Slavina Spasova, Francesco Corti and Bart Vanhercke, ‘Implementing the European Pillar of Social Rights: what is needed to guarantee a positive social impact’ (2018) European Economic and Social Committee 7.

30 Cedefop and ILO (n 5).

31 European Commission, Commission Staff Working Document: Country Report France 2020 accompanying the Communication on 2020 European Semester (2020) SWD2020/509; 65, available at: <https://ec.europa.eu/info/sites/info/files/2020-european_semester_country-report-france_en.pdf>.

32 Cedefop and ILO (n 5).

In this respect, it is important to intertwine the contribution of the EPSR in delivering a Just Transition with the concept of energy solidarity as analysed by Ewa Mazur.³³ The EU's action for a Just Transition is deeply linked to the application of this solidarity principle for territorial cohesion, but also in energy policy. Indeed, Article 174 of the TFEU gives a specific role to the EU for supporting the “areas affected by industrial transitions”.³⁴ The narrative developed illustrates this. The recently proposed Just Transition Mechanism that will be discussed in the following section intends to “leave no one behind”,³⁵ and to support the “regions most affected by the transition”.³⁶ It aims to deliver “a green transition based on solidarity”.³⁷ The examples of tools, introduced in this section, developed for supporting the Just Transition also show a concrete example of “sincere cooperation”³⁸ in climate and energy policy. Beyond these aspects, Ewa Mazur demonstrates how general principles provide a legal ground for EU actions and become legal principles. As general principles, the EPSR contribute to fill normative gaps³⁹ such as the lack of EU competences on social matters. The applications of the EPSR's principles in Just Transition policies, or more broadly, in developing an EU Social Policy, may be another illustration of general principles becoming legal principles. The Just Transition Mechanism proposed under the EU Green Deal may be analysed as strengthening the legal ground of both the energy solidarity and the EPSR by being a concrete implementation of its core principles.

4. THE EU GREEN DEAL: PLANNING A FAIR TRANSITION

4.1. The Just Transition Mechanism in brief

The von der Leyen Commission subscribes to this broad framework and considers the EPSR as a basis for ensuring “no one is left behind” in the ecological and energy transition. The proposal for a Just Transition Mechanism specifically aims to answer the challenge of shifting from polluting industries and energy sources to zero-carbon energy and industry. It targets European regions that are the most reliant on carbon intensive indus-

33 See Chapter 1 by Ewa Mazur in this volume.

34 Consolidated version of the Treaty on the Functioning of the European Union [2012], OJC 326/01.

35 European Commission, ‘Launching the Just Transition Mechanism - for a green transition based on solidarity and fairness’, available at: <https://ec.europa.eu/info/news/launching-just-transition-mechanism-green-transition-based-solidarity-and-fairness-2020-jan-15_en>.

36 Ibid.

37 Ibid.

38 See Chapter 2 by Ewa Mazur in this volume.

39 Ibid.

tries and fossil fuels. The rationale behind the establishment of such mechanisms at the EU level is twofold: the reluctance of some Member States to commit to the Green Deal, especially the climate neutrality objective by 2050 and the need to ensure social acceptability of climate and environmental policies. Therefore, it is both a political instrument and a policy tool.

The Just Transition Mechanism is built upon 3 pillars aiming to mobilise at least 100 billion of investments: a Just Transition Fund, a specific programme within InvestEU and a new public sector loan facility with the European Investment Bank.⁴⁰ A Just Transition Platform will also be established to provide technical assistance to the regions.⁴¹ Recently, the European Parliament and the Council approved the Just Transition Fund proposal, planning a budget of €17.5 billion from the EU budget and the recovery plan, NextGeneration EU.⁴² Other financial instruments, such as the ERDF and the European Social Fund, are also associated with the Just Transition Mechanism to support the targeted regions in the transition.⁴³ These regions will be identified at the national level, but the European Commission provides recommendations to Member States through the European Semester. Member States also have to elaborate Just Transition Plans for these regions that will be submitted for approval by the European Commission to grant access to EU funds.

Relying on the Cohesion Policy, the Just Transition Mechanism is reinforcing its key political functions, which are to increase the “attractiveness of the European union political project with acceding countries”⁴⁴ and to “counteract rising levels of Euroscepticism”.⁴⁵ The latter function, in relation to the Just Transition Mechanism, involves fostering social acceptability of climate policies both at the level of EU citizens and Member States.

40 European Commission, ‘Communication on the Sustainable European Investment Plan’ (COM2020/21).

41 Ibid 23.

42 Council of the European Union, ‘Climate neutrality: Council adopt the Just Transition Fund’ (2021), press release, 7 June 2021, available at: <<https://www.consilium.europa.eu/en/press/press-releases/2021/06/07/climate-neutrality-council-adopts-the-just-transition-fund/>>.

43 European Commission, ‘Proposal for a regulation establishing the Just Transition Fund’ (COM2020/22), 2020/0006 (COD).

44 Paolo Graziano and Laura Polverari, ‘The social impact of EU cohesion policy’, Chapter 8 in Bart Vanhercke, Dalila Ghailani, Slavina Spasova and Philippe Pochet, *Social Policy in the European Union 1999-2019: the long and winding road* (European Trade Union Institute (ETUI) and European Social Observatory (OSE) 2020) 167.

45 Ibid.

The proposal for the regulation of the European Commission to establish the Just Transition Fund underlines the importance of supporting training and reskilling programmes in the context of a Just Transition.⁴⁶ It is a part of the objectives of the Mechanism to provide support in this area and it is also specified that Just Transition Plans will have to “set out the social, economic and environmental challenges and give details on needs for economic diversification, reskilling and environmental rehabilitation as appropriate”.⁴⁷ Therefore, the Just Transition Mechanism in its objectives might answer the need for enhanced coordination at regional levels in terms of coordination of skills responses for the transition. In this respect, it is interesting to note how the Mechanism relies on existing financial instruments and policy tools. Funds are mobilised through different pre-existing means: the European Investment Bank, the InvestEU programme and European Regional funds. The Just Transition Platform is also a project that built upon the initiative of the Coal Regions Platform.⁴⁸ To the same extent, technical assistance for tailoring measures and projects will also be provided through the InvestEU Advisory Hub.⁴⁹ Thus, the strength of the Just Transition Mechanism as proposed by the von der Leyen Commission may be a way to combine those instruments to provide clarity on the available instruments that can support these regions in transition.

4.2. Key points of concern

Several points of concern can be emphasised in view of the implementation of the Just Transition Mechanism. As underlined by many analyses and case studies on Just Transition, the role of social dialogue is fundamental to shift the regional economy in this context.⁵⁰ In this respect, both the company and regional scales need to be considered when identifying the relevant stakeholders in order to plan the industrial restructuring in line with a concrete regional development project based on sustainability. The lack of engagement from employers in defining skills needs is among the factors limiting the success of Just Transition, demonstrating the importance of assessments of skills needs in

46 European Commission (n 79).

47 Ibid 4.

48 Op. Cit. European Commission (n 76).

49 European Commission (n 79) 5.

50 Marta Anczewska, Juliette de Grandpré, Nikos Mantzaris, Georgi Stefanov and Katie Treadwell, ‘Just Transition to climate neutrality: doing right by the regions’ (2020) WWF Germany.

Long-Term Energy Scenarios proposed by companies.⁵¹ The Just Transition Plans represent an opportunity for regions to involve their constituency in policy making but also to consider them as an essential component of the regional development. This planning process could be based on the notion of collective competences applied in the case of industrial restructuring. This notion is defined by the ETUC (European Trade Union Confederation) as “the various know-how developed within the work group, as a result of actually doing a job”⁵² and as a competence that “cannot be developed and exercised by a single individual”.⁵³ In the framework of industrial restructuring, identifying the collective competences and fostering the transfer of this know-how can be an important added value for the company.⁵⁴ Applied to the Just Transition cases, collective competences might be identified at the company and regional levels allowing to identify regional conversion projects based on existing skills and potential of the employees, but also of the constituency.

The existing EU policy tools already develop such an approach of regional development. Smart Specialisation Strategies elaborated to support research and innovation policies at regional levels are good examples. They show how regions targeted by the Just Transition Mechanism could assess this collective competence and potential at both scales, company and economic development of the regions. Indeed, a key component of Smart Specialisation Strategies is to “build on each country/region’s strengths, competitive advantages and potential for excellence”.⁵⁵ This strategic tool and the notion of collective competence could enable regions to develop their Just Transition Plans on the basis of the potential of the available human resources combined with other strengths and needs of the territory. It should also enable local authorities to identify skills gaps by gathering strategic data required to establish reskilling and upskilling pathways. To a certain extent, the notion of collective competence can be associated with the preservation of a cultural identity, on which some regions have chosen to elaborate their conversion strategies such as the

51 Oliver Sartor, ‘Implementing coal transitions: insights from case studies of major coal-consuming economies’ (2018) IDDRI and Climate Strategies 29, available at: <<https://www.iddri.org/sites/default/files/PDF/Publications/Catalogue%20Iddri/Rapport/201809-Synthesis%20Report%20Iddri-COALTRANSITIONS-def.pdf>>.

52 European Trade Union Confederation (ETUC), ‘Restructuring and collective competences: a guide for trade union representatives’ (2013) 13.

53 Ibid.

54 Ibid.

55 European Commission, ‘Factsheet: National/Regional innovation strategies for smart specialisation strategies’ (2014), available at: <https://ec.europa.eu/regional_policy/sources/docgener/informat/2014/smart_specialisation_en.pdf>.

Ruhr Region.⁵⁶ The work undertaken by the START (Secretariat Technical Assistance to Regions in Transition) in the framework of the Coal Regions in Transition Initiative demonstrates the application of such principles to the specific cases of Just Transition. Seven regions⁵⁷ currently receive this technical assistance thanks to which they elaborate regional profiles, and decarbonisation strategies.⁵⁸ These regional profiles gather data on the socio-economic situation, especially on employment such as education level and sectors of employment as shown by the profile of Asturias, Spain.⁵⁹ On the basis of these data, an analysis of the transition challenges and opportunities is provided. The document also identifies the legislative and policy initiatives that can serve the purpose of the regional transition. Such analysis contributes to identifying collective competences of regions, their comparative advantages and skills gaps. This process will allow for and support the deployment of efficient reskilling and upskilling programmes towards fossil fuel workers in these regions.

Alongside the elaboration of Just Transition Plans, another point of concern would be the reliance of the Just Transition Mechanism on national and regional authorities for implementation. Indeed, there is a risk for Just Transition initiatives to be impeded by national political landscapes. Monitoring instruments, especially the European Semester and monitoring mechanisms in EU funds management, are settled by the European Commission and could help monitor the specificities of these projects. Nevertheless, the implementation of the EPSR raised strong criticism and scepticism for its reliance on national and regional levels for the implementation of associated initiatives.⁶⁰ Criticisms are also raised on the assessments of social aspects in Country Specific Recommendations from the European Semester.⁶¹ Moreover, the allocation of funds by national authorities could also be questioned as it could vary as a function of political objectives. As part of the Just Transition Fund will be complemented by Member States' resources coming

56 Anczewska et al. (n 86) 17.

57 START provides its support to seven regions: Asturias, Spain; Jiu Valley, Romania; Karlovy Vary, Czechia; Małopolska, Poland; Megalopolis (Peloponnese), Greece; Midlands, Ireland; Silesia, Poland.

58 European Commission, "Secretariat Technical Assistance to Regions in Transitions", available at: <https://ec.europa.eu/energy/topics/oil-gas-and-coal/eu-coal-regions/secretariat-technical-assistance-regions-transition-start_en#resources-from-the-start-process>.

59 START, 'Regional Profile: Asturias, Spain' (2020), available at: <https://ec.europa.eu/energy/sites/default/files/documents/asturias_regional_profile_-_start_technical_assistance.pdf>.

60 Tricart (n 3).

61 Björn Hacker, 'A European Social Semester? The European Pillar of Social Rights in practice' (2019) Working Paper, European Trade Union Institute (ETUI) 59.

from the ERDF and ESF, it could be an issue if Member States do not intend to provide policy support to regions in delivering a Just Transition. This problem is epitomised by such cases as the Silesia region in Poland and the Southwest region of Bulgaria where the lack of political commitment for the ecological and energy transition impedes regional initiatives in planning a Just Transition.⁶² Nevertheless, the regional level is recognised as the most relevant level of action for this kind of policies, especially to cope with the skill challenges in spite of some shortcomings identified like the lack of coordination.⁶³

Thus, it appears essential to implement a robust governance mechanism for the Just Transition. The planned Just Transition Platform could answer this need as its objectives are to “provide technical and advisory support for the elaboration of the territorial transition plans through an expert network facilitating the sharing of information between Member States, regions, agencies and stakeholders”.⁶⁴ It can be expected that this platform will contribute to the organisation of the social dialogue, and elaboration of targeted labour market strategies in regions asking for this support. The coordination with local just transition centres that emerged in Europe to cope with this challenge could be fostered in the framework of this platform. A question on whether this European level platform should act as training providers for decision makers, but also for citizens can also be raised.

5. CONCLUSION

The case of fossil-fuel reliant regions, entailed in the Just Transition concept and policy, epitomises the interlinkages between social and environmental policies. Many challenges stemming from climate change mitigation policies that the whole society is expected to cope with in the context of decarbonisation pathways converge in these regions. As a result, they act as showcases for these pathways, in terms of challenges, threats and opportunities. The conversion of skills in these areas demonstrates this. This issue is particularly highlighted in fossil-fuel reliant regions but appears as a growing challenge for the whole society as shown by the assessments of the ecological transition on job creation analysed in the first section. Despite a limited level of competences on social policy, the EU manages to elaborate a broad framework for supporting Member States in coping with this skill challenge. The EU’s role is supported by the guiding principles stated by the Charter of Fundamental Rights and reaffirmed through the EPSR. These principles provide a sound narrative and more legal ground for the EU’s action in such social poli-

62 Anczewska et al. (n 86) 35–57.

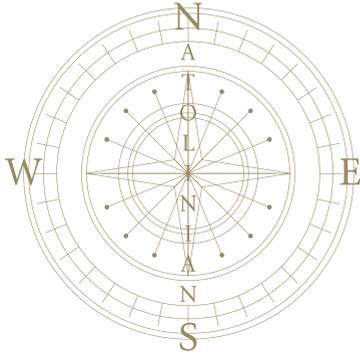
63 Cedefop and ILO (n 5).

64 European Commission (n 76) 23.

cies. While education is a supporting competence, the concept of Just Transition enables the EU to strongly rely on the cohesion and employment policies, which are part of its shared competences.

Thus, the process of Just Transition in these regions may be considered as a laboratory to explore and implement policy options aiming to meet the skill challenge. This process requires tackling the transition both at the individual levels of employees affected by the industrial restructuring and at the local economy level. In this respect, the role of life-long learning, reskilling and upskilling programmes is at the core of the Just Transition thanks to its ability to provide individual and tailored solutions responding to local development strategies. Through policy areas such as the cohesion and employment policies, the EU develops a significant expertise in capacity building for leading a transition that is particularly advanced in the case of Just Transition regions. Technical assistance provided under the Just Transition initiatives reinforces the ability of these regions to develop their comparative advantages and achieve their conversion. The interplay between Just Transition plans and other tools developed for the cohesion policy, such as the Smart Specialisation Strategies, may also need reinforcing in order to identify collective competences of regions, and their development opportunities. Such reinforcement could be highly relevant under the Just Transition Mechanism. However, the strong reliance on the national level for implementation of these policy instruments remains a significant challenge for the EU. A significant number of fossil-fuels reliant regions may not benefit from the Just Transition Mechanism because of their national governments' policy impeding their economic development.⁶⁵ The role of the Just Transition Platform will be fundamental in strengthening social dialogue with national and regional stakeholders on climate change mitigation policies. Therefore, the Just Transition Mechanism represents an opportunity for the EU to showcase and increase its capacity to implement social principles stated in the European Pillar of Social Rights while leading the decarbonisation of the EU economies. The implementation of Just Transition in the EU might contribute to determining the extent to which it will be able to develop an EU social model based on sustainability.

65 Kira Taylor and Vlagyiszlav Maksimov, 'National politics threatens just transition fund for coal-reliant regions' (Euractiv, 01 June 2021) available at: <<https://www.euractiv.com/section/economy-jobs/news/national-politics-threatens-just-transition-fund-for-coal-reliant-regions/>>.



PART VI

CHAPTER 12

Conclusion

BY EMER GERRARD & HELENA HAYMAN



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When we conceived of a conference on EU energy and climate policy back in 2019, we were eager to seize the tenth anniversary of the Lisbon Treaty as an opportunity to reflect on the successes and failures of the ten years of energy policy in EU primary law. By choosing the title “Shining a Light on Energy”, we wished to emphasise the significance of the moment in helping to illuminate lessons learned and the need to focus minds on the next steps ahead. Reflecting upon those ten years of energy policy post-Lisbon Treaty is not purely an academic exercise; rather, it is essential if policies are to improve and to deliver effectively to meet our critical goals, most notably, the pressing need to decarbonise our systems and to minimise dangerous climate change.

While energy policy was not entirely new to the European Union when the Lisbon Treaty introduced a specific article on the topic, it is an area that has evolved markedly in the last decade, as illustrated by the papers in this volume. From the pre-Lisbon policies focused on the internal market to the Climate and Energy Package of 2008/9 and the subsequent Clean Energy for All Europeans package, the EU’s approach to energy has been through many iterations, refinements and additions in the past years. Energy and climate policy are now intertwined more than ever. Even in the short time between the presentation of these papers in June 2020 and the publication of this book, the EU has come forward with a new target on climate, pledging to cut emissions by 55% by 2030. The “Fit for 55” package, designed to deliver this aim, was presented by the Commission in July 2021 and includes major commitments on energy, including revisions to legislation published as recently as in the Clean Energy Package in 2018.¹

There is much to learn from these various attempts at setting a framework for European energy policy. However, as the impacts of the climate crisis are already being felt across the globe, it is clear there is diminishing space for error. The last years have bleakly laid this truth bare, with blazing wildfires across Greece and the Mediterranean and devastating floods in Germany, the Netherlands and Belgium – not to forget the highest ever EU temperature of 48.8°C recorded in Sicily.² The UN Secretary-General has declared “code

1 Arthur Cox LLP, ‘European Green Deal takes shape in Fit for 55: What does it mean for Ireland?’ (22 July 2021), available at: <<https://www.arthurcox.com/knowledge/european-green-deal-takes-shape-in-fit-for-55-what-does-it-mean-for-ireland/>>.

2 Michael Le Page, ‘Sicily hits 48.8°C, the highest temperature ever recorded in Europe’ (New Scientist, 12 August 2021), available at: <<https://www.newscientist.com/article/2286967-sicily-hits-48-8c-the-highest-temperature-ever-recorded-in-europe/>>.

red for humanity”,³ confirming that greenhouse gas emissions are causing “widespread, rapid and intensifying” climate change.⁴ Such warnings only serve to highlight what was already known: that climate action at an unprecedented scale and speed is needed to prevent the most dangerous warming, preserve environments and protect populations.

Energy policy has a critical role to play in tackling the climate crisis. While it is important not to conflate energy and climate policies, it is now impossible to consider one without the other. This has been illustrated in this collection which touches on both areas. Its chapters illustrate the vastness of European climate and energy policy, touching on technical, legal, economic and social questions which range from the issue of energy diversification in the Baltic States to the governance shifts around renewable energy, and to the potential of climate litigation. The range of issues raised in this publication can, at first, appear overwhelming, but we hope that their diversity illustrates both the breadth of questions with which EU climate and energy policy must grapple, but also the depth of knowledge and experience that already has been amassed for the last ten years since the Lisbon Treaty and which can be drawn upon as we look to the future. To help bring these many ideas together and summarise the learnings within, we return in this final chapter to the questions posed in the introduction.

1. CHANGES: STRIKING THE BALANCE BETWEEN ENERGY SOLIDARITY AND SOVEREIGNTY

The Lisbon Treaty of 2009 brought a new approach to European energy policy by setting out not one but four provisions to which the Union should aspire: a functioning energy market, a secure supply, sustainability support (through energy efficiency and renewable energy) and promotion of interconnections. In addition, new principles emerged: “energy solidarity”, as well as the preservation of “energy sovereignty”, through the “caveat” of the right of Member States to determine their energy mix. The previous chapters have explored the EU’s attempts to achieve these multi-faceted goals, bringing to light some of the difficulties for policy-makers looking to implement them.

The question of the EU energy market and, alongside it, the promotion of interconnec-

3 United Nations, ‘Secretary-General Calls Latest IPCC Climate Report ‘Code Red for Humanity’, Stressing ‘Irrefutable’ Evidence of Human Influence’ (9 August 2021), available at: <<https://www.un.org/press/en/2021/sgsm20847.doc.htm>>.

4 IPCC, ‘Climate change widespread, rapid, and intensifying – IPCC’ (9 August 2021), available at: <<https://www.ipcc.ch/2021/08/09/ar6-wg1-20210809-pr/>>.

tors, is perhaps the least-explored provision of the Lisbon Treaty in this volume. This may speak to its success – it is hard to deny that the EU has made significant progress when it comes to implementing a functioning energy market – although it should be acknowledged that this pace has not been homogenous across all states (consider, for example, the obstacles presented in Chapter 3 for the Baltic States). Furthermore, while a liberalised energy market may have been set as a goal in itself, as Blin explores in Chapter 10, it is not evident that this has led to a tangible benefit for consumers, with competition often ultimately failing to deliver lower energy prices for consumers. These disparities generated through the implementation of a functioning energy market raise questions about whether such a policy goal should remain the central tenet of future energy policy.

Several papers in this volume have also highlighted how the EU's pursuit of a liberal energy market has come into conflict with other policy aspirations – notably that of sustainability. This conflict is most clearly illustrated in Chapter 8, through the case study of renewables integration into the electricity market. Leninger demonstrates how sustainability policies, like the subsidisation of renewable energy, coupled with their inherently near-zero marginal cost and a liberalised electricity market which privileges by merit order, erode effective price signalling and ultimately crowd out necessary electricity suppliers, undermining energy availability. As Leninger argues “EU energy market fundamentals are challenged by variable renewable generation”.⁵ The emergence of capacity markets as a means of responding to these challenges offers a solution – albeit a short-term one. If renewables are to increase their share of the energy supply to the extent which is needed to deliver a net-zero economy, a rethinking of the electricity market may be needed. Fundamentally, it may mean a move away from a liberal energy market that views energy as purely a commodity, to one viewing it as a service, which incorporates the significant value of sustainability and resilience to society and consumers. The EU's attempts at carbon pricing do reflect early attempts to do so, but so far these have failed to go far enough to lead to a major shift in the market.

Building consensus around mechanisms and governance has also been a limiting factor in implementing provisions for a cleaner energy system – even within the relatively narrow scope of the Lisbon Treaty. Although all the recent energy and climate packages have included measures on renewable energy and energy efficiency, as ambition in this area has grown, so has the divergence of support across the Member States. Bruhin explores this in Chapter 6. Despite the attempts of the 2020 framework on climate and energy to pursue bold goals that all Member States were (broadly) on board with, the impact of

⁵ See page 178.

rising anti-EU populism and overall greater disunity across the bloc has made consensus more difficult to achieve, forcing the Commission to take a more cautious approach when proposing the 2030 framework. This raises questions about the extent to which the EU may succeed in implementing provisions for an energy transition that are genuinely transformational. With the exception of energy efficiency, which remains a key area of energy policy that the EU has failed to implement effectively,⁶ the 2020 targets – which aspired to a 20% increase in energy efficiency, a 20% reduction in greenhouse gas emissions and a 20% share of renewable energy – have largely been met. However, the shift in governance described by Bruhin puts into question the ability of the EU to enforce and meet its targets for 2030 and beyond, given that they are not binding at the national level. We will revisit this question later in this chapter.

Turning to the issue of energy security, in Chapter 3, Riva explores the controversies behind this concept through the profound yet varied impact it has had on the Baltic States. Through the lens of securitisation theory, he explores how energy security – in this case, in relation to dependence on Russia – is perceived differently according to whether or not it is constructed as a threat to a state. This conclusion points to a challenge underlying the energy provisions of the Lisbon Treaty: what does it mean to speak of a “secure supply”? Various authors have sought to conceptualise the term and point to a breadth of indicators that might be at play: from physical availability to affordability, to technical capacity and environmental security.⁷ In the absence of a shared understanding of energy security across the Member States, the ability to fully implement the Lisbon Treaty’s provision in this regard remains questionable, as does the ability for the EU to reach a consensus on policy responses. Such a challenge has become evident in the controversy surrounding the Nord Stream 2 pipeline.

The idea of ‘energy solidarity’ is equally difficult to conceptualise. It was introduced in the Lisbon Treaty and appears throughout several chapters of this collection. In Chapter 2, Mazur explores its significance and development as a concept since its first inclusion, noting how, for a significant part of the last decade, the principle has been trapped in an “interpretative dilemma”, diminishing its ability to impact policy. However, as Mazur assesses, the 2020 OPAL judgment “freed” the principle and confirmed it as both binding

6 EEA, ‘Trends and Projections in Europe 2020’ (2020) 13 EEA Report 9.

7 Benjamin Sovacool, ‘The Methodological Challenges of creating a comprehensive energy security index’ (2012) 48 *Energy Policy* 835-840, available at: <https://www.sciencedirect.com/science/article/pii/S0301421512001334?casa_token=Q4nS65KZrFCAA AAAA:L65BU2TwyMflvV8KxTur6MrlTJrtRExMnRtRICdtxdiH5aHhancMISkvppezUM0RZcdaXsyBYg#bib6>.

and constitutional – leaving space for it to be drawn on in future in cases where Member States disregard the interests of other Member States. Time will tell whether the principle gains momentum and what its implications may mean in the long term.

The principle of “energy solidarity” is limited further due to the fact it easily comes into conflict with the right of Member States to choose their energy mix, another fundamental provision, or ‘caveat’, of the Lisbon Treaty. The Lisbon Treaty’s text on energy has often been seen as a ‘tug-of-war’ between solidarity and sovereignty, and it is a dilemma that the EU continues to grapple with when making decisions or implementing policies. While the introduction of energy into the Lisbon Treaty as an area of shared competence was certainly an attempt to enable the shaping of more coherent and strategic European energy policy – shifting the political balances towards a more centralised approach – the caveat on shaping energy mixes has proved a continued obstacle to this.

This question of political and institutional balances is explored in detail by Mathews in Chapter 4, who argues that the uncertainty created by the caveat that Member States maintain the right to shape their energy mix makes it unclear whether overall the Lisbon Treaty’s energy provisions actually increase EU legislative competency or not.⁸ She argues that, thus far, neither the Court of Justice of the European Union (CJEU) nor the more recent 2018 Regulation on the Governance of the Energy Union and Climate Action have offered much clarity on the issue. Mathews concludes that while the Governance Regulation’s recommendations remain non-binding, these are a tool of political pressure and can be used to deepen cooperation. This compromise may be a way to recognise the diverse challenges faced by different Member States, yet it remains to be seen if it will ultimately deliver the right balance needed to achieve results for energy policy.

Enhancing cooperation and building consensus is a prerequisite for developing a coherent energy policy that will see us into the next decades, yet there is always a fine balance to be struck between this and the varying interests of Member States. The papers in this collection have highlighted some of the difficulties in implementing sometimes conflicting goals, particularly in the complex institutional setup of the European Union. While the provisions on the energy market have more or less been implemented, those on security and sustainability of supply remain held back by interpretative challenges and by conflicting member state interests. Finding consensus and driving forward policy in an increasingly finely balanced system may require the pursuit of more integrated policy

⁸ Marel Johnston, ‘Ad Lucem? Interpreting the New EU Energy Provision and in particular the Meaning of Article 194(2) TFEU’ (2013) 22 (5) *European Energy and Environmental Law Review* 197.

goals that do not pit one goal, or one member state interest, against another. Ultimately, it may require a rethinking of the existing provisions of the Lisbon Treaty to unlock new avenues for European energy policy.

2. DRIVERS: CRISES AS BOTH CATALYSTS AND ROADBLOCKS FOR AMBITION, GOVERNANCE AND A JUST TRANSITION

The ambitions put forward by the introduction of energy policy in the Lisbon Treaty were varied and challenging – and have created many unresolved questions around political-institutional balance. Yet, the extent of the challenge of developing a coherent energy policy is made even greater when one considers the wider context and the series of challenges and crises that the last decade has presented to the EU and the world. In examining the ambition and governance of European energy policy, many of the papers in this collection have reflected and delved into the significance of such events.

The most influential of these events reflected in the pages of this collection is the Eurozone crisis. Undoubtedly, this crisis had a significant impact on EU internal governance, causing institutions to re-think their purposes and processes, particularly for those dealing with financial matters. In Chapter 5, Smoleńska and Tokarski chart the evolution of the European Central Bank's (ECB) mandate from a rigidly monetarist approach to one that introduced several non-standard monetary policy measures in response to the financial crisis, broadening its remit and tools available. They argue that the crisis can be seen as a learning phase, preparing the ECB to incorporate climate action into its mandate and to address future challenges more effectively. The ECB now presents climate change as a threat to its core *raison d'être* of maintaining price stability, which should push forward its ability to establish a more sustainable financial system and drive greener investments, including energy. In this way, we can see the role of the Eurozone crisis in catalysing change within institutions, encouraging them to adapt to tackle the challenges ahead.

However, the impact of the Eurozone crisis on ambition, climate or otherwise, can be debated. Several authors have pointed to its significant impact on the governance of European energy policy. In particular, as explored in Part 3 of this book, it has been argued that in the aftermath of the Eurozone crisis, the idealist aspirations of EU climate and energy policy in the late 2000s were confronted by pragmatic challenges around cost and implementation. Maintaining or increasing the legally binding commitments of the 2020 Climate and Energy Package set in 2008 (and, at a global level, those of the Kyoto Proto-

col) became far less palatable to the Member States who were dealing with historic levels of public debt, rising unemployment rates and decreasing tax returns.

The shift in governance explored by Bruhin and Van Vliet in Chapters 6 and 7 of this collection illustrates the most apparent manifestation of this challenge and the compromise found across the bloc to enable the continued pursuit of ambitious climate and energy policy. Bruhin's analysis in Chapter 6 demonstrates how the economic consequences of the Eurozone crisis – including the impact on the cost of energy – made the Member States far more reluctant to support a system that would set binding targets for renewable energy, which was seen to be significantly more costly than the alternative at the time. As such, the compromise found, paralleled at a global level through the UNFCCC negotiations, was a shift towards a more flexible governance system for renewable energy (and for climate), replacing national binding targets with overarching binding targets only at the EU level, without legally-binding targets for the individual Member States.

Some, like Bruhin, have viewed this shift as a weakening of energy policy and of ambition – recognising it as the necessary compromise to any agreement in the first place. Others, like Van Vliet in Chapter 7, consider the outcome to be mixed. Through the exploration of the implications of this shift in governance on the externalisation of renewable energy policy, Van Vliet considers that while the shift towards more flexible governance may reflect reduced “bindingness”, in practice, the greater level of oversight and the institutionalisation put in place to enable European institutions to respond to the risks of poor implementation of climate and energy policies and targets might ultimately lead to a greater level of ambition and of effective action. Interestingly, Bruhin parallels this oversight mechanism (that of National Energy and Climate Plans) to that of the European Semester, the reporting mechanism proposed by the European Commission as a way of ensuring increased fiscal stability in 2010, proposing that the response to the Eurozone crisis and its implications on the fiscal policy provided inspiration for climate and energy policy. However, while the governance regulation for meeting climate targets can be considered strong on processes and procedures, it may lack enforcement rules which many consider paramount.⁹ Ultimately, the long-term impact the crisis has had on policy delivery remains to be seen.

9 Marie Vandendriessche, Angel Saz-Carranza and Jean-Michel Glachant, “The Governance of the EU’s Energy Union – Bridging the Gap?” (2017) 15 *EUJ RSCAS*, available at: <<https://cadmus.eui.eu/handle/1814/48325>>.

In more recent times, the EU's desire to push forward ambition has been made clear. Since the presentation of the European Green Deal by Commission President Ursula von der Leyen in December 2019, in terms of ambition at least, the EU's dedication to leading the way on climate action is undeniable. This is evident in the addition of a binding objective of carbon neutrality into law and the scale of the innovative, sometimes controversial, policies, such as the first-of-its-kind carbon border adjustment mechanism (CBAM) and the addition of buildings and road transport to the emissions trading system (ETS). As some have argued, the language and scale of ambition used by the drafters of the European Green Deal suggest something greater than a 'strategy' or 'agenda' and instead suggest a desire for 'a new societal contract for Europe', even a new *raison d'être*.¹⁰ The desire to find this new vision can be in part attributed to a decade of existential crises for the Union.¹¹ Alongside the previously mentioned Eurozone crisis, we can include Brexit, an erosion of multilateralism, the growth of political extremes and the refugee crisis. While the climate crisis represents another shock, the European Green Deal enables the EU to use it as an opportunity to strengthen its role as a climate leader and possess a more coherent narrative going forward. However, it also puts even more pressure on the Union to succeed in meeting these challenges, if it is to continue justifying its role within the world.

Yet, since the Commission's Green Deal was presented in December 2019, the world has been shaken by the Covid-19 pandemic. The EU's success in tackling the latest crisis has been mixed, with initial missteps raising fundamental doubts over the existence of solidarity when an emergency hits, and constraints to the internal market highlighting the ultimate fragility of the Commission against the wishes of Member States. Nonetheless, the pandemic has provided an opportunity to expand the scope of EU and government powers, with unprecedented fiscal measures being implemented in many Member States, some of which have been channelled towards "green" investments and to support a "green recovery", including supporting renewable energy. The Commission has labelled the European Green Deal as 'our lifeline out of the COVID-19 pandemic',¹² and introduced the Next Generation EU package with an additional €800+ billion stimulus package. A considerable 30% of the long-term budget of Next Generation EU is dedicated towards fighting climate change, while almost €11 billion of this is targeted towards the Just Tran-

10 Hosuk Lee-Makiyama, 'The EU Green Deal and Its Industrial and Political Significance' (2021) 1 ECIPE, available at: <https://ecipe.org/wp-content/uploads/2021/02/ECI_21_Policy-Brief_01_2021_LY02.pdf>.

11 Ibid.

12 European Commission, 'A European Green Deal', available at: https://ec.europa.eu/info/strategy/priorities-2019-2024/european-green-deal_en#timeline.

sition.¹³ Policymakers may have been conscious of the ‘missed opportunity’ to tie climate measures to the 2008 financial crisis stimulus.¹⁴ The Member States were due to submit their recovery and resilience plans, to access the bulk of these funds, by April 2021. Early analysis indicates that, of those who have submitted, most have dedicated a substantial proportion to ‘green’ spending.¹⁵ Nonetheless, a number of countries – including Hungary, Poland and Romania – are, at the time of writing, yet to receive approval for their plans from the Commission. Time will tell how successfully these funds can be dedicated to pushing forward the EU’s energy and climate agenda.

Another important element to consider is the major impact that crises have on citizens. In Chapter 11, Renault points out that all crises and their related policy responses have a social impact, often hitting the most vulnerable in society first. Both the Eurozone crisis and the Covid-19 crisis demonstrate this, through rising costs of living, low economic growth and marked disparities across the bloc. Such short-term consequences inevitably limit the ability of citizens and governments to focus on longer-term challenges like climate – particularly those challenges that involve thinking beyond one’s borders. They also reduce the willingness of citizens to support political measures that transfer an additional burden to those already hard-hit. In Part 5 of this collection, Renault and Blin both explore this challenge of a “Just Transition” and how the EU might look to develop successful energy and climate policies by considering their social impact – we will return to these ideas later in the chapter.

These questions of the social impact of crises are coming to light amidst an unfolding energy crisis in Europe, which has seen energy prices rise for winter 2021–2022 for consumers across the continent. Again, attention is being focused on the burden placed on those who can least afford this cost. Blin argues in Chapter 10 that the liberalisation of energy markets has ultimately failed to lower prices; accordingly, other mechanisms may need to be considered, to ensure that the willingness for climate action witnessed on Europe’s streets and in the ballot boxes over recent years is not eroded by inequality and the harsh reality of a cold home.

13 European Commission, ‘The EU’s 2021-2027 long-term Budget and NextGenerationEU – Facts and Figures’, 11, available at: <<https://op.europa.eu/en/publication-detail/-/publication/d3e77637-a963-11eb-9585-01aa75ed71a1/language-en>, p11>.

14 Aleksandra Čavoški, ‘An ambitious and climate-focused Commission agenda for post COVID-19 EU’ (2020) 29 (6) *Environmental Politics* 1112–1117.

15 Zsolt Darvas et al., ‘European Union countries’ recovery and resilience plans’, (Bruegel, 28 September 2021) <<https://www.bruegel.org/publications/datasets/european-union-countries-recovery-and-resilience-plans/>>.

3. CHALLENGES: MATCHING CLIMATE AMBITION WITH ACTION THROUGH INTEGRATED POLICIES

This brings us to the question of the climate crisis, and what can be learned as we look to confront and minimise the worsening impacts of climate change in the next decade. In 2019, in the context of COP25 in Madrid, the EU came forward with a new commitment: climate neutrality by 2050. This is a somewhat ambiguous commitment, but one which comes with the ambition to reach net-zero emissions by 2050. "Net-zero" is a pledge that has become a beacon for climate policy – and by consequence, for energy policy – with 124 other countries, as well as numerous cities, businesses and organisations, having made the same commitment at the time of writing.¹⁶ Evidently, the quest of reaching climate neutrality by 2050, is as crucial as it is arduous. The costs, socially, environmentally and economically, of failure are incalculably high. However, while the ambition is often there, actions to deliver on these commitments – whether in the energy sector or beyond – is still lacking.

Compliance and implementation continue to be key challenges in terms of delivering against ambitious climate goals. The overarching EU targets for emissions reductions, and in particular for renewable energy, are ambitious. However, in light of the shift in governance towards a bottom-up approach discussed earlier in this chapter and in Part 3 of this collection, ensuring that Member States deliver on their non-binding targets for renewable energy will be difficult. Oversight mechanisms and governance processes have been put in place to attempt to do so, but it remains unclear if they will effectively hold states to account. The same goes for wider climate commitments – a lack of tools for enforcement may prevent grand ambitions from being met.

However, other options for ensuring implementation may lie ahead. In Chapter 9, Roguska explores the potential of the emerging field of climate litigation as a means of ensuring compliance around climate targets – noting that the EU is particularly well placed to test this option given its character as a multilateral, rules-based organisation. Recent cases like *Urgenda vs. the Government of the Netherlands* demonstrate that climate litigation can be an option for driving enhanced ambition and action on climate; however, such judgements are still in their infancy. The lack of a clear legal basis or precedent and the ongoing need to balance climate action as a priority with other emerging issues like economic wellbeing, just transition and social development, continue to present obstacles

16 Visual Capitalist, 'Race to Net Zero: Carbon Neutral Targets by Country' (9 June 2021), available at: <<https://www.visualcapitalist.com/race-to-net-zero-carbon-neutral-goals-by-country/>>.

to litigation as a clear route. Furthermore, as Roguska highlights, it is important to not view litigation as an alternative to government-led action and ambition, as it risks undermining the very systems that are being relied upon to put in place the actions needed. Nevertheless, it does offer a new tool in the fight against climate change and one that will continue to be tested by organisations and activists in order to understand its potential and limits.

It would be unfair to put all the blame at the door of politicians – technical challenges for the energy sector in implementing the necessary measures to deliver on climate neutrality remain huge. Chapter 8 highlights this by looking at the technical challenges for integrating renewable energy into the grid. The intermittency of renewables, coupled with the limited options for storage, make grid stability and resilience a real challenge for policymakers. Leninger explores some of the potential options to respond to this, including the promotion of distributed grids or stronger demand-side management, yet the fact remains that, if we are to meet the growing demand for clean electricity driven by the transition, investment in infrastructure and emerging technologies – alongside resources to bring them to commercialisation – remain paramount.

This points to another ongoing challenge in meeting ambitions – the continued need to mobilise flows of finance to drive investment from not only public but also private sources, in order to meet the costs, which, while certainly lesser than the costs of inaction, remain high. Attempts have been made, but finance remains severely lacking to deliver the critical infrastructure needed for a net-zero future. Channelling finance away from fossil fuels is also essential. Financial institutions, including central banks, have a key role to play here, as demonstrated by Smoleńska and Tokarski in Chapter 5. While recognising that the ECB has started to move away from its pre-financial crisis, strictly monetarist position and has made several strong statements on climate, they argue that the principle of market neutrality – which demands that asset purchases reflect the general structure of the market – is not conducive to the green transition. They call for the ECB to depart from market neutrality to create the paradigm shift needed to deliver climate action.

However, it is also important to recognise that the EU does not exist within a bubble and that climate change is a global, cross-border problem. While the EU has long attempted, with varying levels of success, to pitch itself as a climate leader and to influence global progress in this regard, EU success on climate change does not mean that the rest of the world will follow. In Chapter 7, Van Vliet explores the question of the EU's influence on the climate policy of neighbouring states through the Energy Community. However,

as research demonstrates, a lack of clear data coupled with reduced capacity and limited institutional ability to implement climate and energy policies makes it challenging for the EU to shape energy governance externally, particularly in any substantive form. Nevertheless, Van Vliet's paper does shed light on some of the attempts made by the EU to guide climate policy elsewhere.

While negotiations, rhetoric and soft power tools such as that of the Energy Community framework have enabled the EU to bring along other countries in addressing climate change, the absence of "hard" measures has limited this ability. The EU is now looking to address this through the proposal for the long-discussed Carbon Border Adjustment Mechanism (CBAM) as part of the "Fit for 55" package, which has the dual aim of securing the competitiveness of EU industry and avoiding carbon leakage. The Commission's current proposal intends to see importers reporting emissions embedded in their goods by 2023 before a definitive system becomes fully operational in 2026.¹⁷ However, the extent to which this new approach will deliver on emissions reductions, rather than simply creating additional bureaucracy, remains to be seen.

For all the technical, economic and political challenges that remain to be overcome, none may be greater than the social dimension of the climate transition. As explored throughout numerous chapters of this publication, climate policy does not exist in isolation from people and communities. Citizens play a key role in legitimising and implementing climate policies, and a major challenge lies in ensuring this, given the risk of discontentment reflecting in electoral cycles and thereby undermining long-term, sustained action on climate. Attention was focused on this dynamic through the *gilet jaunes* protests in 2018.

Yet, achieving a truly "just transition" goes beyond placating lobby groups or vocal citizens. In Chapter 10, Blin explores energy poverty and the impact that the transition is already having through rising costs of energy for Europe's poorest – pointing to the need for a greater understanding of the social impact of climate change policies. As Renault explores in Chapter 11, great potential lies in expanding the link between the social and climate agendas in a progressive way, which recognises the differing social impact of the green transition. The current Commission is already exploring this through its Just Transition Mechanism, which incorporates a "Just Transition Fund" (JTF). The JTF allocates a total of €17.5 billion to retrain workers, promote social inclusion and advance the deployment of solutions needed for the climate and digital transitions, amongst other

17 European Commission, 'Carbon Border Adjustment Mechanisms: Questions and Answers' (14 July 2021), available at: <https://ec.europa.eu/commission/presscorner/detail/en/qanda_21_3661>.

goals. The additional recent proposal for a Social Climate Fund announced as part of the “Fit for 55” package may yet provide support to vulnerable citizens through the transition and help mitigate costs for those most exposed to the rising price of energy.¹⁸ However, if climate policies are genuinely to succeed, they require close integration with social policy, moving beyond the EU’s current focus on coal regions towards a genuinely progressive social component, that includes considerations of poverty and equity.

Understanding, aligning, and ultimately shaping parallel policy agendas is key to delivering on climate ambition. While the mainstreaming of climate goals and policy, or “climate policy integration” is already happening within the EU, this process has been slow and shallow, and generally insufficient to meet long-term climate goals.¹⁹ As we have demonstrated through this collection, climate change has consequences reaching far beyond the remit of energy policy and which must lead other policy areas to rethink business-as-usual approaches and challenge the status quo. For the market, it means considering approaches that can recognise and embed the value of a decarbonised energy system (and of a ‘greener world’); for security, it means recognising the threats that climate change poses for a secure energy system and a secure world; and for social policy, it means pursuing policy options that do not pit social wellbeing against environmental preservation but understand one as an inherent part of the other and thus can address these through joint, symbiotic approaches. Integrating climate policy effectively requires going beyond the consideration of climate targets across sectors, towards a new “principled priority” approach which recognises that environmental wellbeing – achieved, in part, through a sustainable, net-zero energy system – is a prerequisite for a society that can meet the needs of its citizens and of the planet as we progress into the 21st century.

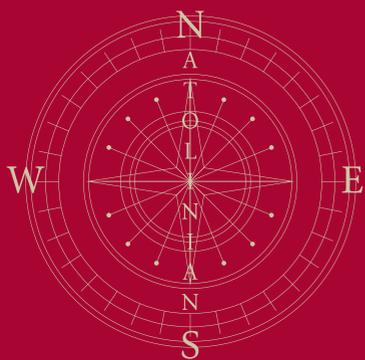
4. SHINING A LIGHT ON ENERGY: CONNECTING DIVERSE PERSPECTIVES TO CONFRONT THE CHALLENGES AHEAD

We hope that, through the diverse and broad-ranging chapters of this collection, we have been able to shed some light on the debates and developments around EU energy policy from the last decade. Some of these remain highly contentious and continue to play out in the current day – including “energy solidarity”, social policy or the role of the ECB in shaping climate policy. We are seeing such theoretical debates reflected in practice, in the

18 European Commission, ‘Social and distributional aspects Factsheets’ (14 July 2021), available at: <https://ec.europa.eu/commission/presscorner/detail/en/fs_21_3677>.

19 Claire Dupont, ‘Explaining climate policy integration: policy, politics, context and process’ in Claire Dupont (ed), *Climate Policy Integration into EU Energy Policy* (Routledge 2015).

discussions around Nord Stream 2, at the COP26 negotiations in Glasgow and with the ongoing gas crisis. By bringing these wide-ranging ideas together in one volume, we hope that connections have been drawn between areas that may at first seem improbable partners. However, it is exactly through this diverse, transdisciplinary approach to energy and climate policy that the best lessons can be learned and the most valuable ideas formed; these will then be instrumental to confronting the challenges of the future. Dealing with these challenges in tandem, and not through siloed approaches, is key if we are to move towards an energy system (and a wider climate policy landscape) that is fit to deliver on the EU's climate aspirations and a secure, net-zero future.



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The College of Europe, established on the initiative of the Hague Congress, dates back to 1949 and is the oldest postgraduate institute of European studies. The founding idea was to establish an institution where university graduates from many different European countries could study and live together in preparation for careers related to European cooperation and integration. In 1949, the first campus of the College of Europe was established in the city of Bruges, in Belgium.

Since 1992, the College of Europe in Natolin, located at the EU's Eastern border, is the ideal place to study the EU's relations with its neighbours, and its enlargement process. Through its two Academic Chairs focusing on the European Neighbourhood Policy and European Civilization, the College fosters a transnational and interdisciplinary intellectual exchange among academics, practitioners, graduate students, and other members of society. The College of Europe in Natolin operates through innovative teaching and research approaches to multiple areas of interest, including in particular, energy and climate transition, migration, digital media, knowledge-based journalism, or interactions between politics and technology. It focuses on enhancing employability, tackling skill gaps and mismatches, and supports an inclusive higher education culture. The academic, capacity-building, and international cooperation programmes of the College of Europe in Natolin directly serve students of around 30 nationalities experiencing campus life and instruction either on-site, through study visits, or via blended-learning. In addition, it reaches society at large with a number of new annual audience members through its communication and dissemination activities.

In 2018, the College of Europe in Natolin launched a new component of its offer known as Nests. The Nests are situated on the various orbits of the core and thus are able to provide the interdisciplinary bonding with the ever-changing realm of Europe, the European Union and their interactions with the world. The volatile nature of such interactions is also reflected in the flexibility and adaptability of the concept of Natolin's Nests which mixes academic teaching, policy discussions, workshops, and extracurricular activities to focus on contemporary topics.