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## 2. Competences in EU energy policy

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### 1. EUROPEAN INTEGRATION AND ENERGY

Energy has been a central area of EU law and policy from the very beginning. Two of the three founding treaties focused on energy: the now extinct European Coal and Steel Community Treaty and the European Atomic Energy Community Treaty. In addition, the more general European Economic Community Treaty included energy within its scope. One of the notorious early judgments from the European Court of Justice, *Costa v Enel*,<sup>1</sup> from 1964, known by EU law specialists for establishing one of the most significant general principles of EU law – the supremacy of EU law over national laws – concerned energy and confirmed the role of the energy sector as part of the economic activities covered by EU law and policy.<sup>2</sup> However, as is always the case, law only functions within the boundaries set by politics, and in those early days political sensitivities surrounding the energy sector meant that in practice it was not subject to the EU market integration project.<sup>3</sup> In those early days, the energy sector was very much a politically loaded sector; energy was perceived as an activity where the state had a central role. Both the electricity and natural gas markets were organized under state-owned or licensed monopolies and divided along the borders of EU Member States. No internal market in energy was in place, nor planned. The 1956 Spaak report had already concluded that electricity and gas were nationally organized and therefore integration would not make sense. However, while the same report also excluded the hydrocarbon sector from the area of potential integration, as the sector was controlled by multinational oil companies, it did propose the atomic energy sector as a subject suitable for integration, as it would facilitate overcoming the significant financing requirements.<sup>4</sup>

For the reasons set out above, energy was consciously excluded from the process of European integration.<sup>5</sup> For a long time, the energy sector and national energy monopolies were protected from the effects of EU law. In the late 1980s, the EU's approach to the energy sector changed. This was largely impacted by the developments in the United States and United Kingdom and the positive early experiences of these countries. A state-controlled sector started slowly changing into something more market-oriented. Faith in market forces was exceptionally strong in the 1980s and 1990s. US companies were advocating the benefits of free competition and the free market approach in the EU. These positive examples of successful market liberalization encouraged other European leaders to begin gradually opening up national markets to competition. The idea was that, as a result of such competition, the markets would become more efficient and consumers would benefit both from lower prices and from the freedom to choose from a wider range of suppliers. Governments could step aside and limit their role to ensuring the proper functioning of the market.<sup>6</sup>

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1 6/64 *Costa v Enel* [1964] ECR 585.

2 This was later confirmed in a number of cases. For example, C-393/92 *Almelo* [1994] ECR I-1477; C-157/94 *Commission v Netherlands* [1997] ECR I-5699; C-159/94 *Commission v Italy* [1997] ECR I-5793; C-158/94 *Commission v France* [1997] ECR I-5819.

3 Even today, the energy sector continues to be an area where political priorities sometimes supersede the strict application of EU laws. For an example, see C-573/12 *Ålands Vindkraft* (ECLI:EU:C:2014:2037). For a detailed analysis of the case, see S.L. Penttinen; 'Ålands Vindkraft AB v Energimyndigheten – The Free Movement Law Perspective', OGEL 3 (2015), <https://www.ogel.org/>.

4 Spaak Report. Available at: <https://www.cvce.eu/en/education/unit-content/-/unit/1c8aa583-8ec5-41c4-9ad8-73674ea7f4a7/dee61d43-7dc3-4383-a3dc-eb1e9f2e78db> (accessed 17.12.2023), pp. 126–7.

5 For an overview of the early years of the EU, see T. Daintith and L. Hancher, 'The Management of Diversity: Community Law as an Instrument of Energy and Other Sectorial Policies', 4(1) *Yearbook of European Law* (1984), pp. 123–67. The historical development of EU energy law is examined in detail in K. Talus, *EU Energy Law and Policy: A Critical Account* (Oxford University Press 2013).

6 See A. Belyi and K. Talus (eds), *States and Markets in Hydrocarbon Sectors* (Palgrave 2015) and K. Talus, *EU Energy Law and Policy: A Critical Account* (Oxford University Press 2013).

In the 1990s, the various directives constituting the so-called First Energy Package<sup>7</sup> were adopted. These reflected the political realities of the 1990s and had an unambitious content. The First Energy Package did, however, lay down a regulatory basis for future regulation of this area. Negotiated or regulated third party access to electricity and gas networks and functional unbundling of network and other energy sector activities were among the key issues covered in the directives. However, it was clear that these first steps were not in themselves sufficient to create a functioning energy market. At issue was only the initial phase, moving towards a competitive market.

In 2003, the Second Energy Package<sup>8</sup> was adopted. Its aim was to speed up the process of creating competitive gas and electricity markets.<sup>9</sup> The new directives and regulations contained in it included more detailed sector-specific obligations, which were intended to achieve further liberalization of the European energy markets. The new legislative instruments included provisions on national energy market authorities, regulated third party access to networks, and functional and legal unbundling, as well as creating a regulatory framework for cross-border interconnectors.

The Third Energy Package was adopted in 2009.<sup>10</sup> It introduced a raft of new regulations and included internal market directives for electricity and gas with rules on ownership unbundling and new powers for national regulators, regulations on access to electricity and gas networks, and on the establishment of a new, EU-level energy regulator: the Agency for the Cooperation of Energy Regulators (ACER). In addition to these regulatory instruments, the Third Energy Package created a competence to enact further legislation in respect of issues relating to the functioning of the energy markets. This is to be done through a new type of instrument in EU energy law, known as ‘network codes’. These network codes have already been issued in different sub-sectors of the energy markets.<sup>11</sup>

The Energy Union was launched in 2015 with a view to reform European energy governance, policy and regional cooperation and streamline these with long-term climate protection goals. The Energy Union is based on the three objectives of the EU energy policy: security, sustainability and competitiveness. It has five “guiding dimensions”, intended to assist in the realisation of these objectives: (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; and (5) research, innovation and competitiveness. These are further supported by 15 action points and 43 initiatives.<sup>12</sup> The first specific proposals to have been put forward under the Energy Union flag concerned security related issues, natural gas and the external elements of EU energy law and policy: gas

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7 This package included Directive 98/30/EC of the European Parliament and of the Council of 22 June 1998 concerning common rules for the internal market in natural gas (OJ L 204, 21.7.1998, p. 1) and Directive 96/92/EC of the European Parliament and of the Council of 19 December 1996 concerning common rules for the internal market in electricity (OJ L 27, 30.1.1997, p. 20).

8 This package included 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 (OJ L 176, 15.7.2003, p. 57); Directive 2003/54/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity and repealing Directive 96/92/EC (OJ L 176, 15.7.2003, p. 37); and Regulation (EC) No 1228/2003 of the European Parliament and of the Council of 26 June 2003 on conditions for access to the network for cross-border exchanges in electricity (OJ L 176, 15.7.2003, p. 1).

9 The 2003 package is also called the ‘acceleration package’.

10 Regulation (EC) No 713/2009 of the European Parliament and of the Council of 13 July 2009 establishing an Agency for the Cooperation of Energy Regulators (OJ L 211, 14.8.2009, p. 1); Regulation (EC) No 714/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the network for cross-border exchanges in electricity and repealing Regulation (EC) No 1228/2003 (OJ L 211, 14.8.2009, p. 15); Regulation (EC) No 715/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the natural gas transmission networks and repealing Regulation (EC) No 1775/2005 (OJ L 211, 14.8.2009, p. 36); 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, 14.8.2009, p. 55); 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, 14.8.2009, p. 94).

11 <https://www.acer.europa.eu/gas/network-codes> (accessed 15.12.2023).

12 Commission Communication, *A Framework Strategy for a Resilient Energy Union with a Forward-Looking Climate Change Policy*, COM(2015) 80 final.

security, intergovernmental agreements, liquefied natural gas (LNG) (in addition to heating and cooling).<sup>13</sup> The second wave, which came about six months later, focused on low-carbon economy.<sup>14</sup> The Clean Energy Package, a set of measures on the energy performance of buildings, renewable energy, energy efficiency, energy governance and electricity market design, was adopted in 2018. These rules aimed to update the European energy policy framework in order to facilitate the transition away from fossil fuels towards cleaner energy and to deliver on the EU's Paris Agreement commitments for reducing greenhouse gas emissions.<sup>15</sup>

The European Green Deal<sup>16</sup> was adopted in 2019. It is a package of policy initiatives providing for the strategy for the EU to reach the 2050 climate neutrality target, which is now established as a legally binding rule of EU Climate Law.<sup>17</sup> The Green Deal is a cross-sectoral policy framework that outlines the measures required to move towards a climate-neutral and sustainable future. With regard to energy, it sets out sector-specific objectives to achieve these: (i) supporting the development and uptake of cleaner energy sources, such as renewable offshore energy and hydrogen; (ii) fostering integration of energy systems throughout the European Union (EU); (iii) developing interconnected energy infrastructure via EU energy corridors; and (iv) revising the current legislation on energy efficiency and renewable energy, including their 2030 targets.

In the context of the Green Deal, the European Commission put forward a proposal for a 'Fit for 55' legislative package in 2021. The package aims to provide rules for the EU to reach the ambitious greenhouse gas reduction targets.<sup>18</sup> The package included legislative proposals to revise the entire EU 2030 climate and energy framework to reach an intermediate target to cut emissions by at least 55% by 2030. The 2023 Renewable Energy Directive,<sup>19</sup> one of the key proposals under the Fit For 55 package raised the share of renewable energy in the EU's overall energy consumption to 42.5% by 2030 with an additional 2.5% indicative top-up that would, in line with the 2022 introduced RePowerEU Plan<sup>20</sup> enacted to counter the reduction of Russian energy flows following the attack on Ukraine, allow the EU to reach 45%.<sup>21</sup>

## 2. THE EUROPEAN UNION POLICY ON ENERGY

One of the changes brought about by the Lisbon Treaty was the explicit inclusion of energy as an area of shared competences under Article 4 of Part I of the TFEU. The more specific details of the Union competences and their exercise in the area are set out in the energy specific Article, also a novelty introduced by the Lisbon Treaty.<sup>22</sup>

The Union policy on energy is based on three basic objectives: a competitive internal market; security of energy supply; and sustainability. According to Article 194 TFEU, EU energy policy is to have four elements that to a

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<sup>13</sup> See Commission press release, *Towards Energy Union: The Commission presents sustainable energy security package*, Brussels, 16 February 2016, (IP/16/307).

<sup>14</sup> See Commission press release, *Energy Union and Climate Action: Driving Europe's transition to a low-carbon economy*, Brussels, 20 July 2016 (IP/16/2545).

<sup>15</sup> Commission Communication, *Clean Energy For All Europeans*, COM(2016) 860.

<sup>16</sup> European Commission, *The European Green Deal* (COM(2019) 640 final, Brussels, 11.12.2019). See also European Commission, *The European Green Deal sets out how to make Europe the first climate-neutral continent by 2050, boosting the economy, improving people's health and quality of life, caring for nature, and leaving no one behind*. December 11, 2019. October 9, 2023 ([https://ec.europa.eu/commission/presscorner/detail/en/IP\\_19\\_6691](https://ec.europa.eu/commission/presscorner/detail/en/IP_19_6691)).

<sup>17</sup> Article 2 of Parliament/Council Regulation (EU) 2021/1119 *establishing the framework for achieving climate neutrality ('European Climate Law')*, O.J. L 243/1 (2021).

<sup>18</sup> European Commission Press Release, *European Green Deal: Commission proposes transformation of the EU economy and society to meet climate ambitions*, 14 July 2021, IP/21/3541.

<sup>19</sup> Directive (EU) 2023/2413 of the European Parliament and of the Council of 18 October 2023 amending Directive (EU) 2018/2001, Regulation (EU) 2018/1999 and Directive 98/70/EC as regards the promotion of energy from renewable sources, and repealing Council Directive (EU) 2015/652 (OJ L, 31.10.2023)

<sup>20</sup> Communication from the Commission, *REPowerEU Plan* (COM/2022/230 final).

<sup>21</sup> See Council press release, *Council and Parliament reach provisional deal on renewable energy directive*, 30 March 2023, at <https://www.consilium.europa.eu/en/press/press-releases/2023/03/30/council-and-parliament-reach-provisional-deal-on-renewable-energy-directive/>

<sup>22</sup> For the developments towards this new energy specific Treaty Article, see L. Hancher and F. Salerno, 'Energy Policy after Lisbon', in A. Biondi, P. Eeckhout and S. Ripley, *EU Law after Lisbon* (OUP 2012), pp. 365–400.

certain degree are both internally intertwined and related to other policy-oriented provisions of the TFEU. These four elements will now be briefly discussed and contextualized.

First, EU energy policy shall ensure the functioning of the energy market (Article 194(1)(a) TFEU). Through this aim, energy policy is to enhance, in particular, the free movement of goods, services and capital within the energy sector, and the free movement of energy between Member States.

This connects to a second aim of the energy policy – it shall promote interconnection between energy networks (Article 194(1)(d) TFEU). A well-functioning energy infrastructure is a prerequisite for a well-functioning market. This objective was added as a separate EU energy policy objective with the Lisbon Treaty. Prior to that, the idea of interconnecting EU energy markets was based on general internal market objectives, as well as forming the legal basis for trans-European networks (Article 170 TFEU). This Article provides that ‘the Union shall contribute to the establishment and development of trans-European networks in the areas of transport, telecommunications and energy infrastructures’.

A third objective of EU energy policy is to ensure security of energy supply in the Union (Article 194(1)(b) TFEU). Security of supply in the EU energy policy entails the constant availability of affordable energy with minimal social costs, including environmental costs. In addition to the energy-specific Treaty Article, energy security is also covered by Article 122, which relates more generally to ‘severe difficulties [that] arise in the supply of certain products, notably in the area of energy’.

Finally, the promotion of energy efficiency, energy saving and the development of new and renewable forms of energy is an objective listed under Article 194(1)(c) TFEU. This last aim also relates to Article 11 TFEU and sustainable development, as well as the environmental competences under Article 191 TFEU.

The requirement that energy policy shall be formulated ‘in a spirit of solidarity between Member States’ accentuates the interdependence of Member States’ energy policies and actions.

Article 194 TFEU also recognizes Member States’ energy rights in the areas of taxation and in determining the conditions for exploiting their energy resources, choices between different energy sources and the general structure of energy supply in each Member State.

The next section will focus on Union competences for energy, and examine both the interrelations between energy and other competence areas as well as certain specific questions that arise under Article 194.

## 2.1 ‘In the Spirit of Solidarity’

One of the new elements under the Lisbon Treaty is that energy solidarity now appears prominently in the language of the TFEU. This is the case with the new energy-specific Article 194 TFEU (‘Union policy on energy shall aim, in a spirit of solidarity between Member States, to: [. . .]’), as well as the more general Article 122 TFEU (‘in a spirit of solidarity between Member States’ and that these difficulties in supply may be experienced, ‘notably in the area of energy’). Solidarity can be seen as one illustration of the new interdependencies between previously separate national markets. With an increasing interconnection of markets, the actions and policies of one country will have effects on the other Member States. An illustration of this is the sudden increase of renewable energy in German markets and the negative effects on the country’s neighbours through periodical surges of power.

Another way of viewing energy solidarity in the TFEU is to see the introduction of solidarity references as an attempt to create a corrective mechanism to the failure of the markets to achieve security of supply. The notion of solidarity was only introduced after it became increasingly clear that the markets had failed to create security of supply. A market-based security of supply scheme of the 1980s and 1990s was replaced or complemented by a public-sector-based solidarity scheme. Supply disruptions, like those that occurred in the flow of natural gas from Russia through Ukraine, were not sufficiently addressed by market forces. As such, a public-sector-driven response mechanism was necessary: enter solidarity.<sup>23</sup> It has specifically been argued that the reference to the solidarity principle in Article 194 TFEU was introduced in response to requests made by the Polish Government

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23 In line with this, Regulation (EU) No 994/2010 of the European Parliament and of the Council of 20 October 2010 concerning measures to safeguard security of gas supply and repealing Council Directive 2004/67/EC (OJ L 295, 12.11.2010, pp. 1–22), adopted under Article 194(2) TFEU, builds heavily on the solidarity approach. It reflects a stronger role for the state and public sector in ensuring security of supply. (See Articles 3 (noting that security of gas supply is shared between the state and the markets) and 9–12 (placing the responsibility for security of supply on the state). Also, recital 20 specifically notes that the ultimate responsibility for gas supply security lies within the state.) The Regulation formalizes the response mechanisms at state, regional and EU level, all in the spirit of solidarity.

and relates primarily to concerns over the security of gas supply from Russia (illustrated in the Russian-Ukrainian/Georgian gas disputes).<sup>24</sup>

The Court of Justice of the European Union has had the opportunity to elaborate on the meaning and rationale of the principle of energy solidarity in the context of Article 194 TFEU. In its judgment of 15 July 2021<sup>25</sup> Court emphasized that spirit of solidarity mentioned in Article 194(1) TFEU extends to any action falling within the European Union's energy policy.<sup>26</sup> According to the Court the principle of energy solidarity entails a general obligation, for the European Union and the Member States, in the exercise of their respective competences in respect of EU energy policy, to take into account the interests of all stakeholders liable to be affected, by avoiding the adoption of measures that might affect their interests, as regards security of supply, its economic and political viability and the diversification of sources of supply, and to do so in order to take account of their interdependence and de facto solidarity.<sup>27</sup> The Court confirmed the finding of the General Court that principle of energy solidarity does not mean that EU energy policy must never, under any circumstances, have negative impacts for the particular interests of a Member State in that field. However, the EU institutions and the Member States are required to take into account, in the context of the implementation of that policy, the interests both of the European Union and of the various Member States that are liable to be affected and to balance those interests where there is a conflict.<sup>28</sup>

In addition to the new Article 194 TFEU and its solidarity reference, the wording of Article 122(1) TFEU was also changed to include both the reference to solidarity and to energy. The new wording is that: Without prejudice to any other procedures provided for in the Treaties, the Council, on a proposal from the Commission, may decide, in a spirit of solidarity between Member States, upon the measures appropriate to the economic situation, in particular if severe difficulties arise in the supply of certain products, notably in the area of energy.

As it is now clear from the judgment of the Court of Justice, principle of energy solidarity mentioned in these Articles of the TFEU is a general principle of EU energy law. The Court reaffirmed that the spirit of solidarity between Member States, mentioned in that provision, constitutes a specific expression, in the field of energy, of the principle of solidarity, which is itself one of the fundamental principles of EU law.<sup>29</sup>

## 2.2 Union Competences in the Field of Energy and the Internal Market

No specific legal base was created for energy in the Treaty of Rome, nor did the Single European Act or other subsequent Treaty modifications prior to Lisbon Treaty bring this about. However, the lack of a precise legal basis for energy policy and energy regulation was not a significant obstacle in the past.<sup>30</sup> Instead of a separate legal basis and EU-level competence for energy, the progress in this area was mainly driven through the competences for the internal market (Article 95 EC, now 114 TFEU) and for the environment (Article 175(1) EC, now 192(1) TFEU).<sup>31</sup> This has of course meant that regulation has focused on areas that can be connected with these two policy areas.

Under Article 114, the European Parliament and the Council can, acting in accordance with the ordinary legislative procedure, adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market. Adopting legislative Acts regarding energy on this legal basis was possible because energy forms part of the pursuit of creating a functioning internal market. This concerns, in particular, the directives on internal electricity and natural gas markets and the regulations targeting cross-border elements of the internal energy market. This means that all three internal energy market packages (1990s; 2003 and 2009) were adopted under the general internal market competence.

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24 J-P. Pielow and B.J. Lewendel, 'Beyond "Lisbon": EU Competences in the Field of Energy Policy', in B. Delvaux, M. Hunt and K. Talus (eds), *EU Energy Law and Policy Issues* (Intersentia 2011), p. 300. For the reasons and background behind these disputes, see J. Stern, 'The Russia-Ukrainian Gas Crisis of January 2006', 4(1) *OGEL* (2006) and S. Pirani, J. Stern and K. Yafimava, *The Russo-Ukrainian Gas Dispute of January 2009: A Comprehensive Assessment*, NG 27 (Institute for Energy Studies, February 2009).

<sup>25</sup> Case C-848/19 P, *Germany v Poland*, ECLI:EU:C:2021:598.

<sup>26</sup> Judgment of the Court, para. 28.

<sup>27</sup> Judgment of the Court, para. 71.

<sup>28</sup> Judgment of the Court, para. 73.

<sup>29</sup> Judgment of the Court, para. 38.

<sup>30</sup> K. Talus, *EU Energy Law and Policy: A Critical Account* (OUP 2013).

<sup>31</sup> In some cases legislative acts have been based on both of these Treaty articles. An example of such instruments is 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 (OJ L 140, 5.6.2009, p. 16). Most of the Directive is based on the environmental competence but three Articles are based on the internal market competence.

With Article 194 TFEU, measures aiming at ensuring the functioning of the energy market can and must now be based on the energy competence provided in that Article.<sup>32</sup>

### 2.3 Union Competences in the Field of Energy and the Environment

Regulatory measures in relation to the energy sector have also been adopted under the Treaty provision on competence in environmental matters. This is the case for the renewable energy directives, which have been partially based on Article 175(1) EC (now 192(1) TFEU).<sup>33</sup> The legal foundation of EU environmental action is principally to be found in Articles 191 and 192 TFEU and the general energy Article 194 TFEU with reference to new and renewable energies, plus the general reference to the environment and sustainable development in Article 11 TFEU.

Article 191 TFEU provides that EU policy on the environment is intended to contribute to the pursuit of the following objectives:

- preserving, protecting, and improving the quality of the environment;
- protecting human health;
- prudent and rational utilization of natural resources; and
- promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change.

The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, decide together what action is to be taken by the EU in order to achieve these objectives. By way of derogation from this decision-making procedure, the Council, acting unanimously in accordance with a special legislative procedure, adopts measures which significantly affect a Member State's choice between different energy sources and the general structure of its energy supply. In these cases, the European Parliament is merely consulted.

Although the requirement for a 'high level of environmental protection' in respect of EU action under Article 37 TFEU is a goal, it is a difficult one to achieve, despite the increasing number of directives and regulations to the same effect. This difficulty stems from the use of the principle of subsidiarity, the recognition of national differences and the exercise of governmental discretion in shaping policies based on often uncertain assumptions. Constitutional powers are significant here: a directive which is aimed, at least to a significant extent, at contributing towards the internal market does not require unanimity, but matters of tax, choice between energy sources (renewables are particularly noteworthy in this context) and the general structure of a Member State's energy supply, do (Articles 192(2) or 194(2) TFEU).

Another energy-specific issue under Article 192(2) is that Member States cannot be compelled by a majority to give up energy sources which are seen as environmentally more questionable – for example Polish coal, French nuclear power and so on. Article 194(2) explicitly states that 'measures [taken under Article 194 TFEU and majority voting] shall not affect a Member State's right to determine the conditions for exploiting its energy resources, its choice between different energy sources and the general structure of its energy supply, without prejudice to Article 192(2)(c)'. Article 192(2)(c) TFEU provides that 'measures significantly affecting a Member State's choice between different energy sources and the general structure of its energy supply' are subject to a requirement for unanimity. As such, the new energy title should *a priori* not restrict Member States' choices with respect to energy sources. However, the current practice, which pre-dates the TFEU, suggests that the matter might not be so simple.

In order to reach the EU-wide target of 20% renewable energy production by 2020, Directive 2009/28/EC on the promotion of the use of energy from renewable sources set 'mandatory' national targets and required Member States to prepare and establish national action plans to reach their respective targets. The national targets that in principle translate into the overall EU target of 20% of energy production from renewables varied considerably from Member State to Member State. For example, the UK's target was 15% (from a 2005 level of 1.3%) while Latvia had a target of 40% (from a 2005 level of 32.6%) and Sweden 49% (from a 2005 level of 39.8%). Finland's target was 38% (from a 2005 level of 28.5%) and the French target 23% (from a 2005 level of 10.3%).

Looking at the above figures, it is clear that the environmental requirements under the EU energy *acquis* expect that countries achieve what in some cases, like Latvia, Finland and Sweden, are very significant shares of

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32 C-490/10, *Parliament v Council* (ECLI:EU:C:2012:525).

33 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, amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC (OJ L 140, 5.6.2009, p. 16) and its predecessors.

renewable sources in total energy production. In these cases, the renewables targets clearly restrict the right of the Member States to decide on their energy mix. Given that Directive 2009/28/EC was adopted under Article 175(1) EC (now 192(1) TFEU) – except for the biofuels-related requirements which were adopted under the internal market Article 95 EC (now 114 TFEU) – and by a majority vote, it seems that the Directive 2009/28/EC was adopted under the wrong legal basis, and is therefore in conflict with the Treaty, provided of course that a requirement that approximately half of the national electricity production be from renewable energy sources instead of nuclear, coal, natural gas or other options is considered to ‘significantly affect’ the right of a Member State to choose between different sources of energy supply.

## 2.4 Union Competences in the Field of Energy and Security of Supply

By introducing a specific legal basis for security of energy supply, related EU-level regulation eliminated one of the peculiarities of the energy *acquis*. While it is possible to make links between the internal market (objective under Article 114 TFEU) and security of supply,<sup>34</sup> the link between some of the security of supply related instruments and their legal basis (Article 95 EC) has not always been evident.<sup>35</sup>

However, Article 194 TFEU is not the only Treaty Article addressing security of energy supply. A similar reference is also made in Article 122(1) TFEU, which provides that:

Without prejudice to any other procedures provided for in the Treaties, the Council, on a proposal from the Commission, may decide, in a spirit of solidarity between Member States, upon the measures appropriate to the economic situation, in particular if severe difficulties arise in the supply of certain products, notably in the area of energy.

The same provision also existed, albeit in a bit more general form and without the solidarity reference, in Article 100 EC. This provision was used as the legal basis for Directive 2004/67/EC concerning measures to safeguard the security of natural gas supply.<sup>36</sup>

Given that Article 194 TFEU constitutes a *lex specialis* legal basis for all energy regulation in the EU, save for certain more specific Articles addressing specific situations, it is Article 194 TFEU that today provides the primary legal basis for regulation aiming at security of supply. Also the legal basis for security of gas supply instruments has moved from Article 122 to 194 TFEU, with the more recent Regulation (EU) No 994/2010 (the ‘Gas Security Regulation’) of 2010 being based on Article 194.<sup>37</sup> This is also in line with the case law of the European Court of Justice, which, in case C-490/10, *Parliament v Council*,<sup>38</sup> provided guidance on the relationship between Article 194 and other Treaty Articles:

66 Article 194 TFEU, introduced by the Treaty of Lisbon, therefore inserted into the TFEU an express legal basis for the European Union policy on energy. As is apparent from its wording, in particular that of Article 194(2) TFEU, that provision constitutes the legal basis for European Union acts which are ‘necessary’ to achieve the objectives assigned to that policy by Article 194(1) TFEU.

67 Such a provision constitutes the legal basis intended to apply to all acts adopted by the European Union in the energy sector which are such as to allow the implementation of those objectives, subject to, as can be deduced from the terms ‘[w]ithout prejudice to the application of other provisions of the Treaties’ at the beginning of Article 194(2) TFEU, the more specific provisions laid down by the TFEU on energy. As the Council noted, Articles 122 TFEU and 170 TFEU are *inter alia* covered, concerning severe difficulties arising in the supply of energy products and trans-European networks respectively, as well as the competences that the European Union has under other provisions of the Treaty, even if the measures at issue also pursue one of the objectives of the energy policy stated in Article 194(1) TFEU.

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34 For a detailed discussion on this, see H. Bjernebye, *Investing in EU Energy Security: Exploring the Regulatory Approach to Tomorrow’s Electricity Production* (Kluwer 2010), especially Chapter 8 ‘The Relationship between Security of Supply Objective and the Fundamental Objectives of TFEU’.

35 An example of this is Directive 2005/89/EC of the European Parliament and of the Council of 18 January 2006 concerning measures to safeguard security of electricity supply and infrastructure investment (OJ L 33, 4.2.2006, pp. 22–7), which is based on Article 95 EC.

36 Council Directive 2004/67/EC of 26 April 2004 concerning measures to safeguard security of natural gas supply (OJ L 127, 29.4.2004, pp. 92–6).

37 Regulation (EU) No 994/2010 of the European Parliament and of the Council of 20 October 2010 concerning measures to safeguard security of gas supply and repealing Council Directive 2004/67/EC (OJ L 295, 12.11.2010, p. 1).

38 C-490/10, *Parliament v Council* (ECLI:EU:C:2012:525).

As such, the role of Article 122 TFEU is to be applied in more restricted and urgent cases than the more general Article 194 TFEU. The situations it may be used are: (I) 122(1) TFEU provides that the Council may take “in a spirit of solidarity between Member States, upon the measures appropriate to the economic situation, in particular if severe difficulties arise in the supply of certain products, notably in the area of energy” and (II) 122(2) TFEU provides that Council may grant “Union financial assistance” where a Member State “is in difficulties or is seriously threatened with severe difficulties caused by natural disasters or exceptional occurrences beyond its control”.

While there had been some urgent measures enacted on the back of Article 122 TFEU had been relied on, mainly outside of energy in area like Eurozone and refugee crises, the Russian attack on Ukraine in 2022 and the energy crises that followed created a situation that was met the threshold for the application of Article 122 TFEU. As explained in the Council Regulation (EU) 2022/1854 on an emergency intervention to address high energy prices: “The current disruptions of gas supplies, reduced availability of certain power generating plants, and the resulting impacts on gas and electricity prices, constitute a severe difficulty in the supply of gas and electricity energy products within the meaning of Article 122(1)”.<sup>39</sup> The Regulation explains how it was adopted in the context of a “crisis situation which requires the adoption of a set of urgent, temporary, exceptional measures of economic nature to address the unbearable effects on consumers and companies”.<sup>40</sup>

### 3. EXCEPTIONS FROM THE ORDINARY LEGISLATIVE PROCEDURE

Article 194 TFEU also includes exceptions to EU competence in energy matters. According to Article 194(2) TFEU, measures adopted under Article 194(1) TFEU are not allowed to ‘affect a Member State’s right to determine the conditions for exploiting its energy resources, its choice between different energy sources and the general structure of its energy supply, without prejudice to Article 192(2)(c)’. This means that despite the competence conferred on the EU in energy matters, Member States retain the competence to determine which energy sources they wish to exploit. They may therefore choose freely between oil, natural gas, nuclear power, coal, or renewable energy sources. However, the meaning and scope of this provision are somewhat unclear. For one, Member State competence is restricted in practice, as was discussed above, due to obligations relating to the promotion of renewable energy. Here the reference to Article 192 TFEU: ‘without prejudice to Article 192(2)(c)’ is of interest as it seems to suggest that if an environmental measure affects the energy rights of Member States, the special legislative procedure under that Article can be employed without Article 194(2) restricting this in any way. It is necessary to note here that unlike Article 192(2) TFEU, Article 194(2) does not include the possibility of using a special legislative procedure in cases where those areas reserved for Member States are affected.

Second, due to the unclear wording of the exception, there is uncertainty as to what Article 194(2) really means.<sup>41</sup> For example, what is the threshold for ‘affecting’ Member States rights? This is significant as many EU energy policy measures will affect (directly or indirectly) those areas left to the Member States’ competence under Article 194(2). It is noteworthy that under Article 192(2)(c), the threshold is ‘significantly affecting’, which could explain the legal basis for the Renewable Energy Directive. There is no comparable ‘significance’ threshold under Article 194(2). It is of course possible that the Article could be interpreted by the Court of Justice of the European Union as to implicitly include some kind of ‘appreciability test’, as suggested by Johnston and van der Marel.<sup>42</sup>

Third, it is also unclear what the second part of Article 194(2) implies: does it mean that the EU has no competence to legislate in areas where the Member States’ energy rights are affected and every Member State could therefore veto any planned EU energy law that would have this effect or does it simply mean that the Member State can choose not to apply an instrument of EU law with this effect? Johnston and Block are in favor of the latter interpretation and argue that the provision allows a Member State to opt out from national application of this type of EU measure.<sup>43</sup>

In a similar manner to the energy mix, all matters of a primary fiscal nature are accorded special treatment under the TFEU, and under Article 194(3) in particular. Instead of following the ordinary legislative procedure – which might be described as the ‘default’ legislative procedure – a special legislative procedure is followed in

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<sup>39</sup> Council Regulation (EU) 2022/1854 on an emergency intervention to address high energy prices, para. 7.

<sup>40</sup> Council Regulation (EU) 2022/1854 on an emergency intervention to address high energy prices, para. 8.

<sup>41</sup> A. Johnston and E. van der Marel, ‘Ad Lucem? Interpreting the New EU Energy Provision and in Particular the Meaning of Article 194 (2) TFEU’, 22(5) *European Energy and Environmental Law Review* (2013), pp. 181–99.

<sup>42</sup> *Ibid.*, p. 184.

<sup>43</sup> A. Johnston and G. Block, *EU Energy Law* (Oxford University Press 2012), p. 5.

these cases. This means in practice that instead of the majority voting approach used in the ordinary legislative procedure, unanimity is required for all matters of a primarily fiscal nature, and the role of the European Parliament is reduced to that of a consultative body. This is to ensure that fiscal matters remain under the control of Member States. Furthermore, because the decision-making process is based on unanimity, all Member States must be in agreement before any legislative instruments can be adopted. It is obvious that it is very difficult to achieve unanimity among 28 EU Member States. An illustration is provided by the failed attempt to re-draft the old Directive 2003/96/EC on energy taxation.<sup>44</sup> In the context of the Fit for 55 package, negotiations towards a recast energy tax directive have again been reinitiated.<sup>45</sup>

#### 4. THE PRACTICE OF MULTILEVEL ENERGY GOVERNANCE IN THE EU

The gradual transfer of competences from the Member States to the EU level and the remaining ambiguities in this division of competences is one manifestation of the multilevel energy governance in the Union. This is a system whereby EU institutions and Member States negotiate with each other, and envision and plan energy policies in interaction with consultancies, local authorities, NGOs and external actors, such as supplier states and companies therein. Public, private and hybrid energy companies along with technology and infrastructure providers are consulted while they also lobby the system actively. The companies are crucial in the implementation of regulatory and policy reforms by virtue of supplying the required on-field solutions. Financial institutions often occupy key roles as investors owing to the large upfront costs of the ongoing transition away from fossil fuels towards electrification based on local renewable resources, such as wind and solar power.<sup>46</sup>

This electrification trend does not lessen the need for governance. Electricity is arguably more regulation intensive owing to its highly technical nature compared to fossil fuels. High degree of electrification based on increasing share of variable output wind and solar power in the energy mix requires detailed regulation on the functioning of electricity markets and on the increasing cross-border trade in electricity, as well as administrative best practice transfer. Coordination is needed for the integration of existing hydropower, biomass and nuclear power units, with large-scale but variable output wind and solar power plants and small-scale solar PV, in an increasingly networked, interconnected and data-intensive system where electricity production and consumption should be balanced at all times.<sup>47</sup> The emerging system requires reinforced attention to the coordination of flexibility resources on the national, regional and European levels, including cross-border electricity trade, new types of energy storage, and prospects of converting electricity into e-fuels such as hydrogen, e-ammonia and e-methanol, as well as their distribution and trade across borders.<sup>48</sup> All of this means multiple groups of affected stakeholders including both incumbents and new actors, with complex bargaining and negotiation between them. For this reason EU energy policies are likely to continue developing gradually, even though they face the challenge of accelerated transition. Most of the time this also means, at best, sub-optimal outcomes.<sup>49</sup>

Within the EU, the Commission is the main institution in the practical work for developing markets as this is the policy sector where it enjoys its most powerful competences. The Commission has acted as the driving force

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44 Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity (OJ L 283, 31.10.2003, p. 51).

45 See Proposal for a Council Directive restructuring the Union framework for the taxation of energy product and electricity (recast), COM(2021) 563 final.

46 See e.g. P. Aalto, 'Institutions in European and Asian Energy Markets: A Methodological Overview', 74 *Energy Policy* (2014), pp. 4–15; P. Aalto, K. Kotilainen, B. Sovacool, M. Bilgin, K. Talus, 'How to Accelerate Electrification? The Leverage of Policies', in P. Aalto (ed.), *Electrification: Accelerating the Energy Transition*, (Academic Press/Elsevier 2021), pp. 57-75;.

47 P. Aalto, A. Mori, M. Kojo, 'Toward a Roadmap for Electrification', in P. Aalto (ed.), *Electrification: Accelerating the Energy Transition* (Academic Press/Elsevier 2021), pp. 289-300.

48 J. Koskela, S-L. Penttinen, T. Vesterinen, H. Holttinen, J. Konttinen, P. Järventausta, J. Kiviluoma, P. Aalto, K. Talus, 'The Role of Energy Storage and Backup Solutions for Management of a System with High Amount of Variable Renewable Power', in P. Aalto (ed.), *Electrification: Accelerating the Energy Transition* (Academic Press/Elsevier 2021), pp. 105-124; C. Breyer, G. Lopez, D. Bogdanov, P. Laaksonen, 'The role of electricity-based hydrogen in the emerging power-to-X economy', 49(Part D) *International Journal of Hydrogen Energy* (2024), p. 351-359.

49 P. Aalto, D. Dusseault, M.D. Kennedy and M. Kivinen, 'Russia's Energy Relations in the East and West: Towards a Social Structurationist Approach to Energy Policy Formation', 17(1) *Journal of International Relations and Development* (2014), pp. 1–29, here p. 25.

for the gradual liberalization of the electricity and natural gas markets within the Union. In this work, it has received support especially from the UK, as long as it was a Member, and Denmark and Sweden, which had liberalized their own markets already before the first energy package. Germany and Italy were initially reluctant. Alongside Germany, France also had incumbent state-owned or vertically integrated energy companies to protect. Upon their entry to the EU in 2004, Poland and the Baltic states preferred a transition period to protect their markets and energy companies from uninhibited seizure by Russian companies, given their infrastructural links to Russia dating back to the Soviet era. These links comprise pipeline networks and electricity grids covering the whole EU-Russia border; while they are combined with acquisitions of energy infrastructure assets in the EU area by Russian investors.<sup>50</sup> Some of these East-West infrastructure links continued to function even after several rounds of mutual sanctions between the EU and Russia since 2022. These legacy infrastructures and the different national traditions in energy supplies and market design illustrate the wide variety of path dependencies and consequent national interests vis-à-vis market development on the part of the 27 Member States as of 2024. Simultaneously the whole EU witnesses a gradual shift in its global operating environment from neoliberal models towards more state capitalist ones where the ‘regulatory state’ model looks unfit despite having been so central for decades in EU energy policy. In this new order, public sector actors play the role of ‘catalytic state’. This means close coordination with private sector actors in response to economic crises, pandemics and also, in the implementation of ambitious transition policies. Both the Commission and Member States direct renewed attention to energy security at the expense of the formerly prevalent least-social-cost and liberal models in energy policy while the Member States are allowed more state intervention in strategic matters.<sup>51</sup>

Despite the Commission and Member States share similar concerns regarding the changing operating environment, the Member States may often respond in asynchronous ways. This results in continuance of differentiated integration including uneven implementation of EU level energy directives in the Member States. As a result, for example during 2022, the Commission opened infringement procedures against eight Member States for failing to transpose the electricity directive, pursuing further the procedures in two more cases; regarding the renewable energy directive, further steps were taken in 15 cases; regarding the energy efficiency directive, in 12 cases; and regarding the energy performance in buildings directive, 15 cases.<sup>52</sup>

The constant stream of new regulatory and policy packages from the Commission, culminating in the highly strategic character of the Green Deal and RePower EU testify to increasing market interventions on the part of the Commission. The RePowerEU includes measures such as research, development and innovation (RDI) subsidies, and the promotion of accelerated permitting, and streamlined environmental impact assessment and other regulation to speed up the transition.<sup>53</sup> Underpinning the Commission’s activity is a common and growing acknowledgement it shares with the Member States of how such ‘catalytic state’ type leadership and coordination is necessary to compete globally in the context of ongoing green transition, in particular electrification and related transition to hydrogen-based fuels. This is important in light of how many competitor states such as China, Japan and South Korea apply if not state capitalism, then ‘new’ or ‘green’ developmentalism to link the efforts of states and companies.<sup>54</sup> In the same RePower EU package in 2022, the Commission pledged 29 billion euros additional investment via projects of common interest (PCI) for electrification-enabling measures such as electricity interconnections, each involving at least two Member States, while it also launched a ‘Hydrogen accelerator’ for integrated infrastructure, storage and port capacity. In two rounds during 2022, the Commission mobilised funds for such ‘clean’ hydrogen projects worth 10.6 billion euros in public investment.<sup>55</sup>

With respect to multilevel governance, it is notable that the actions on hydrogen were prepared in consultation with the industry. The European Clean Hydrogen Alliance was set up in July 2020 to enhance such consultation. However, mere RDI subsidies do not create markets on their own. Here the Commission is dependent on the transition policy mixes of Member States. For example, the Finnish ST1 company halted in December 2023 its e-

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50 F. Proedrou, *EU Energy Security in the Gas Sector: Evolving Dynamics, Policy Dilemmas and Prospects* (Ashgate 2012), pp. 61–3.

51 A. Prontera, *Beyond the EU Regulatory State: Energy Security and the Eurasian Gas Market* (ECPR Press 2019).

52 European Commission, ‘Report from the Commission: Monitoring the application of European Union law: 2022 Annual Report’, Brussels, 14.7.2023 COM(2023) 453 final.

53 European Commission, ‘RePowerEU: Joint European Action for more affordable, secure and sustainable energy’. Strasbourg, 8.3.2022 COM(2022) 108 final.

54 C.M. Dent, ‘East Asia’s new developmentalism: state capacity, climate change and low-carbon development’, 39(6) *Third World Quarterly* (2018), pp. 1191-1210.

55 European Commission, ‘IPCEIs on hydrogen’ (2022), available at [https://single-market-economy.ec.europa.eu/industry/strategy/hydrogen/ipceis-hydrogen\\_en](https://single-market-economy.ec.europa.eu/industry/strategy/hydrogen/ipceis-hydrogen_en) (accessed 15 December 2023).

methanol project that had already received a 35 million euros subsidy from the EU's Recovery and Resilience Fund, citing the lack of a national blending mandate policy that would have created the market for the fuel by 2026 as required by the Commission. This is but one example of the many instances in which companies were expecting rapid regulatory and policy action from the EU and governments in order to receive firm political signals to enable them to commit for large investments with long payback times.

The RePowerEU plan is also sensitive to the high natural gas dependence of many Member States including how many industries traditionally depend on it. For this reason, the package includes measures to guarantee continued natural gas supplies during the transition period to a more renewable electricity dominated system. Here the Commission managed to facilitate common gas procurement via the 2022 launched Energy Facility. For example the third tender in May 2023 yielded bids from 25 supplier companies for altogether 13.4 billion cubic metres.<sup>56</sup> At the same time, Member States have continued to scramble for LNG supplies on a bilateral basis.<sup>57</sup> This has also included LNG acquisition from Russian suppliers that in principle goes against the RePowerEU plan. Hungary even negotiated on a new pipeline gas contract with Gazprom as of 2023. As for hydrogen, often envisioned as a substitute for natural gas, similar pattern exist. The Commission published a communication on a Hydrogen Bank in 2023, with the aim to create a market for renewable energy-based hydrogen, both imported and EU-produced. The market interventions concerned investment leveraging, and subsidies in the form of fixed-term premium payments to cover the price difference between fossil fuel based and renewable energy-based hydrogen via auction mechanisms within the EU, and similar premium arrangements for hydrogen trade into the EU area. In the policy's preparation, companies and the RDI sector were consulted.<sup>58</sup> Simultaneously, many natural gas reliant Member States, with German and Dutch actors standing out, were engaged in active hydrogen diplomacy with MoUs and other bilateral agreements to secure future supplies once production becomes online. Taken together, the EU's overall response to the war in Ukraine represents a familiar pattern of both Union level joint activity and Member States' own bilateral initiatives.

The division of competences between the EU and Member States also affects regional energy cooperation within the Union. This is evident for example in the North Sea Wind Power Hub (NSWPH) project. Several technical studies elaborate the prospects of building an artificial island into the relatively shallow water areas in the North Sea that are found between the Exclusive Economic Zones of Denmark, Germany, the Netherlands and the UK.<sup>59</sup> The island would host a wind power hub connecting to-be-built nearby wind power plants via HVAC cables to it and then with a longer distance HVDC cable to the mainland. The hub could also act as an interconnector between different electricity markets. It would support the security of supplies principle by helping to fully utilize offshore wind, possibly host a battery storage or hydrogen conversion units, and help balancing supply and demand between North Sea littoral states and their neighbors. It would also bolster the markets principle by facilitating trade in electricity, via contributing to the Union's target of 15% electricity interconnection by 2030.<sup>60</sup> These benefits prompted the European Network of Transmission System Operators (ENTSO-E) to include the NSWPH in its electricity infrastructure map.<sup>61</sup> However, initially the national transmission system operators (TSOs) in Denmark, Germany, the Netherlands, Norway and the UK were hesitant to embark on the project. They were reluctant to step beyond their traditional core business of operating profitable cables and connecting offshore wind farms to them.<sup>62</sup> The project's EU-wide multilateral benefits are, however, difficult to realise. If implemented in the large-scale 30GW format, it would affect the profitability of fossil fuel generators in several markets; the feasibility of other interconnector projects; while it could include wind farms operating under different national subsidy and/or support schemes pertaining to issues such as who is responsible for cable connections and grid reinforcements. Moreover, the inclusion of actors from the UK would raise

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<sup>56</sup> European Commission, 'RepowerEU at a Glance' (2023), available at [https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/european-green-deal/repowereu-affordable-secure-and-sustainable-energy-europe\\_en#diversifying\\_our\\_energy\\_supply](https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/european-green-deal/repowereu-affordable-secure-and-sustainable-energy-europe_en#diversifying_our_energy_supply) (accessed 15 December 2023).

<sup>57</sup> C.K. Kuzemko, M. Blondeel, C. Dupont, M.C. Brisbois, 'Russia's war on Ukraine, European energy policy responses & implications for sustainable transformations', 93(102842) *Energy Research & Social Science* (2022).

<sup>58</sup> European Commission, 'Communication on the European Hydrogen Bank', Brussels, 16.3.2023 COM(2023) 156 final.

<sup>59</sup> M. Jansen, C. Duffy, T.C. Green, I. Staffel, 'Island in the Sea: The prospects and impacts of an offshore wind power hub in the North Sea', 6 *Advances in Applied Energy* 6 (2022), 100090.

<sup>60</sup> European Commission, 'Towards a sustainable and integrated Europe: Report of the Commission Expert Group on electricity interconnection targets' (November 2017).

<sup>61</sup> ENTSO-E, 'Project 335: North Sea Wind Power Hub 2018' (2018), available at: <https://tyndp.entsoe.eu/tyndp2018/projects/projects/335> (accessed 16 December 2023).

<sup>62</sup> B. Flynn, 'Marine Wind Energy and the North Sea Offshore Grid Initiative: A Multi-level Perspective on a Stalled Technology Transition?', 22 *Energy Research & Social Science* (2016), pp. 36–51.

questions on how power generated in the EU area is remunerated in the non-Member UK.<sup>63</sup> Some models indicate that while consumers might benefit most, some producers may be hit. Among them, electricity exporters might face lower prices and sales. Therefore, to attract producers, capacity auction mechanism might be needed or possibility to invest in the wind generation to share its profits.<sup>64</sup> The EU funds relevant studies in the planning phase while the bulk of the available EU infrastructure financing has gone for individual cable projects. Because eventually the project will need some 30 billion euros for its financing, the Member States and their interests are most consequential for the project, despite its relatively clear European dimension. In brief, the interests of incumbent actors in the Member States are not convergent enough, while the division of competences does not fully equip the EU level to decisively push the project forward.

In the natural gas segment, we find a case in the Nordic region where the direct involvement of the EU is somewhat more consequential than in the NSWPH. The 187.5 million euros funding from the EU's Connecting Europe Facility was decisive in financing the Balticconnector project which links the natural gas infrastructures of Finland and Estonia. The pipeline, finalised by the end of 2019, offers a further linkage to Latvia and Lithuania with access to gas storage, and provides a further connection to central European grids. This function was discontinued in Autumn 2023 for several months owing to the pipeline becoming damaged by a Hong Kong flagged Chinese transit ship. The investigations and reparation work was conducted mostly on a national basis. As for hydrogen, the European Backbone map, drafted by 33 European energy infrastructure operators, seeks to link the Nordic region from the start to continental European markets owing to the high potential for wind power based hydrogen production, by means of both new and retrofitted natural gas pipelines. EU support schemes are likely to be crucial for implementation. However, given the Balticconnector incident, Member States may consider less pipeline dependent hydrogen solutions for national security of supply reasons, such as tanker, truck and fuel tube type more decentralised solutions offering greater resilience.

The reinforced role of energy security considerations may work to maintain the multilevel governance structures in the EU, including pressure from the Member States to maintain a sufficient degree of division of competencies and willingness to pay much higher security premiums than in the past. Particularly consequential factors in this regard include national strategic cultures and their degree of eventual convergence, nationally evolved path dependencies, including historically important infrastructures and preferred sources and origins of energy. External actors such as the Russian state and companies will likely seek to exploit any such differences..

## 5. CONCLUSION

The lack of an energy-specific legal basis in the Treaty has never stopped the EU from enacting energy-sector-specific secondary EU law. Despite this, a specific legal basis for the energy sector was established in the Treaty of Lisbon under Article 194 TFEU. Under this provision, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, can establish the measures necessary to achieve the four objectives of EU energy policy. Since the enactment of the TFEU in 2009, new EU instruments in energy can now be adopted under Article 194. This has also been done and, because of Article 194(1)(b) relating to energy security, it was possible to base Regulation (EU) No 994/2010 on security of gas supply of 2010 on Article 194.<sup>65</sup> Similarly, due to Article 194(1)(c) on energy efficiency and energy saving and on new and renewable energy, it was possible to base Directive 2012/27/EU on energy efficiency on the same provision.<sup>66</sup> In the same vein, all future EU energy-market regulation should now be based on Article 194 TFEU.<sup>67</sup>

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<sup>63</sup> M. Jansen et al., op. cit.

<sup>64</sup> A. Tosatto, X.M. Beseler, J. Østergaard, P. Pinson, S. Chatzivasileiadis, 'North Sea Energy Islands: Impact on national markets and grids', 167 *Energy Policy* (2022), 112907.

<sup>65</sup> Regulation (EU) No 994/2010 of the European Parliament and of the Council of 20 October 2010 concerning measures to safeguard security of gas supply and repealing Council Directive 2004/67/EC (OJ L 295, 12.11.2010, p. 1).

<sup>66</sup> Directive 2012/27/EU of the European Parliament and of the Council of 25 October 2012 on energy efficiency, amending Directives 2009/125/EC and 2010/30/EU and repealing Directives 2004/8/EC and 2006/32/EC (OJ L 315, 14.11.2012, p. 1).

<sup>67</sup> C-490/10, *Parliament v Council* (ECLI:EU:C:2012:525).