The Nexus between Common Foreign and Security Policy and Energy Policy

Theodore Konstadinides and Despoina Mantzari

I. INTRODUCTION

Energy policy has always been part of the DNA of the European Union (EU) since its inception as a European Coal and Steel Community (ECSC) in 1951, and European Atomic Energy Community (EURATOM) in 1957. The focus was twofold: on the one hand, the ECSC paved the way for a single coal and steel market and, on the other hand, the EURATOM established a nuclear safety framework.[1] While the EU is still very much focused on maintaining an integrated internal energy market, the scope of energy policy has expanded considerably from its market liberalisation origins. At present, security of supplies lies at the core of EU energy policy in the CFSP. Beyond cross-border coordination and integration in energy trade there is an important foreign policy component to EU energy policy which has in recent years become more prominent due to European dependence on Russia and the need to manage external security and supply risks (of imported natural gas in particular) in Europe's immediate and wider neighbourhood. Last but not least, CFSP is important in coordinating the variations in current EU Member States' attitudes to security and energy policy. Hungary's recent deal to expand its Paks nuclear power station using Russian technology and financing demonstrates that some Member States are far from reducing reliance on Russian energy.[2]

Energy security is about the EU's capacity to secure access to energy supplies in order to correspond to the energy needs of its Member States. Especially the need to avoid potential gas shortages became more prominent following Russia's annexation of Crimea in 2014. Security of energy supply therefore constitutes one of the key aims of EU energy policy according to Article 194 (1) (b) TFEU. The EU has become increasingly involved in securing access to energy supplies from abroad and responding to the energy needs of its Member States. In this internal and external policy context, energy policy has gradually obtained a coercive character, as the EU is not only looking for reliable and sustainable energy partners but also for partners which can comply with its

[1] See especially Articles 31, 32 Euratom.

[2] Andrew Byrne, 'EU approves Hungary's Russian financed nuclear station', Financial Times, 6 March 2017. Available from: https://www.ft.com/content/0478d38a-028a-11e7-ace0-1ce02ef0def9 Accessed 11 September 2017.

regulatory framework. In order to ensure compliance, the EU has sought to become able to impose rigorous sanctions against both its Member States (e.g. for negotiating supply contracts without consulting the EU) as well as third countries (e.g. against external partners such as Russia for its activities in Ukraine which undermine EU values).

As the title suggests, the purpose of this chapter is to discuss the nexus between CFSP and energy policy. It explores the legal issues about EU energy competence, highlights the increasing prominence of energy security in CFSP, and finally places emphasis on the security dimension that exists in internal market energy regulation. The latter aims to provide a counterpoint: it is argued that, whilst energy policy has become more prominent in CFSP, security also underlies non-CFSP (in this case, competition) policy. The externalisation and securitisation of the EU's internal energy market and the light that such a development sheds on CFSP are, therefore, important components of this chapter. We will be arguing that there is a strong link between securitisation and competitiveness. In this regard, we will point out the EU's capacity to externalise its internal market policies both inside and outside the contours of CFSP by providing an overview of the existing CFSP framework and insight on the extraterritorial application and force of EU competition law to achieve CFSP objectives.

II. ENERGY POLICY COMPETENCE IN THE CFSP

This section will focus on the relevant competence provisions pertaining to EU external energy policy. Knowledge about the EU's respective legal bases will help the reader shape a more informed view about the EU's CFSP opportunities. These include inter alia, implementing effective initiatives in order to reduce import dependency from Russia (which comprises one third of the EU energy bill) and promoting resilience against future external energy shocks or disruptions. It is argued that a legal competence in the field of EU external energy policy is key to the success of CFSP. This is particularly pertinent because since its inception EU energy policy has been characterised by a rather rickety legal competence framework, which owes to the lack of an explicit legal basis in the Treaty regarding the adoption of legislation in the field – whether internally or externally.

A. Energy policy as a new field of legal competence

The EEC Treaty did not provide an express legal basis that would enable the EU to adopt energy measures and subsequently push for internal energy market liberalisation. What the Treaty provided, instead, was a host of *leges speciales* that enabled the EU legislature to regulate the

Single Market or certain *leges generales* to pursue supranational objectives viz. building an internal energy market, reducing carbon emissions, and setting renewable energy and efficiency targets. It was not until the Treaty of Lisbon that 'energy policy' featured in the Treaty proper as an area of EU competence under Article 4 (2) (i) TFEU while Article 194 TFEU created a new competence in the field of energy which is now shared between the EU and the Member States. It states the following:

> 1. In the context of the establishment and functioning of the internal market and with regard for the need to preserve and improve the environment, Union policy on energy shall aim, in a spirit of solidarity between Member States, to:
>
> (a) ensure the functioning of the energy market;
>
> (b) ensure security of energy supply in the Union;
>
> (c) promote energy efficiency and energy saving and the development of new and renewable forms of energy; and
>
> (d) promote the interconnection of energy networks.
>
> 2. Without prejudice to the application of other provisions of the Treaties, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall establish the measures necessary to achieve the objectives in paragraph 1. Such measures shall be adopted after consultation of the Economic and Social Committee and the Committee of the Regions.
>
> Such measures 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).
>
> 3. By way of derogation from paragraph 2, the Council, acting in accordance with a special legislative procedure, shall unanimously and after consulting the European Parliament, establish the measures referred to therein when they are primarily of a fiscal nature.

Like many other TFEU provisions, Article 194 (1) TFEU is not explicit about covering exclusively the internal dimension of EU energy policy leaving therefore open the possibility of employing it in order to achieve CFSP objectives. Having said that, it needs to be stressed that, from the perspective of the EU legislature, describing a measure as internal or external may carry significant repercussions for EU competence viz. setting the tone with regard to the choice of legal basis for future acts in the field of energy and the relevant institutional participation through the voting

procedure.[3] Any demarcation lines would have to be drawn in litigation by Luxembourg judges reading any secondary legislation adopted under Article 194 TFEU in the light of Article 40 TEU. As it is known, the latter constitutes a 'mutual' non-affectation clause triggered when a legal act touches upon both CFSP and non-CFSP fields. Due to the lack of express preference in Article 40 TEU (as modified by the Lisbon Treaty) towards either CFSP or non-CFSP legal bases, CJEU judges will have the opportunity to adjudicate on whether an alleged Article 194 (1) TFEU act on energy is in fact a CFSP act and vice versa. They will therefore act as referees viz. drawing the boundaries between the TEU and TFEU by upholding the non-affectation clause of Article 40 TEU.[4]

It remains to be seen how the CJEU would go about resolving future borderline legal bases cases where an act under Article 194 (2) TFEU pursues a mixed objective.[5] This has become a real possibility in the post-Lisbon dispensation. Although energy security has for a while been a marginal competence and until recently rarely invoked by the EU's High Representative or the External Action Service,[6] this has now changed following the gradual externalisation of the EU's internal targets which means that the EU can now adopt autonomous instruments in the field of energy security (under Article 194 TFEU) as well as conclude international agreements (e.g. bilateral agreements with third countries) to this end. We will consider each of these in turn.

B. Autonomous instruments in the field of energy security

As soon as the Treaty of Lisbon came into force, the EU Institutions made use of the new energy competence under Article 194 TFEU in 2010 and adopted a Regulation (994/2010) on security of gas supply under Article 194 (2) TFEU requiring Member States to put in place internal measures with a view to create an action plan (prevention and emergency).[7] Yet, the introduction of the new energy competence came with a caveat. Article 194 (2) TFEU reduces the pre-emptive effect of EU

[3] For instance, the CJEU has held that a Regulation on 'smart sanctions' was rightly based on Article 215 (2) TFEU, thereby rejecting the European Parliament's argument that the measure ought to have been taken on the basis of Article 75 TFEU, which ensured a greater degree of parliamentary participation through the ordinary legislative procedure. See C-130/10 *European Parliament v Council* [2012] ECLI:EU:C:2012:472.

[4] See in this regard Alan Dashwood, 'Article 47 and the Relationship between First and Second Pillar Competences' in Alan Dashwood and Marc Maresceau (eds), *Law and Practice of EU External Relations* (CUP 2008) 99; Piet Eeckhout, 'The EU's Common Foreign and Security Policy after Lisbon: From Pillar Talk to Constitutionalism' in Andrea Biondi and Piet Eeckhout (eds), *EU After Lisbon* (OUP 2012) 272.

[5] See for instance in the context of energy: B. Van Vooren, "EU External Energy Policy" in M. Trybus and L. Rubini, *Treaty of Lisbon and the Future of European Law and Policy* (Cheltenham: Edward Elgar, 2012), p. 301.

[6] Bart Van Vooren, 'Europe Unplugged: Progress, Potential and Limitations of EU External Energy Policy Three Years post-Lisbon', (Sieps working paper 2012) 5 <http://www.sieps.se/sites/default/files/2012_5_0.pdf> accessed 14 July 2017.

[7] Regulation (EU) No 994/2010 concerning measures to safeguard security of gas supply and repealing Council Directive 2004/67/EC O.J/L 295/1, art 4.

legislation in the field of energy by confirming that the adoption of measures which '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' is prohibited. Accordingly, EU secondary legislation on the exploitation of the Member States' energy resources can only be adopted on the basis of other, non-energy specific provisions, such as by unanimous decision of the Council in accordance with Article 192(2)(c) TFEU viz. Environment measures significantly affecting a Member State's choice between different energy sources and the general structure of its energy supply.

Despite the above restrictive scope of energy competence, it is worth reiterating that it is due to the Lisbon Treaty reforms that the EU acquired the constitutional and institutional capacity to act collectively on behalf of its Member States in the field of energy. Such an empowerment has helped in gradually shaping the EU's external profile in the field of energy. For instance, one may identify CFSP links in otherwise non-CFSP EU secondary legislation adopted under the new energy competence of Article 194 TFEU. For instance, Regulation 994/2010 on security of gas supply adopted under Article 194 (2) TFEU is a case in point. In particular, while the Regulation imposes substantive obligations on the Member States, such as to ensure bi-directional capacity of gas infrastructure (Article 6 and 7), it also makes reference to 'energy security' as an aspect of EU security policy in its Preamble:

> The Report on the Implementation of the European Security Strategy... highlights the growing reliance on imported energy as a significant additional risk for the Union's security of energy supply and stresses energy security as one of the new challenges for security policy. The internal gas market is a central element to increase the security of energy supply in the Union, and to reduce the exposure of individual Member States to the harmful effects of supply disruptions.[8]

The CFSP undertone of legislative activity under the TFEU owes primarily to the EU's reliance on imported energy. Having said that, the Regulation on security of gas supply does not establish a parallel external competence in the field of energy security. It boosts, however, the presence of energy in the EU foreign policy terrain which is strengthened further by the conclusion of international agreements and other aspects of external relations law, such as restrictive measures – an important tool of CFSP.

C. Conclusion of international agreements

[8] Ibid, Preamble 11.

Although the Treaty remains silent on energy as an aspect of EU external policy, international agreements on energy can be concluded through resort to Article 24 TEU (EU competence in matters of CFSP) and Article 37 TEU (conclusion of agreements with one or more countries). There are certain limitations as pointed out by Article 37 TEU which states that the EU may only conclude international agreements in areas covered by the Treaty's CFSP Chapter. Article 37 TEU can be read in the light of Article 23 TEU (EU action on international scene) and Article 24 TEU (CFSP competence). Article 23 TEU, in particular, states that CFSP action shall be guided by the principles in Article 3 TEU (promotion of EU values) and the objectives inherent in Article 21 TEU (democracy, rule of law, human rights). Yet, none of these values or objectives explicitly mentions 'energy security'.

Even if an 'energy security' competence is not, therefore, granted to the EU expressly in the TEU, the EU institutions can resort to their implied external powers under Article 216 (1) TFEU.[9] Like Article 194 TFEU, Article 216 (1) TFEU was also introduced by the Lisbon Treaty in a shorthand attempt to codify the ECJ's voluminous case law on the EU's external implied powers. In summary, Article 216 (1) TFEU constitutes a residual competence under which the EU may conclude international agreements with third parties in the following three situations: i) where the Treaties so provide; ii) where the conclusion of an agreement is necessary in order to achieve, within the framework of the EU's policies, one of the objectives referred to in the Treaties (also known as the principle of *necessity*); and iii) [where the conclusion of an agreement] is provided for in a legally binding EU act or is likely to affect *common rules* or alter their scope. To clarify, Article 216 (1) TFEU does not on its own provide a substantive legal basis for external energy policy with a CFSP flavour. It rather enables the EU to conclude international treaties on, inter alia, energy efficiency and renewables (governed by Article 194 TFEU); security of supply (Article 122 TFEU); energy networks (Articles 170-172 TFEU) or nuclear energy (Euratom Treaty), which may have a varying, impact on CFSP.

The conclusion of international agreements on energy policy under the EU's residual competence of Article 216 (1) TFEU may, conversely, impact upon the competence of Member States to negotiate and conclude their own energy deals. For instance, the Commission's recent request for a Council mandate to negotiate with Russia an agreement on the Nord Stream 2 pipeline is indicative of the EU's ambition that future infrastructure projects are operated in line with EU

[9] The Treaty only provides for express provisions regarding the EU's legal personality (Article 47 TEU), the capacity to negotiate agreements with third countries or international organisations (Article 218 TFEU) and the possibility to pursue common policies and actions to safeguard EU values, fundamental interests, security, independence and integrity (Article 21 (a) TEU).

rules rather than 'in a legal void or according to a third country's energy laws only'.[10] These rules mandate inter alia transparency in pipeline operation, non-discriminatory tariff-setting and third-party access. In this regard, the ECJ's role in clarifying whether EU international action is necessary to achieve the objectives set for EU energy policy will be crucial both for the extent of future energy treaties concluded by the EU and more broadly for the development of external energy policy in CFSP. The ECJ's case law on implied powers is well known and has been discussed elsewhere.[11] Suffice it to say here that the EU's growing internal competence to act autonomously in the field of energy will have an undeniable effect in the way EU Institutions advance EU external energy policy. Of course certain key elements of energy policy, such as the choice of energy sources remain a national competence and for Member States to decide. Having said that, Member States shall exercise their exclusive powers by paying due regard to their obligations stemming from EU membership. The ECJ's previous jurisprudence has been effective in managing mixity in external action by pointing Member States to the duty of sincere cooperation enshrined in Article 4 (3) TEU and the requirement of unity in the EU's international representation. At another level, we have witnessed some judicial self-restraint where the CJEU is also prepared to recognise mixity as a means of safeguarding national competences.[12]

On consideration of the above, it can be confirmed that the EU external energy policy in CFSP has now acquired a certain existence. Apart from what has already been mentioned, the nexus between energy policy and CFSP also owes to a range of parallel external policy developments such as the proliferation of export and import of energy products from and to third countries which falls within the scope of EU Common Commercial Policy (CCP) – an EU exclusive competence. In particular, Article 207 TFEU grants the EU the power to conclude tariff and trade agreements and adopt autonomous measures with regard to all aspects of CCP (goods, services, commercial aspects of IP).[13] What is more, energy-related aspects can become part of Enhanced Partnership and Cooperation Agreements (Enhanced PCAs). These are individual international cooperation mechanisms predominantly occupied with establishing a free trade area. PCAs were originally concluded as mixed (cross-pillar) agreements between the EU, the Member States and the newly

[10] See European Commission Press Release of 9 June 2017, Available from: http://europa.eu/rapid/press-release_IP-17-1571_en.htm

[11] The ECJ has clarified the EU's implied competence used widely to conclude agreements in the field of transport, safety in the workplace, commercial policy in respect of services and the recognition of judgments in civil and commercial matters. See for more detail Theodore Konstadinides 'EU Foreign Policy under the Doctrine of Implied Powers: Codification Drawbacks and Constitutional Limitations' (2014) 39 (4) ELRev 511.

[12] See Theodore Konstadinides, 'In the Union of Wine: Loose Ends in the Relationship between the European Union and the Member States in the field of External Representation' (2015) 21 (4) European Public Law 679.

[13] See Sanam S. Haghighi, *Energy Security: The External Legal Relations of the EU with Major Oil and Gas Supplying Countries* (Hart Publishing 2007) 112.

independent states that emerged after the fall of the Soviet Union.[14] They are now concluded on the basis of Article 212 TFEU which provides that 'the Union shall carry out economic, financial and technical cooperation measures, including assistance, in particular financial assistance, with third countries other than developing countries'.[15] Some of these Agreements have provided the framework for further integration of the partner country with the EU market of goods and services and modernisation of energy infrastructure.[16] For instance, in December 2011 the EU and Ukraine established a political association and economic agreement and replaced the original PCA which was in force since 1998. The EU-Ukraine AA/DCFTA (Association Agreement including a Deep and Comprehensive Free Trade Area), applicable since January 2016, has provided for alignment of Ukraine's legislation to EU standards in trade-related energy-aspects, including investment, transit and transport.[17] Conversely, the EU-Russia PCA expired in 2007 and negotiations on a new EU-Russia Agreement were suspended in 2014 due to Russia's actions destabilising the situation in Ukraine.[18] Article 65 dealt specifically with energy, mandating that cooperation in this field to be carried out 'within the principles of market economy and the European Energy Charter, against the background of progressive integration of the energy markets in Europe'.[19] Nonetheless, the PCA instrument has not been as significant as other developments aiming at pursuing a market economy into the Russian energy markets, such as the Energy Charter Treaty.[20] The Energy Charter Treaty was adopted in 1994 and is the only major multilateral treaty in the energy sector. It aims to build a legal framework for global energy security, based on the principles of open, transparent, and non-discriminatory energy markets and transit systems. However, the significance of the latter decreased after Russian indicated that it would not ratify it. Yet, it remains the EU's primary international instrument in the area despite the emergence of the Energy Community Treaty in 2005. Overall, the

---

[14] Borrowing from C Hillion, G De Baere calls these agreements 'proto cross-pillar' because at the time PCAs were concluded, the EU did not have legal personality to enter into treaties (they were concluded on behalf of the EC). Yet again PCAs provided a model for bridging cross-pillar objectives such as promoting trade and combating crime. Post-Lisbon, cross-pillar mixed agreements declined because all international agreements are now signed by the EU. Still, however, a certain fuzziness is maintained in lieu of the retention of CFSP in the TEU and thus its firm separation from the rest of the TFEU policy areas. See Geert De Baere, *Constitutional Principles of EU External Relations* (OUP 2008) 297.

[15] See for an extensive study of PCAs see Christophe Hillion, *The Evolving System of EU External Relations as Evidenced in the EU Partnerships with Russia and Ukraine* (Ph.D thesis, Leiden, 2005).

[16] See new Enhanced PCA with Kazakhstan (04.02.2016, OJ L 29/3) and talks on a new agreement with Azerbaijan (See EEAS Action Plan: https://eeas.europa.eu/sites/eeas/files/azerbaijan_enp_ap_final_en.pdf Accessed 11 September 2017).

[17] The EU-Ukraine AA/DCFTA forms part of the EU-Ukraine Association Agreement, 29 May 2014, OJ L 161/3.

[18] For more information on the state of EU-Russia relationship see House of Lords, European Union Committee, 'The EU and Russia: Before and Beyond the Crisis in Ukraine', (February 2015) accessed 14 July 2017 at <https://www.publications.parliament.uk/pa/ld201415/ldselect/ldeucom/115/115.pdf>

[19] See Article 65(1) of the Agreement on partnership and cooperation.

[20] Council and Commission Decision of 23 September 1997 on the conclusion, by the European Communities, of the Energy Charter Treaty and Energy Charter Protocol on energy efficiency and related environmental aspects (98/181/EC, ECSC, Erratum) [1998] OJ L69 (9 March 1998).

legal obligations contained in these treaties are quite thin and mostly relate to trade.[21] Additionally, the Council recently prolonged economic sanctions targeting the financial, energy and defence sectors of the Russian economy until 31 January 2018. Such sanctions include limiting access to EU primary and secondary capital markets for major Russia energy companies.[22] We will now turn to consider sanctions as a tool to promote the objectives of CFSP and their impact on EU energy policy.

D. Other aspects of external relations law: imposition of sanctions

The CFSP powers to weave a web of sanctions (also known as restrictive measures) is crucial to EU external action - particularly the EU's competence on CCP and the suspension of the EU-Russia negotiations. Such sanctions may have a practical impact on the energy sphere – for instance through the wide prohibition on investment in energy sectors against Russia or Iran.[23] The trade (CCP) and foreign policy (CFSP) overlap can hardly be overstated in the imposition of economic sanctions employed to achieve EU foreign policy objectives.[24] Article 215 TFEU provides the legal basis for the interruption or reduction, in part or completely, of the EU's economic and financial relations with one or more third countries, where such sanctions are necessary to achieve the objectives of the CFSP.[25]

As mentioned, the EU has widened the legal basis for restrictive measures, most recently against Russia.[26] In this respect, the role of the CJEU to determine the scope of restrictive measures and the judicial remedies available to individuals is important. Recent litigation has shed light on the CJEU's limited jurisdiction pursuant to Article 24 (1) TEU and Article 275 (2) TFEU

---

[21] Kim Talus, EU Energy Law and Policy (OUP 2013) 219.

[22] See Council of the EU, List of persons and entities under restrictive measures over the territorial integrity of Ukraine. Available from http://www.consilium.europa.eu/en/policies/sanctions/ukraine-crisis/. Accessed 11 September 2017.

[23] Such economic and financial sanctions include prohibition to import crude oil, natural gas, petrochemical and petroleum products; prohibition to sell or supply key equipment used in the energy sector, gold, other precious metals and diamonds, certain naval equipment, certain software, etc. See for a summary of restrictive measures the relevant links on the Council's website: 'EU Restrictive Measures in response to the crisis in Ukraine', accessed 14 July at http://www.consilium.europa.eu/en/policies/sanctions/ukraine-crisis/; 'EU Restrictive Measures against Iran', accessed 14 July at http://www.consilium.europa.eu/en/policies/sanctions/iran/ See also contribution by Eckes in this volume. Eckes points out that the only legal bridge between CFSP and TFEU is in the field of sanctions (state and individual / 'smart').

[24] See for a detailed study on CCP, Dorota Leczykiewicz, 'Common Commercial Policy: The Expanding Competence of the European Union in the Area of International Trade' in Philipp Dann and Michal Rynkowski (eds.) *The Unity of the European Constitution* (Springer, 2006) 289. See for a comparison with CFSP, Finn Laursen, 'The EU's External Action according to the Lisbon Treaty: Institutional Choices and their Explanation', in Maciej Wilga and Ireneusz Karolewski, *New Approaches to EU Foreign Policy* (Routledge 2014) 17.

[25] See for a detailed account: <http://eeas.europa.eu/archives/docs/cfsp/sanctions/docs/measures_en.pdf> last accessed 14 July 2017.

[26] See Council of the EU, 'Ukrainian Crisis: EU broadens remit of sanctions', Press Release ST 12038/14; Council of the EU, 'Russia: EU prolongs economic sanctions by six months', Press Release 414/17.

respectively. In *Rosneft,* for instance, the CJEU held that TFEU provisions of Articles 19, 24 and 40 TEU, Article 275 TFEU as well as Article 47 of the EU Charter of Fundamental Rights must be interpreted as meaning that the CJEU has jurisdiction to give preliminary rulings on the validity of acts adopted on the basis of CFSP provisions, such as those concerning restrictive measures against Russia, provided that the request for a preliminary ruling relates either to monitoring their compliance with Article 40 TEU, or to reviewing their legality against natural or legal persons. [27]

So far we have discussed the legislative capacity of the EU to act collectively on behalf of its Member States in the field of energy and the CFSP undertone of legislative activity under the TFEU. We also considered how international agreements on energy can be concluded, mentioning that 'energy security' competence is not granted to the EU expressly in the TEU - hence the EU institutions can resort to their implied external powers for this purpose. Energy security has featured prominently with regard to the interplay between national and supranational energy policies, and the quality of EU relations with Russia. We have not however examined the background and the way in which CFSP has been used in terms of energy security. This is the subject matter of the next section which also helps to illustrate the assimilation between internal and external EU policies insofar as energy policy is concerned.

III. THE INCREASING PROMINENCE OF ENERGY SECURITY IN CFSP

This section serves to illustrate the increasing prominence of energy security in CFSP – a component which has brought EU foreign policy closer to the EU's internal market mentality viz. potential TFEU-TEU cross-fertilisation through legislative basis interplay and more active involvement of the EU political institutions in policy shaping, monitoring and future enforcement. While this section alludes to the erosion of the schism between the internal and the external – at least as far as energy policy is concerned – it also points, first, to the inherent limitations of CFSP as a means for the EU to speak and act as one in world affairs and, second, to the conceptual shortcomings of energy security. For instance, it is argued that while energy security is at the forefront of international and European politics, it can hardly be contained within a single legislative framework.

In the devastated from the Second Word War Europe, energy was very much tied to national sovereignty, and state-owned, vertically integrated energy monopolies were established as the main vehicle to rebuild the countries' economy. In contrast to the slow progress made in the creation of a

[27] Case C-72/15 *PJSC Rosneft Oil Company v Her Majesty's Treasury and Others* [2017] ECLI:EU:C:2017:236. See also Chapter X by Christophe Hillion and Ramses Wessel in this volume.

single market for energy, measures to promote energy security were put in place since the very beginning of European integration, rendering security of supply the main pillar of a common energy policy.[28] This development was due to the major oil crises (i.e. Suez Crisis in 1956-1957; OPEC oil crisis 1970), which exposed EU's dependency to varying degrees on energy imports of oil, gas, coal and electricity. EU dependency on energy imports in turn triggered efforts to create an EU-wide emergency system, which continues to evolve.[29] More recent initiatives in the fields of renewables energy[30], energy efficiency[31] as well as the on-going efforts to further develop a well-functioning and well-integrated internal energy market[32] also aim at securing energy. Similarly, in the light of recent geopolitical threats and vulnerabilities within the EU and the wider European region, energy policy in the CFSP context has naturally focused on energy security. Indeed, energy security features high on the political agenda of EU foreign policy, gradually becoming a political priority for the establishment of a resilient Energy Union that will serve a tripartite purpose: provide the citizen with secure, sustainable, competitive and affordable agency; induce concerted action by

---

[28] See Decision 68/416/EEC on minimum stocks of crude oil and petroleum products and Council Directive 73/238/EEC of 24.6.1973 on measures to mitigate the effects of difficulties in the supply of crude oil and petroleum products, OJ 1973, L 228, p.1.

[29] Directive 68/414 of 20.12.1968 about minimum storage requirements for oil and oil products, OJ 1968, L 308, p.14 was promulgated as a response to the second Suez crisis. The 1968 Directive was subsequently amended by Directives 72/425/EEC of 19.12.1972, OJ L291/154 and 98/93/EC [OJ L358/100] both of which were later codified by Directive 2006/67/EC [2006] OJ L217/8. The current legislation in force is contained in Directive 2009/119/EC [2009] OJ L265/9. Other measures include Regulation (EEC) No 1055/72 of the Council of 18 May 1972 concerning notification of imports of crude oil and natural gas [OJ 1972, L120/3]; Regulation (EEC) No 1056/72 of the Council of 18 May 1972 on notifying the Commission of investment projects of interest to the Community in the petroleum, natural gas and electricity sectors, [OJ L 120/7]; Directive concerning measures to weaken the impact of difficulties of supply with oil and oil products, OJ 1973, L228. The Community developed its own emergency system in the light of the oil shocks at the end of the 1970s and in the wake of the Iranian revolution and subsequent war with Iraq by adopting two decisions: one on the export of crude oil and petroleum products from one Member State to another in the event of supply difficulties (Council Decision 77/186/EEC [1977] OJ L61/23, as amended by Decision 79/879/EEC [1979] OJ L250/58) and another to cut back consumption of primary energy resources in the case of supply difficulties (Council Decision 77/706/EEC [1977] OJ L292/9, implemented by Commission Decision 79/639/EEC [1979] OJ L183/1). During the 1970s oil crisis, a limitation of Article 34 regarding free and competitive trade through EU secondary legislation was tolerated in the light of security of supply fears, see Council Directive 77/186/EEC [1977] OJ L 61/23 amended by Council Decision 79/879/EEC [1979] OJ L 270/58; these provisions have since been abolished.

[30] Proposal for a Directive amending Directive 98/70/EC relating to the quality of petrol and diesel fuels and amending Directive 2009/28/EC on the promotion of the use of energy from renewable sources COM/2012/0595 final - 2012/0288.

[31] Communication from the Commission to the Council and the European Parliament of 6 October 2006: 'Mobilising public and private finance towards global access to climate-friendly, affordable and secure energy services: The Global Energy Efficiency and Renewable Energy Fund' COM (2006) 583 final.

[32] European Commission, 'Towards Energy Union: The Commission presents sustainable energy security package' (16 February 2016) last accessed 14 July 2017 at http://europa.eu/rapid/press-release_IP-16-307_en.htm. See, in particular, the legislative proposal for the review of the Regulation on Security Supply, which aims to increase the transparency of natural gas supply contracts in the EU last accessed 14 July 2017 at:
<https://ec.europa.eu/energy/sites/ener/files/documents/1_EN_ACT_part1_v10.pdf>

Member States acting in a spirit of mutual solidarity and trust and; speak with one voice in global affairs.[33]

As mentioned, EU political consensus on energy actorness, cohesiveness and effectiveness with energy security at the epicentre of EU internal and external action is hardly a novelty. Almost ten years ago, in his capacity as High Representative for the CFSP, Javier Solana highlighted the importance of CFSP in establishing a 'united policy on energy questions'.[34] Likewise, in its Green Paper of March 2006, while recognising the importance of the realisation of its internal energy marker, the Commission stressed that 'Member States should promote the principles of the internal energy market in bilateral and multilateral fora, enhancing the Union's coherence and weight externally on energy issues.'[35] Last but not least, the 2008 review of the European Security Strategy, which provided the CFSP's conceptual framework, emphasised that given the EU's energy dependence increase (which was predicted to reach 75% by 2030) 'our response must be an EU energy policy which combines external and internal dimensions.'[36] The above milestones serve to illustrate that, already prior to the Treaty of Lisbon, the focus was on a coherent approach to ensuring energy security as a part of the CFSP. For instance, in 2006 the Commission set out in a Communication a new approach to European trade policy priorities under the broad title Global Europe. Energy was a central component of its strategy.

> As global demand increases and Europe becomes more dependent on external energy sources, the EU needs to go further in developing a coherent policy for competitive, secure and sustainable energy. Internally, this means completing a competitive, EU-wide energy market and promoting a sustainable, efficient and diverse energy mix. Externally, we should seek to improve transparency, governance and trade in the energy sector in third countries through non-discriminatory conditions of transit and third party access to export pipeline infrastructure; and by helping to improve production and export capacities and develop energy transportation infrastructure. Diversity of source, supply and transit is essential to our internal and external policies.[37]

More recently, the 2014 European Energy Security Strategy set the tone about energy security as an EU objective and its related foreign policy dimension viz. responding to the high EU dependence on energy imports through, inter alia, building emergency and solidarity mechanisms, switching to

---

[33] See Commission Communication on 'A Framework Strategy for a Resilient Energy Union with a Forward-Looking Climate Change Policy' COM 2015 080 final.

[34] Javier Solana, 'Energy in the Common Foreign and Security Policy' in Greg Austin et al. (eds) *Energy Conflict Prevention* (Madariaga European Foundation 2007).

[35] European Commission, Communication to the European Council, 'External energy relations – from principles to action', 12.10.2006, COM (2006) 590 final.

[36] European Council, 'Report on the Implementation of the European Security Strategy - Providing Security in a Changing World' Brussels, 11 December 2008 S407/08.

[37] European Commission, 'Global Europe, A Contribution to the EU's Growth and Jobs' Strategy' (4 October 2006) 7 last accessed 14 July 2017 at <http://trade.ec.europa.eu/doclib/docs/2006/october/tradoc_130376.pdf>

alternative fuels and increasing energy production in the EU.[38] These proposals were also echoed in the 2016 EU Global Strategy whose motto is 'joining up internal and external policies'[39] and the 2017 Joint Communication on Resilience which focuses on energy security and the neighbourhood viz. the need to strengthen the EU's resilience on energy security, hybrid threats and strategic communication.[40] In this respect, it is also worth mentioning the 2014 Energy Union Initiative which, inter alia, placed emphasis on strengthening the hand of the Commission in intergovernmental agreements in order to ensure that future agreements are in compliance with EU Law.[41] The package also outlined the intention of the Commission to review the 2012 Intergovernmental Agreements Decision (994/2012/EU) that established an information exchange mechanism with respect to energy agreements between Member States and third countries.[42] This Decision provided that Member States should submit to the Commission all the intergovernmental agreements they have concluded within the meaning of Article 25 of the Vienna Convention on the Law of Treaties.

The review of the Intergovernmental Agreements Decision will focus on ensuring that the Commission has the power to inter alia ensure agreements are compatible with EU legislation before negotiations are concluded and securing the involvement of the Commission in such negotiations. It is important to note that in its statement on subsidiarity in the proposal for a new Intergovernmental Agreements Decision, the Commission has acknowledged that 'the Decision stands at the cross-roads of the external dimension (as it involves agreements with third countries) and of the internal market (as non-compliant provisions such as destination clauses have a negative impact on the free flow of energy products within the internal market).'[43] The Commission therefore identified a clear added value to reinforce the cooperation and transparency at EU level in the framework of this proposal.[44]

Addressing the external reliance of the EU to its energy needs has inevitably created a strong linkage between the EU internal market and foreign policy, with energy security as the

---

[38] European Energy Security Strategy COM (2014) 330 final.

[39] See for more information <http://europa.eu/globalstrategy/> last accessed 14 July 2017.

[40] European Commission, 'Joint Communication on "A Strategic Approach to Resilience in the EU's External Action', (7 June 2017) last accessed 14 July 2017 at <http://europa.eu/rapid/press-release_MEMO-17-1555_en.htm>

[41] Communication from the Commission: A Framework Strategy for a Resilient Energy Union with a Forward-Looking Climate Change Policy COM/2015/080 final.

[42] The Commission produced a proposal to that effect on 16 February 2016. See Proposal for a Decision 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 and repealing Decision No 994/2012/EU COM/2016/053 final.

[43] Decision of the European Parliament and the Council 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 and repealing Decision No 994/2012/EU, COM (2016) 53 final.

[44] Ibid, See Subsidiarity heading.

common denominator. There are still open questions, however, with regard to the deployment of external instruments as a means to tackle energy security issues. For instance, political aspirations for the establishment of an Energy Union are constrained by CFSP legal limitations on EU lawmakers. There are both institutional/procedural and conceptual limitations. First, as it is well-known, CFSP is unique in a number of respects viz. the limited role of EU supranational institutions and majoritarian decision-making which is still far from superseding national foreign policies. Also, as pointed earlier, any ambition related to CFSP future action on energy security has to be counterbalanced against the existing limitations of the internal market competence on energy. As mentioned, Article 194 (2) TFEU secures the right of Member States to determine the conditions for exploiting their energy resources. This is crucial especially when it comes to energy security viz. the conclusion of international treaties on, inter alia, energy efficiency and renewables (governed by Article 194 TFEU). What is more, CFSP action on energy security is clouded with conceptual inconsistencies. For instance, energy security is a multidimensional concept which can be hard to decipher in legal terms - it relates to security of supply as well as security of demand and it implies different measures to attain these objectives.[45] Most importantly, although energy can be bought and sold like any other commodity, it can also be used as a political weapon, or as blackmail, to achieve political goals. According to neorealist thought, energy resources constitute power components of national foreign policy often utilised by states to exert their external influence upon their counterparts.[46]

Such a reading of energy security is crucial for the future CFSP involvement in the field. Energy security can, therefore, be supported by different external instruments and policies ranging from CFSP to development policy as well as the solidarity provisions of Articles 222 TFEU if energy infrastructure falls victim to a natural or man-made disaster within the EU and Article 42 (7) TEU in the event energy is used as a weapon against Member States.[47] Any future action taken under these provisions can be added to the economic initiatives and measures discussed below, since energy security involves inter alia the security of supply and demand, as well as the reliability of contractual arrangements on energy and the interplay between national and supranational energy policies.

---

[45] See e.g. B. Barton, C. Redgwell, A. Ronne and D. Zillman, who define it as a condition in which 'a nation and all, or most of its citizens and businesses have access to sufficient energy resources at reasonable prices for foreseeable future free from serious risk or major disruption of service' in Barry Barton, Catherine Redgwell, Anita Ronne and Donald N. Zillman (eds), *Energy Security: Managing Risk in a Dynamic Legal and Regulatory Environment* (OUP 2004) 4. See further, Hugh Dyer and Maria Julia Trombetta (eds) *International Handbook on Energy Security* (EE 2013) Ch 12.

[46] See Tom Dyson, *Neoclassical Realism and Defence Reform in Post-Cold War Europe* (Palgrave Macmillan 2010).

[47] See Theodore Konstadinides, "Civil protection cooperation in EU law: Is there Room for Solidarity to Wriggle Past?' (2013) 19 (2) E.L.R. 267; Steven Blockmans, 'L'Union Fait la Force: Making the Most of the Solidarity Clause (Art. 222 TFEU)', in Inge Govaere and Sara Poli (eds) *EU Management of Global Emergencies: Legal Framework for Combating Threats and Crises* (Brill Publishers 2014) 111

The section highlighted the strong link between the EU internal market and foreign policy, with energy security as the common denominator. At the same time, however it explored the institutional, procedural and conceptual limitations of relying on CFSP to promote energy security. The next section will illustrate how these can be addressed by the externalisation of the EU's internal energy market regulation.

IV. THE SECURITY DIMENSION OF INTERNAL MARKET ENERGY REGULATION

The aim of this section is two-fold. First, to illustrate that, whilst energy has become more prominent within the framework of CFSP, security underlies non-CFSP (in this case, competition policy). Second, and relatedly, to demonstrate how limitations posed by the CFSP framework can be addressed by the externalisation of the EU's market 'constitution'. In this regard we may confidently refer to a CFSP dimension of market liberalisation.

The externalisation of internal market policies is mostly evident in the introduction of the so-called 'Third Party Clause', otherwise known as the 'Gazprom clause' provided in the Third Energy Package.[48] Under this provision, a Transmission System Operator (TSO) controlled by a third-country supplier that wishes to perform its functions on the territory of a Member State must receive certification prior to its establishment in the EU. The certification procedure aims to satisfy that the TSO complies with the unbundling requirements of the Third Package.[49] Unbundling is a market liberalisation tool and refers to the process of separation of energy supply and generation from the operation of transmission networks. This is seen as an appropriate mechanism to remove the conflict of interest that may arise if a single company operates a transmission network and generates or sells energy at the same time.[50] In such a scenario, the vertically integrated company may have an incentive to obstruct competitors' access to infrastructure, preventing competition in the market and leading to consumer detriment in the form of higher prices. Under the Third Package unbundling must take place in one of the three following ways: Ownership Unbundling (OU), where all integrated energy companies sell off their gas and electricity network; Independent System Operator (ISO), where energy supply companies may still formally own gas or electricity

[48] 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), O.J. 2009, L 211/55 (hereinafter referred to as 'Electricity Directive 2009/72/EC'), art 11 and Recital 22; and Directive (2009/73/EC) of the European Parliament and the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive (2003/55/EC), O.J. 2003, L 211/94 (hereinafter referred to as 'Gas Directive 2009/73/EC), Recital 25.

[49] See Ibid, articles 9-23 regarding ownership unbundling of production, supply and network assets within the controlling undertaking.

[50] See Electricity Directive 2009/72/EC (n 41), Recital 11.

transmission networks, but must leave the entire operation to an independent company; and Independent Transmission Operator (ITO), where energy supply companies may still formally own gas or electricity transmission networks but must leave the entire operation and investment in the grid to an independent company.

Under the Third Party Clause, when a third country entity seeks certification as a Transmission System Operator (TSO), Article 11 in each Directive requires a detailed assessment by the National Regulatory Authority (NRA) to ensure that the unbundling obligations are met and that security of energy supply of the Member State and the EU will not be put at risk. The burden of proof lies with the respective TSO. A prior Commission opinion must be sought before certification and the NRA must take 'utmost account' of that opinion when adopting its final decision. Each Member State retains the ultimate power of veto when its security is at stake. All in all, the purpose of this political, one may argue, provision is to ensure that EU interests will be secured and to avoid situations where an external, non-EU (vertically integrated) undertaking has control over EU networks.[51] More recently, the discussion has resurfaced in the context of the Nord Stream 2 pipeline project 2, Russia's proposed $10 billion gas pipeline that will bring natural gas from Russia across the Baltic to Germany and then onwards to Central and Western Europe. In particular, it is still debatable whether in respect of the original corporate structure (whereby Gazprom owned 50% of the operator), or probable corporate structure (whereby Gazprom will probably own all or most of share of Nord Stream 2) Nord Stream 2 would be considered to be controlled by a third country person.[52]

Turning to security of supply considerations, these mostly underlie non-CFSP dimensions, and in particular competition policy. This is owing to the fact that security of supply is closely interrelated with and dependent upon the effective functioning of the internal market and the greater integration of Member State's markets. Hence, in parallel with the provisions of sector-specific regulation relating to unbundling and third party access, the application of EU competition law also plays an important, complementary role in safeguarding and promoting security of supply. EU competition law is found in Articles 101 TFEU, with prohibits agreements between undertakings, which may affect trade between Member States and distort competition in the internal market and 102 TFEU, which prohibits the abuse of a dominant position by an undertaking within the internal

---

[51] For an analysis of the origins of the Third Party Clause see Monica Waloszyk, *Law and Policy of the European Gas Market* (EE 2014) 69-73. For the relationship between the Third Party Clause and the Energy Charter Treaty see Kim Talus, EU Energy Law and Policy (OUP 2013) 84-5 and Van Hoorn, 'Unbundling' Reciprocity and the European Internal Energy Markets: WTO Consistency and Broader Implications for Europe' 18 *European Energy and Environmental Law Review* (2009) 51-76.

[52] See n (10) above. For an insightful analysis see Alan Riley, "Nordstream 2: A Legal and Policy Analysis" CEPS Special Report No. 151 (November 2016) last accessed 14 July at: <https://www.ceps.eu/publications/nord-stream-2-legal-and-policy-analysis>

market or in a substantial part of it. The EU Merger Regulation (EC) No. 139/2004 is also powerful tool.[53]

As will be shown, competition law has attained a disciplinary function in allegations involving activities performed by third-country gas undertakings on the EU territory. As the European Commission has repeatedly stated, trade relationships with foreign energy suppliers have to abide with EU Competition law rules.[54] EU's jurisdiction in such cases derives from the territoriality principle under public international law. According to the territoriality principle, EU may exercise its executive and judicial jurisdiction over violations committed on its territory, irrespective of the nationality of the offender. Article 7 of Regulation (EC) No. 1/2003, the procedural framework governing EU competition law, states that 'the Commission, when finding that there is an infringement of [Articles 101 and 102 TFEU], may impose on the relevant undertakings any behavioural or structural remedies which are proportionate to the infringement committed and necessary to bring the infringement effectively to an end'.[55]

Hence, the Commission has repeatedly examined under Article 101 TFEU trade agreements concluded between EU-based undertakings and large external producers and suppliers of gas, such as Gazprom (Russia) and Sonatrach (Algeria). Such vertical agreements, typically referred to as long-term energy contracts, are a pervasive feature of the European energy sector. For a long time, they were considered as the cornerstone of security of supply in European countries. This is because they allowed the EU buyers, typically the national energy monopolies, to secure energy supply and the external suppliers to secure energy demand that was necessary financing for developing infrastructure. Following the liberalisation of the energy markets, however, long-term energy contracts came under scrutiny by the European Commission. Because long-term energy contracts typically tie a large percentage of market demand, they may result in upstream market foreclosure and violate competition law rules, particularly when the supplier has market power.[56] Furthermore, such agreements typically contain a number of clauses, which may be anticompetitive in nature,

---

[53] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) [2004] OJ L 24/1.

[54] GFU, Case COMP/36.072; Territorial restrictions 1) Algeria gas transport contracts, 2) Expansion of TAG pipeline, Case COMP/37.811; Territorial restrictions – Austria (Gazprom/OMV), Case COMP/38.085; Territorial restrictions in Germany (Ruhrgas/Gazprom), Case COMP/38.307. See further Maarit Lindroos, Dominik Schnichels and Lars Peter Svane, 'Liberalisation of European Gas Markets - Commission settles GFU case with Norwegian gas producers' (October 2002) 3 Competition Policy Newsletter 50 last accessed 14 July at <http://ec.europa.eu/competition/publications/cpn/2002_3_50.pdf>.

[55] Council Regulation (EC) 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2013] OJ L 1.

[56] For an analysis see Kim Talus, 'Long-term natural gas contracts and antitrust law in the European Union and the United States' (2011) 4(3) *The Journal of World Energy Law & Business* 260. See further the Commission's final report from the sector inquiry into energy markets showing that long-term agreements foreclose both upstream and downstream markets, resulting in persistent market division and reinforcement of concentration levels and Kim Talus, 'Long-term gas agreements and security of supply-between law and politics' (2007) 4 European Law Review 535.

such as territorial sales restrictions, profit-splitting mechanisms, long-term exclusive purchase obligations and use restrictions. Most crucially, such clauses may indirectly undermine the objectives of security of supply and diversification of gas supplies by impeding the entry of new market players, as the Energy Sector Inquiry revealed. [57]

Hence, in 2003, the Commission negotiated the removal of territorial restriction clauses from the agreements between Gazprom and some of its EU trading partners such as ENI (Italy),[58] OMV (Austria)[59] and E.ON Ruhrgas (Germany).[60] Such clauses, otherwise known as 'destination clauses', prevent the buyer from reselling the gas outside a certain geographic area thus undermining the creation of a pan-European energy market. For example, ENI was prevented from selling gas bought from Gazprom outside of Italy and Gazprom could not sell gas to other Italian customers without ENI's consent. Furthermore, the Commission has successfully negotiated the removal of other anticompetitive clauses such as use restrictions, included in agreements with the Norwegian companies Statoil and Norsk Hydro[61] as well as profit sharing mechanisms[62] included in agreements with the Algerian company Sonatrach.[63] In the latter case, negotiations between the European Commission and the Algerian government lasted over 7 years and Sonatrach undertook inter alia to delete territorial restriction clauses from all existing contracts and not to insert such clauses in any future contracts nor to employ profit sharing clauses in any existing or future gas supply contract. Similarly, in December 2002, the Commission ended its investigation of sales by Nigerian gas company NLNG into the EU following the latter's agreement to release one of its European customers from a clause preventing the customer from selling outside of it national borders.[64] NLNG further undertook not to introduce territorial restrictions clauses, use restrictions

---

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

[58] Commission Press Release, 'Commission reaches breakthrough with Gazprom an ENI on territorial restriction clauses' IP/03/1345, 6.10.2003.

[59] Commission Press Release, 'Competition: Commission secures improvements to gas supply contracts between OMV and Gazprom' IP/05/195, 17.2.2005. 17 February 2005.

[60] Commission Press Release, 'Competition: Commission secures changes to gas supply contracts between E.ON Ruhrgas and Gazprom', IP/05/710, 10.6.2005.

[61] Commission Press Release, 'Commission successfully settles the GFU case with Norwegian gas producers', IP/02/1084, 17.7.2002.

[62] Profit sharing mechanisms (PSMs) oblige the buyer/importer to share a certain part of the profit with the supplier/producer if the gas is sold on by the importer to a customer outside the agreed territory or to a customer using the gas for another purpose than the one agreed upon. PSMs have been used as an alternative to territorial restrictions clauses.

[63] Commission Press Release, 'Commission and Algeria reach agreement on territorial restrictions and alternative clauses in gas supply contracts' IP/07/1074, 11.07.2007.

[64] Commission Press Release, 'Commission settles investigation into territorial sales restrictions with Nigerian gas company NLNG' IP/02/1869, 12.12.2002.

or profit splitting mechanisms in future contracts. The only cases to close with a formal decision were the GDF/ENEL and GDF/ENI cases.[65]

Most recently, Article 102 TFEU has also played an important role in disciplining the behaviour of foreign undertakings so as to promote inter alia energy security in the EU gas market.[66] In September 2012, the European Commission opened a formal investigation of Gazprom's business practices in the EU.[67] Gazprom is one of the EU's largest gas suppliers and the dominant natural gas supplier in all Central and Eastern European countries. As such, its role in ensuring security of supply in the EU is essential. The Commission alleged that some of its business practices in Central and Eastern gas markets constituted an abuse of its dominant position in breach of Article 102 TFEU. In particular, the Commission accused Gazprom of pursuing an overall strategy to partition Central and Eastern gas markers by imposing territorial restrictions in its supply agreements with gas wholesalers and with some industrial customers in Bulgaria, the Czech Republic, Estonia, Latvia, Lithuania, Poland, Hungary and Slovakia. These territorial restrictions included export ban clauses, destination clauses and other measures preventing the cross-border flow of gas. As a result of this market partitioning, Gazprom may have been able to charge unfair prices in five eastern EU member states (Bulgaria, Estonia, Latvia, Lithuania, and Poland) 'by charging prices to wholesalers that are significantly higher compared to Gazprom's costs or to benchmark prices'.[68] These unfair prices result partly from Gazprom's price formulae that index gas prices in supply contracts to a basket of oil product prices and have unduly favoured Gazprom over its customers.

According to the Commission's preliminary findings, Gazprom may be leveraging its dominant market position by making the supply of gas to Bulgaria and Poland dependent on obtaining unrelated commitments from wholesalers concerning gas transport infrastructure. For example, gas supplies were made dependent on investments in a pipeline project promoted by Gazprom (not explicitly referring to but alluding to the South Stream project in Bulgaria) or accepting Gazprom reinforcing its control over a pipeline (alluding to the Yamal-Europe pipeline in Poland). Regarding the South Stream project, in particular, the implications of Gazprom's actions were much wider. South stream was envisaged, once onshore in Bulgaria, to take a northern route,

---

65 Case COMP/38.662, GDF- décision GDF/ENEL, 26 October 2004 and COMP/38.662, GDF- decision GDF/ENI, 26 October 2004.

66 See e.g. the *Marathon cases*, where the systematic refusal of five gas companies in continental Europe to grant access to their gas pipelines to a Norwegian subsidiary of an American oil and gas producer was considered by the Commission as a potential abuse of dominant position Marathon/Ruhrgas / GDF et alia, Case COMP/36246

67 Commission Press Release, 'Commission sends statement of objections to Gazprom for alleged abuse of dominance on Central and Eastern European Gas Supply Markets IP/15/4828, 22.4.2015. See further, A Riley, "Gazprom versus Commission: The Antitrust Clash of the Decade?" (CEPS Policy Brief No. 285, 31 October 2012) available at: https://www.ceps.eu/publications/commission-v-gazprom-antitrust-clash-decade

68 Ibid.

which would also include Serbia, i.e. a non-EU Member State (but part to the Energy Community Treaty) in which Gazprom is dominant. That would not only secure Gazprom a possible transit route from the Black Sea to Central Europe but also bring Serbia closer to Moscow giving the latter leverage over Belgrade's alignment with CFSP decisions.

Such behaviour, if confirmed, impedes the cross-border sale of gas within the Single Market thus lowering the liquidity and efficiency of gas markets. It raises artificial barriers to trade between Member States and results in higher gas prices. The hefty fines imposed for antitrust violations, which may reach up to 10 per cent of the dominant undertaking's total turnover in the preceding year,[69] may explain Gazprom willingness to offer commitments[70] so as to alleviate the Commission's concerns.[71] Introduced into EU competition law by Article 9 of Regulation 1/2003, commitment decisions allow the Commission to terminate the investigation without the finding of infringement and the subsequent imposition of a fine. The standard of proof is thus significantly low. The parties may propose remedies to remove the Commission's concerns embodied into legally biding commitment decisions. In essence, 'commitment decisions are a bargain between the Commission and the undertaking concerned'.[72] By contrast, antitrust procedures under Article 7 of the same regulation may lead to the establishment of an infringement and levy significant fines. Damages before national courts may also be triggered.

In particular, Gazprom's proposed measures to remedy competition concerns relate to the removal of restrictions to re-sell gas cross-border, to ensuring competitive gas prices in Central and Eastern European gas markets and removing demands in relation to gas infrastructure projects obtained through its dominant market position.[73] At the time of writing, the Commission is market testing Gazprom's concessions and, if satisfactory, it may adopt a decision making the commitments legally binding on Gazprom.[74] In the event that Gazprom breaks such commitments, the Commission may impose a fine up to 10% of the company's worldwide turnover, without having to prove an infringement of the EU antitrust rules.

---

[69] Council Regulation 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty OJ L1/1, art 23(2).

[70] Ibid, art 9.

[71] See Case AT 39816, Commitment Proposal, 14 February 2017 last accessed 14 July 2017 at http://ec.europa.eu/competition/antitrust/cases/g2/gazprom_commitments.pdf

[72] Von Rosenberg, H. (2009), 'Unbundling through the Back Door . . . The Case of Network Divestiture as Remedy in the Energy Sector', E.C.L.R., 30, 245.

[73] Press Release: "Antitrust: Commission invites comments on Gazprom commitments concerning Central and European gas markets" Brussels (13 March 2017) last accessed at 14 July 2017 <http://europa.eu/rapid/press-release_IP-17-555_en.htm>

[74] For an analysis see J Stern and K Yafimava, 'The EU Competition Investigation of Gazprom's sales in Central and Eastern Europe: a detailed analysis of the commitments and the way forward' NG 121 The Oxford Institute for Energy Studies (July 2017)

Furthermore, merger control has also emerged as a powerful tool in promoting energy security. Under article 2(3) of the Merger Regulation,[75] the Commission is entitled to declare a concentration that causes significant impediments to effective competition incompatible with the internal market, particularly if it concerns the strengthening of a dominant position in the market. A recent case concerns the proposed acquisition of the only Greek gas transmission system operator DESFA by SOCAR, the State Oil Company of Azerbaijan Republic is pending approval by the European Commission since January 2015.[76] According to the Commission, there is preliminary evidence that the proposed merged entity 'may have the ability and the incentive to hinder competitive upstream gas suppliers from accessing the Greek transmission system, in order to reduce competition on the upstream wholesale gas market in Greece. This could reduce the number of current and potential suppliers and the amount of natural gas in Greece and lead to higher gas prices for clients'.[77]

Finally, it is also possible that activities conducted by foreign undertakings in the energy sector, through for example international mergers amongst incumbents, may have an impact upon competition within the EU territory, even if no Member State or its territory is involved. In such cases, a question arises as to whether the EU competition law rules could apply extraterritorially against an undertaking in another country, where the latter behaves in an anticompetitive manner having adverse effects on the EU territory ('effects doctrine').[78] So far, the CJEU has not ruled specifically on whether there is an 'effects doctrine' under EU law, since it has been possible under Articles 101 TFEU and 102 TFEU to extend the territorial jurisdiction of EU competition law based on the 'single economic entity doctrine' or the 'implementation doctrine'. According to the former, parents and subsidiaries are considered to form the same undertaking for the purposes of applying competition law rules so the parent can be held responsible for the unlawful conduct of the subsidiary.[79] According to the latter, the EU may assert jurisdiction over foreign undertakings in relation to their foreign conduct if that conduct was implemented in the EU.[80]

---

[75] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) OJ L 24/1.

[76] Commission Press Release, 'Commission opens in-depth investigation into proposed acquisition of Greek gas transmission system operator DESFA by SOCAR' IP/14/1442, 5.11.14.

[77] Ibid.

[78] For a general discussion on the extraterritorial application of EU Competition Law see R Whish and D Bailey, *Competition Law* (8th edn, OUP 2015) Ch 12. For a discussion in the context of the Gazprom investigation see Marek Martyniszyn, 'On Extraterritoriality and the Gazprom case' (2015) 37(6) *European Competition Law Review* 291.

[79] Cases 48/69 etc *ICI v Commission* [1972] ECR 619 (Dyestuffs).

[80] Cases 114/85 etc *A Ahlström Oy v Commission* [1988] ECR 5193

In its recent judgment in *Intel*,[81] the General Court ruled that the jurisdiction of the EU is justified under public international law either by the implementation doctrine or by the 'qualified effects' doctrine, that is to say, the criteria of 'immediate, substantial and immediate effects'.[82] The latter has been invoked in the context of mergers outside the EU and the most important pronouncement was given in the *Gencor v Commission* case.[83] The extraterritorial application of competition law in that case prevented the merger between two South African mining companies, which would have left them with 30-35% of world production. On appeal, the General Court found the application of the EU Merger Regulation justified under public international law 'when it was foreseeable that the proposed merger would have 'an immediate and substantial effect in the Community.[84]

This section served to illustrate how limitations posed by the CFSP framework relating to the promotion of energy security have been addressed by the externalisation of internal market policies. It explored the externalisation of both the sector-specific regulatory regime, through the introduction of the so-called 'Gazprom clause', and competition law, that, as shown, has attained a disciplinary function in allegations involving activities performed by third-country gas undertakings on the EU territory. A key dimension of energy security that resonates throughout the foregoing analysis refers to the EU's security of supply (from an 'internal perspective') in a predominantly economic sense. In other words, it reflects the view that well-functioning EU energy markets via the promotion of free trade and competition will enhance security of supply by inter alia 'sending the right signals to industry participants'.[85] Hence, as discussed above, the EU is ready to intervene in supply contracts that may cover large parts and/or shares of relevant markets and/or be lengthy in duration. While recognising that these serve as an important instrument in securing supplies from abroad, it has adopted a cautious approach when they foreclose new entry and competition in the EU energy markets. The Gazprom case and the merger cases also discussed illustrate the EU's efforts to address the acquisition and/or abuse of a dominant position on the part of major external suppliers in the EU energy markets with the effect of reducing competition upstream and or downstream. In sum, the promotion of upstream and/or downstream competition serves to advance security of supply via inter alia promoting the diversification of supplier countries and routes.

---

[81] Case T-286/09 *Intel v Commission* ECLI:EU:T:2014:547. The General Court's judgment on this issue has been appealed to the CJEU, Case C-413/14, R, not yet decided.

[82] Ibid, paras 233-236 and 243-244, on appeal to the CJEU on this point. See further, Case C-413/14 P *Intel Corporation Inc. v. European Commission* (not yet decided), Opinion of AG Wahl (20 October 2016), paras 278-327.

[83] Case T-102/96 *Gencor Ltd v Commission* [1999] ECR II-753. See further, Morten Broberg, 'The European Commission's Extraterritorial Powers in Merger Control. The Court of First Instance's Judgment in Gencor v. Commission' (2000) 49(1) ICLQ 172.

[84] Ibid, para.90.

[85] Commission, Green Paper : A European Strategy for Sustainable, Competitive and Secure Energy, COM(2006) 105 (8 March 2006), 8.

V. CONCLUSION

The chapter looked into the energy policy and CFSP nexus. It provided an overview of the historical development of the EU's CFSP competence in energy policy by looking at its origins, gradual externalisation and future potential. Two EU responses, in particular, have raised issues about the future design of energy policy as a part of CFSP. These responses are firmly related to EU aspirations for more actorness, cohesiveness and effectiveness in dealing with geopolitical developments and threats in the realm of foreign and security policy. The first response concerns EU's effort to 'securitise' EU energy policy and law. Through a number of initiatives related to energy security, the EU has succeeded in widening the conceptual scope of EU external action objectives to include energy. The second response pertains to the increased EU emphasis on the CFSP dimension of market liberalisation, which seems to have compensated for the lack of a CFSP legal basis in the field of energy.

Both the securitisation of EU energy policy and law and the CFSP dimension of the internal market have helped built rules and procedures for a comprehensive approach to external action in the field of energy. For instance, the EU's third energy package and its Gazprom clause constitute examples where not only does the EU confirm its presence as a global economic actor, but also emerges as a disciplinarian in the field of external relations against third countries. Indeed, the disciplinary influence of the restrictive measures adopted under the TEU against Russia in conjunction with competition rules under the TFEU are bound to impact upon current and future EU energy partnerships.

The legal challenges ahead are of course numerous. From a policy standpoint, action in the field of energy via resort to CFSP instruments or competition law may not be easily distinguished. From a legal perspective, however, we have to deal with the perennial issue of legal competence which has occupied much of the scholarship on the law of EU external relations. The nuance between TFEU and TEU in the field of energy takes place in an environment where EU competence is not clear-cut and perhaps it is bound to remain uncertain due to the Member States' desire for mixity in CFSP and the deeply politicised (and intergovernmental) context within which CFSP rules are applied.

While post-Lisbon energy has gained more visibility in the Treaty, there are two main challenges ahead with reference to CFSP energy competence. The first relates to the question of how to combine the CFSP legal basis, the new energy legal basis, and the Treaty's Article 40 TEU non-affectation clause as the legal foundation for both internal and external energy security instruments. Indeed, a challenge posed by the Lisbon Treaty on the use of implied powers pertains

to the choice of legal basis for cross-sectoral international agreements involving multiple objectives such as CFSP and energy. In this case, a dual legal basis, namely Article 194 TFEU and Articles 24 TEU and 37 TEU or Article 216 (1) TFEU (in case external action on energy is implied) may be the way forward to sign energy agreements (viz. gas transits; interdependence). A dual legal basis would be particularly useful since Article 40 TEU excludes that external competence can be implied for external energy measures under Article 194 TFEU alone.[86] The second challenge to CFSP 'energy' competence relates to the caveat in Article 194 (2) TFEU on Member States' right to determine the conditions for exploiting their energy resources. This is crucial especially when it comes to energy security. Energy security constitutes one of the key aims of EU energy policy according to Article 194 (1) (b) TFEU. It is commonly meant to entail the EU's capacity to secure access to energy supplies in order to correspond to the energy needs of its Member States.

By way of conclusion, it is argued, therefore, that energy action under the TFEU cannot achieve CFSP objectives single-handedly. By contrast, an energy legal basis in the TEU recognising energy policy as part of the CFSP *acquis* would be desirable. Such an innovation would add legal certainty in the implementation of a comprehensive approach to EU external action in the field of energy and, in particular, for the future CFSP legal framework at large.

[86] For an insight on the problems that a dual legal basis may raise see Cremona's contribution in this volume.