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## The Integration of Energy and Environment under the paradigm of Sustainability threatened by the hurdles of the internal energy market.

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### I. Introduction:

Energy issues have always been at the heart of European integration, nonetheless, energy related topics (such as climate change policy, renewable energies, energy planning, energy security of supply, etc...) have only gained growing importance (also in the very quantitative sense of the word) on the EU's policy and regulation agenda following the evident "environmentalisation" of Energy law under the auspices of sustainability<sup>2</sup>. This paper gives an overview of how this particular field of policy action shows why the EU's legal system is profoundly affected by paradoxes and hurdles hampering the effective enhancement of an internal energy market and a strong EU sustainability governance despite of the existence of a strong constitutional setting advocating for it. The EU regulatory framework for Member States to reach the same direction towards the energy transition and decarbonised economy is following different speeds according to uncoordinated national policy decisions. This, of course, puts at risk the whole European integration process and the integrity of a solid Energy market that has taken a new resilient direction towards energy regulation by setting capacity mechanisms of decentralized nature for security reasons.

We understand that Energy and Environmental policy, originally perceived as separate competences, are now two faces of the same coin. Energy is one of the most important pillars of the "sacred temple"<sup>3</sup> of sustainability. Still, while there is an agreeing understanding towards the consideration of the Treaty of

Lisbon as a "milestone" towards further EU integration on line with Sustainability goals setting a new paradigm of action, there is perhaps not such an approach as to the question of attaining a satisfactory answer towards more specific questions regarding the use of natural resources and energy supply under a more coordinated line of action. Nonetheless the past decade has seen intensive legislative activity in the field of European energy policy. Three legislative packages aiming at the promotion of competition and of a number of non-economic objectives, such as security of supply and environmental sustainability, have been implemented. Courts have also been active developing matters regarding national support schemes for renewables and security of supply, without attaining the issue of sustainability and the integration of the European energy market that should be at the heart of this topics.

The specific energy provision introduced by article 194 into the Treaty on the Functioning of European Union (from now onwards TFEU) in 2009, being fairly a new provision welcoming a shared new EU competence on energy policy, security of supply and introducing the principle of solidarity between MS still raises doubts and concerns about future developments in the field of energy<sup>4</sup>. What is clear since 2009 is that the European Parliament and the Council have adopted a significant number of regulations and directives related to a myriad of aspects of energy policy without signs of slowing down. It has become a complicated legal field with an intensive and sometimes uncoordinated legislative production. These facts, demonstrate the growing importance attributed to the Union Policy on energy that could have helped to emphasise the desire of MS to face the challenges in the field of energy with a common response at European level. But there are certain signs pointing towards a different direction. Moreover, the "[s]pirit of solidarity" proclaimed by Article 194(1)(b) TFEU is somehow overlooked.

Our analyses is not just concerned with the transformation process of the energy market

<sup>2</sup> I. Solorio, Mischa Bechberger, Lucia Popartan, "The European Energy Policy and its 'Green Dimension': Discursive Hegemony and Policy Variations in the Greening of Energy Policy" in, P. Barnes and T. Hoerber (eds), *Sustainable development and Governance in Europe*, Routledge (2013).

<sup>3</sup> Recalling the words of Vaughan Lowe "Sustainable development...is clearly entitled to a place in the Pantheon of concepts that are not to be questioned in polite company, along with democracy, human rights and the sovereign equality of states...", in "Sustainable Development and Unsustainable Arguments", in Alan Boyle and David Freestone (eds.) *International Law and Sustainable Development. Past Achievements and Future Challenges* (OUP 1999), 30-31.

<sup>4</sup> See, Johnston, Angus, Van der Marel, E. "Ad Lucem? Interpreting the New Energy Provision, and in particular the Meaning of Article 194 (2) TFEU" in *European Energy and Environmental Law Review*, October, 2013, pp. 181 et seq.

into a liberalised single market which allows for competition across the borders. What is more essentially important to us is that, the whole EU constitutional framework advocating for sustainability and integration in different policy areas is at risk precisely because of one of its cornerstones, the energy market. The energy market seems to be the heart of the EU constitutional setting critical aspects. Let's admit that the ambitious EU's climate policy and the EU leadership on the sustainability governance is in contrast with the complexities of the internal energy market. It is still rather underdeveloped, regardless of the abused existence of the term "sustainability" within the enormous block of legal instruments advocating for it.

Furthermore, the CJEU following the controversial decisions of *Essent Belgium* and *Ålands Vindkraft* does not seem to be willing to give encouragements to complete the energy market. There are also signs of overcoming considering the differences on MS' capacity to manage climate change issues added to the difficulties of addressing the EU integrated policy on matters of Energy security under the recent crisis between Russia and Ukraine pose additional challenges<sup>5</sup>. Thus, many sustainability aims are being contradicted by the EU's own single European Market<sup>6</sup>. Here is where the 'EU constitutional concerns' firmly established by the Lisbon Treaty should play an important role if we want to shape the future of our energy and environmental policy under the "sustainability" paradigm. In Europe sustainability fits in within traditional categories of normativity, and this contribution seeks to show how it operates in the current EU legal framework.

## II. Successful Environmental Governance

Our first premise starts by ascertaining how the EU is quite a unique successful experiment in regional environmental governance, especially after having seen the lack of such governance at international and global level. This is widely

accepted<sup>7</sup>. On the top of this, for some it is noticeable how for "over 50 years the EU member states have noted the advantages to be gained by incrementally transferring sovereign rights to a supranational level"<sup>8</sup>, of course the obvious advantage of this is that member states coordinate their efforts, through legislation and centralised decision-making that has important enforcement mechanisms. Therefore to this end, the EU provides an exemplary model of governance for sustainability and the past years have seen an intensive legislative activity in the field of energy integrating environmental and Climate Change governance<sup>9</sup>. In fact, one of the most prominent aspects of EU environmental policy in this phase remain however the actions and initiatives in response to climate change defined in the Sixth EAP as the "outstanding Challenge of the next 10 years and Beyond". A related side-effect of the growing prominence and autonomy acquired by the EU climate policy is its progressive detachment from the

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<sup>7</sup> "[W]ith the exception of regional systems, such as the EU, international environmental law still suffers from a serious deficit of enforcement mechanism",

<sup>8</sup> Bosselman, *The principle of Sustainability*, p.187.

<sup>9</sup> Directive 2009/28/EC on the promotion of the use of energy from renewable sources; Regulation (EC) No 663/2009 establishing a programme to aid economic recovery by granting Community financial assistance to projects in the field of energy, as amended by Regulation (EU) No 1233/2010; Regulation (EC) No 713/2009 establishing an Agency for the Cooperation on Energy Regulators; Directive 2009/28/EC on the promotion of the use of energy from renewable sources; Regulation (EC) No 663/2009 establishing a programme to aid economic recovery by granting Community financial assistance to projects in the field of energy, as amended by Regulation (EU) No 1233/2010; Regulation (EC) No 713/2009 establishing an Agency for the Cooperation of Energy Regulators; Regulation (EC) No 714/2009 on conditions for access to the network for cross-border exchanges in electricity; Regulation (EC) No 715/2009 on conditions for access to the natural gas transmission networks; Directive 2009/72/EC concerning common rules for the internal market in electricity; Directive 2009/73/EC concerning common rules for the internal market in natural gas; Directive 2009/119/EC imposing an obligation on Member States to maintain minimum stocks of crude oil and/or petroleum products; Directive 2009/125/EC establishing a framework for the setting of ecodesign requirements for energy-related products; Regulation (EC) No 1222/2009 on the labelling of tyres with respect to fuel efficiency and other essential parameters; Directive 2010/30/EU on the indication by labelling and standard product information of the consumption of energy and other resources by energy-related products; Directive 2010/31/EU on the energy performance of buildings; Regulation (EU) No 617/2010 concerning the notification to the Commission of investment projects in energy infrastructure; Regulation (EU) No 994/2010 concerning measures to safeguard security of gas supply; Regulation (EU) No 1227/2011 on wholesale energy market integrity and transparency (REMIT); Directive on Energy Efficiency (2012/27/EU); Directive to reduce indirect land use change for biofuels and bioliquids (EU 2015/1513). Of course this is not an exhaustive list. There is also work in progress for a new directive on Renewables for the period after 2020.

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<sup>5</sup> Recent reports addressing EU energy policy have identified that the issues concerning security of supply have not been adequately taken into account, particularly because the EU institutions have remained "much too focused on sustainable development". The Ukrainian crises of 2009 and 2014 and the most recent one this winter covering 2015 and 2016, did however prompt the EU to examine in depth and seriously address the issues of security of external supply. On this point see, Sami Andoura and Jean-Arnold Vinois, foreword by Jacques Delors, "From the European Energy Community to the Energy Union – A Policy Proposal for the Short and Long Term", Studies & Reports No. 107, Jacques Delors Institute, January 2015.

<sup>6</sup> For a good overview on the above mentioned contradictions see, Armin Steinbach, R. Bruckmann, "Renewable Energy and the Free-movement of Goods", (27) *Journal of Environmental Law*, 2015.

field of environmental policy (culminating with the creation of a separate Directorate). At the same time the new energy title introduces explicitly an environmental dimension in the pursuit of EU Energy policies, and given the increasing prominence of energy issues in the EU, the specific reference to environmental and climate change objectives in the Energy title is certainly a positive step towards promoting the integration of environmental concerns with other key policy areas<sup>10</sup>.

The evolution of EU environmental law and policy since the 1960 shows how the European project has remarkably expanded from the specific economic sphere of market integration to address new social challenges under the sustainability paradigm<sup>11</sup>. Still, the intensification of legislative and policy initiatives aimed at strengthening the linkages between energy and climate change objectives within the framework of an integrated energy market has some remarkable weaknesses.

Difficulties may arise, of course, due to the EU enlargement and their different geopolitical conditions (especially those concerned with the exploitation of their natural resources and the importation of energy), the number of European states subject to EU policy on sustainable development has grown to 28 member states<sup>12</sup> and this means that greater economic integration within the EU and between the EU and other European states has increased the impact of that policy. The enlarged EU has gained an enhanced role and reputation in international conventions and negotiations relating to sustainability and sustainable development. But still, what challenges remain at the forefront?

### **III. EU's Energy Policy at the crossroads of Environmental Protection Law. The Hegemonic presence of Sustainability in the EU Governance model.**

The Europeanisation of Energy law with the footprint of sustainability should provide long lasting provisions and help MS to develop green

economies easier and faster that should happen in other parts of the world. Thus, the European Union with energy rules set at the European level; and energy policy with a clear ecological core could illustrate an increasing Europeanisation process and a unique governance model towards sustainability. The EU is the world's only region where sustainable development combining economic, social and environmental policies is declared a 'constitutional objective'.

As we have mentioned MS coordinate their efforts through legislation and centralised decision-making fostering an administrative system that has been perceived "as a trustee of the regional interest"<sup>13</sup> concerning environmental, social and economic matters. The adoption of sustainability norms into the EU by the Fifth Environment Action Programme (EAP) and the Amsterdam Treaty on the European Union represent the two ground-breaking steps towards what it will be its constitutionalisation with the Lisbon Treaty. The objective of the fifth EAP was to transform patterns of growth within the EU community to promote sustainability but the innovative part of it was its departure from a 'command-and-control' approach in favor of 'shared responsibility between various actors: government, industry and the public'<sup>14</sup>. It followed the sixth EAP noting concerns regarding the lack of willingness of member states to implement the fifth EAP. Therefore, in response to this concern the sixth EAP advocated 'a more inclusive approach including more specific targets and an increased use of market-based measures' strengthening integration of environmental concerns into other policies<sup>15</sup>.

As we will see further below EU's integration of sustainability norms are promoted by the specific provisions of the Amsterdam Treaty (Article 6 and Article 3)<sup>16</sup> granting quasi-constitutional status to the idea of sustainability. The formulation contained in the Amsterdam Treaty is the basis of the current constitutional

<sup>10</sup> According to E. Orlando, "The Evolution of EU Policy and law in the Environmental field: Achievements and Current Challenges" in Bakker, Francioni, The EU, *The US and Global Climate Governance*, Routledge, 2014, p.74.

<sup>11</sup> E. Ostrom, "Polycentric systems for coping with collective action and global environmental change", in *Global Environmental Change*, vol.20, Issue 4, October 2010, pp.550-557.

<sup>12</sup> We are witnessing a historical moment for Europe after the results of the British referendum to leave the EU. Article 50 of the TFEU regulating the process of leaving the EU has never been applied before. The EU has only grown. This is the first time Europe is facing the situation by which one of its member states decides to exit. See further comments on this argument, Paul P. Craig, "Brexit: A Drama in Six Acts", *European Law Review* (2016).

<sup>13</sup> G. Winter, "Introduction", in G. Winter (ed.), *Multilevel Governance and Global Environmental Change* (Cambridge, CUP), 2006, p. 24.

<sup>14</sup> See, 'Fifth European Community Environment Programme: Towards Sustainability' available at <<http://europa.eu/scadplus/leg/en/lvb/128062.htm>>

<sup>15</sup> According to K. Bosselman, 'Missing the Point? The EU's Institutional and Procedural Approach to Sustainability', in M. Pallemat and A. Azmanova (eds), *The European Union and Sustainable Development: Internal and External Dimensions*, Kluwer, 2006, pp.105,110,111. See also, 'Sixth Environment Action Programme, Environment 2010: Our future, Our Choice', available at <<http://europa.eu.int/comm/environment/newprg>>

<sup>16</sup> Currently articles 3 and 11 subsequently. See further text of the Amsterdam Treaty 1997.

setting. Still what emerges from a thorough analyses is that a common-framework of action is essentially needed in such delicate topic, especially when it comes to the issue of the energy market. One could say that the future of the EU is at stake on its energy policy. Given today's challenges on energy security of supply, climate change and biodiversity conservation, with the growing awareness towards an equitable allocation of resources, sustainable development perceived as a new constitutional paradigm is even more essential as part of our regulatory frameworks than when the concept was coined in the 1987. Not by chance, environmental Policy has progressively integrated energy policy through the 'hegemonic' presence of 'sustainability' before Climate Change policy made its outstanding appearance in Member States legal scenario. It is surely the discourse on sustainability that has structured the process of 'greening' the EU energy policy and has completed the operational process of energy and environmental integration initiated by the Cardiff process in 1998. The so-called Cardiff process gave effective departure to the founding principle of environmental integration that should stand at the core of the principle of sustainability and so guide European Energy policy<sup>17</sup>. Still, it was not a successful process that has ever come to an end and many concerns are still unresolved. In fact, recent debates on Energy Policy point up to the common concern of Member States with long-term energy supply in Europe, so that recent interventions are driven by encouragement on investment in generation capacity, offering an additional revenue stream for conventional power plants in addition to the existing heavily subsidised investments in renewable energy

<sup>17</sup> As a background we should draw our attention to 1998 and the Cardiff process, for being this one the first step of an unfinished process of integration and institutionalization of Environmental policy. In 1998 the Cardiff European Council welcomed the Commission's Strategy for integrating environmental concerns and sustainable development in other policy areas, considering transport, energy and agriculture sectors for the first wave of this process. Since then the process of greening EU energy policy has never stopped, and the discourse on sustainability has somehow structured such process. The Lisbon Strategy followed and it went for a further integration commitment bringing about economic, social and environmental renewal in the EU. This Strategy policy integration will consist on bringing alongside environmental and social policies that ensure sustainable development and social inclusion. Further along, in 2001, the European Council adopted the EU Sustainable Development Strategy, combining dynamic economy with social cohesion and high environmental standards. See, [http://eur-lex.europa.eu/summary/chapter/environment.html?root\\_default=SUM\\_1\\_CODED%3D20,SUM\\_2\\_CODED%3D2003&locale=en](http://eur-lex.europa.eu/summary/chapter/environment.html?root_default=SUM_1_CODED%3D20,SUM_2_CODED%3D2003&locale=en)

sources<sup>18</sup>. This is just one single flow of the capacity remuneration mechanisms emerging from the European regulatory debate, but it is also a very important indicator of how things are taking a sort of a "more conservative" leadership leaving aside the 'sustainability' criteria, whilst it is already acknowledged that European energy policy is driven by different factors, many of which are global and therefore outside the control of the EU's policy-makers<sup>19</sup>.

#### IV. Some concerns regarding "sustainability" as a constitutional paradigm of the EU.

European Constitutionalisation (within the EU never-ending process of integration), have profoundly affected the EU's legal system as well as MS legal systems. What it seems to be more unresolved at community level concerns the justiciability of new and crucial guiding principles that should lie behind public policies striving for sustainability at horizontal level. This is, what at national level is substantially more clear-cut due to the historical and political roots of every legal principle. In Europe, the evident increasing proximity of Energy and Environmental policy means a whole process of 'Europeanisation' of Energy Law and the possibility of bringing different sovereign bodies to delegate such a crucial matter to

<sup>18</sup> On the evolution of these debates and for an up-dated picture of the Energy Market and Capacity Mechanisms in the EU see, L. Hancher, A. Hauteclouque, M. Sadowska (eds.), *Capacity Mechanisms in the EU Energy Market*, Oxford press, 2015.

<sup>19</sup> Just to mention the most important ones. Let's start with the first of these factors, the finite nature or scarcity of fossil fuel. The main problem Europe faces is that of import dependency, due to a lack of domestic resources and growing competition from other Organization for European Co-operation and Development (OECD) countries as well as the emerging markets in Asia and Latin America. Scarcity also results from a lack of investment in the development of new deposits, insufficient diversification, hesitant progress on energy productivity, and disinterest in research on alternative sources of energy at the time of cheap fossil fuels. Insufficient or inefficient investment is partly due to the (re)nationalization of energy resources and state-owned companies that are also guided by non-economic interests. The combination of reduced energy availability, perceived energy insecurity, and growing demand will constrain economic development in the near future because of reduced or prohibitively expensive energy supplies. In the future, there will be greater tensions around gaining access to the remaining fossil fuels. Further consequences of scarcity are higher prices on tighter markets and, in the long run, an increase in the demand for renewable energy sources (RES) and an effort towards higher energy efficiency. On this see, F. Bauman, "A common market and Sustainable Energy for Europe", in P. Barnes and Hoerber, *Sustainable Development and Governance in Europe. The evolution of the discourse on Sustainability*. Routledge, (2013), p 77 *et seq.*

The second factor is the impact of periods of political instability on energy prices.

achieve a sort of supportive body of legislation<sup>20</sup>.

Let's start with the principle of "conferral" encapsulated in the very first article of the Treaty of the European Union; it stipulates that "[t]he Member States confer competences to attain objectives they have in common"<sup>21</sup>. Further on, in article 5 (2) of the TEU we get the limits of the principle of conferral<sup>22</sup>, "[t]he Union shall act only within the limits conferred upon it by the Member States in the Treaties to attain the objectives set out there in"<sup>23</sup>. What is of importance to us are the shared competences. Energy and environment are, according to the TFEU shared competences and thereby adhere to the principles related to this particular regard in Article 2(2) TFEU and then, environment and energy listed as shared competences in Article 4(2) e) and i) TFEU respectively. The new constitutional setting brings about within the areas of environment and energy a more detailed regulatory setting, this is it within the Treaty itself and, within the context (on the other side) of a fragmented and infinite secondary legislation. This, shall prevent Member States from acting with an 'egoistic' criteria, and the possibility for the EU to enhance the objectives of such policies in a more coherent, collaborative and efficient manner.

Then, we jump into the well-established principle of environmental integration enshrined in Article 11 of the TFEU<sup>24</sup> with a clear and a strong wording. Still, how can it be realistically applied to foster an effective transformation of MS regulation towards a transition guided by

"sustainability" if a truly green energy sector is not consolidated yet at European level?. The principle enshrined by this article should be read in accordance with another provision of general application in order to trigger some effective results, Article 7 of the TFEU<sup>25</sup>. This article provides the legal basis for the Union to ensure consistency between its various legal policies and activities. This is determinant in the field of energy policy where environmental objectives are expressly or even indirectly included, and although no priority between the Union's environmental policy and its energy policy exists, it is certainly clear that energy provisions entail more environmental aims than the environmental provision defining energy related goals<sup>26</sup>.

Important to note though that there is an open window towards the intertwined nature of the legal basis of such differentiated provisions. So, following this line of reasoning it is worth assessing Article 194 (1) TFEU; it provides that the Union's energy policy shall regard to the need to preserve and improve the environment whereas Article 191(1) TFEU refers to the objective of combating climate change<sup>27</sup> that has at its core a complex matrix of energy aspects. Nonetheless, the legal basis chosen by one of the most important normative elements of the EU energy policy, (this is the current Renewable Energy Directive) is the one of environmental competence (Article 192 (1))<sup>28</sup> where the EU ordinary legislative procedure applies<sup>29</sup>. Article 192 (2) always under the umbrella of environmental policy, refers to issues for which Member States are more reluctant to lose decision-making power<sup>30</sup> and

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<sup>20</sup> Using Collier words on, U. Collier, *Energy and Environment in the European Union*, Aldershot, (1994), p. 36. His point about supportive policies draws on the conceptualisation of environmental policy integration and he defines such integration as "achieving sustainable development and preventing environmental damage; removing contradictions between policies as well as within policies, and realizing mutual benefits and the goal of making policies mutually supportive", his point which is shared by our view was perhaps missing at that time today's European Constitutional framework, that needs the 'support' of the institutional body of the EU and specially a stronger role of the CJEU on defining the guiding principles for an integrated approach aiming at sustainable development.

<sup>21</sup> Consolidated version of the Treaty on European Union, Article 1 (1), 2008, OJEU, 115/15.

<sup>22</sup> What we will see when analysing case law, is that, accordingly and nonetheless the principle of conferral, the Union has competences to take legally binding measures to ensure that protection of the environment is at least taken into consideration, even when commercial policy is involved or when other decisions are being taken in other fields, such as energy, transport, trade, etc....

<sup>23</sup> Article 5 (2) *Ibid*, p.18.

<sup>24</sup> Article 11 of the TFEU (Ex art. 6 TEC) reads as follows: "Environmental Protection requirements must be integrated into the definition and implementation of the Union's policies and activities in particular with a view to promoting sustainable development."

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<sup>25</sup> Article 7 of the TFEU reads as follows: "The Union shall ensure consistency between its policies and activities, taking all of its objectives into account and in accordance with the principle of conferral of powers."

<sup>26</sup> Article 11 TFEU and Article 37 of the Charter read together do on this direction, see, E. Morgera, M. Durán, "Article 37", in S. Peers, T. Harvey, J. Kenner and A. Ward, *The EU Charter of Fundamental Rights: A Commentary*, Hart Publishing, (2014), p. 983-1003.

<sup>27</sup> Opinion AG Mazák in case C-2/10 *Azienda Agro-Zootecnica Franchini sarl and Eolica di Altamura Srl v Regione Puglia* [2011] ECR I-6561, para. 47.

<sup>28</sup> Old Article 175 ECT regulating environmental policy. Article originated in the Single European Act of 1987 providing a general competence for environmental legislation in the EU and including also energy issues.

<sup>29</sup> It entails a joint adoption of legislation by the Parliament and the Council, on the basis of a proposal from the Commission.

<sup>30</sup> Article 192 (c) measures significantly affecting a Member State's choice between different energy sources and the general structure of its energy supply. See *supra* note 68, old article 175 (c).

The Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, the Economic and Social Committee and the Committee of the Regions, may make the ordinary legislative procedure

even if one could think that it was more adequate (considering the Renewable Energy Directive touches upon Member States capacities to move to renewable energy sources for, in total, at least 20% of EU Energy consumption), it was not chosen on purpose by the Member States. It is also, important to stress that within the current EU Constitutional framework, along with environmental competences, there are two other competences relevant for energy measures, article 194 TFEU that embodies the heart of EU energy policy competence, and article 114 TFEU<sup>31</sup> in relation to articles 17, 18, 19 of the Directive 2009/28/EC which addresses the sustainability criteria for biofuels and bioliquids, and provides evidence of another serious paradoxical measure. It is an article of an ‘integrative’ nature at its core for it stipulates a high level of protection to be taken concerning health, safety, environmental protection and consumer protection. The paradox has to do with the fact that by choosing such legal basis for articles 17, 18 and 19 of the Renewable Energy Directive the internal market is seen as the primary goal of the provisions that deal with the sustainability criteria but just focused on biofuels and bioliquids, whilst the sustainability criteria is extremely important in general for Member States compliance with the renewable energy targets and the success of the internal energy market.

Instead, the energy provisions that could be future legal basis for a sustainable normative body addressing energy issues, are found on Article 194. This article encompasses a lower protection level of the environment though. Reference to the environment is stipulated in order “to preserve and improve” it. So, even if it may seem like the respective aims of renewable energy directive are tailor-made for Article 194 TFEU, the legal basis was not questioned in the revision process in 2012 despite of the argumentation put forward that “[...]energy measures aiming at preventing climate change should be adopted by virtue of both Articles 192 (1)<sup>32</sup> and 194 (2) TFEU”<sup>33</sup>, this of course underpins the understanding that European measures enacted based on either legal basis contribute to the common European interest,

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applicable to the matters referred to in the first subparagraph.

<sup>31</sup> Old article 95 ECT.

<sup>32</sup> Here the main procedure for legislation in the EU, the ordinary procedure, applies. It entails a joint adoption of legislation by the Parliament and the Council, on the basis of a proposal from the Commission. Voting in the European Parliament is by simple majority, whereas for the Council a qualified majority vote is prescribed.

<sup>33</sup> N. De Sadeleer, *EU Environmental Law and the Internal Market*, Oxford University press, (2014), p. 136.

and the Articles<sup>34</sup> that could eventually rise most controversial aspects regarding national sovereignty are excluded.

One point that becomes clear, and it is the most wide-spread opinion<sup>35</sup>, is that the promotion of renewable energy is best guaranteed when the objectives of the environmental policy are pursued, but what happens when the objectives of environmental policy are strongly intertwined with energy policy and the way Member States deal with energy supply?. Indeed, acting under article 192 (1), EU legislation can interfere with the Member State’s rights regarding energy. As already Peeters<sup>36</sup> has argued there is no case law on this gap in the TFEU regarding the legal competence for environmental energy measures<sup>37</sup> that do not significantly affect the mentioned Member States’ choices on the matter of exploiting their energy sources. This leaves us with the question whether Article 192 (1) TFEU can be seen as valid basis for measures that do not concern significant renewable energy action, but do affect Member State’s choices as being formulated in Article 194 (2) TFEU<sup>38</sup>.

Fortunately, the current principle of integrating the environment into all EU policies, the basic requirement in making sustainable development work, has been given a prominent place at the beginning of Part III on policies, thereby confirming its application to all policies and activities of the Union. Although its position in Part III is not as prominent as in the Amsterdam Treaty it nevertheless affirms a clear commitment and obligation by the EU<sup>39</sup>.

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<sup>34</sup>As an exception, and particularly for issues for which Member States were reluctant to lose decision-making power, unanimity voting is required for selected topics. This is according to Article 192 (2) © TFEU, the case for “measures significantly affecting a Member State’s choice between different energy sources and the general structure of its energy supply”.

<sup>35</sup> M. Peeters, “Governing Towards renewable Energy in the EU: Competences, Instruments, and procedures”, 21 *MJ* 1 2014,p.43.

<sup>36</sup> See M. Peeters, *Ibid*.

<sup>37</sup> Broadly speaking could involve a multitude of aspects considering the implications of energy related topics when assessing today’s climate problems.

<sup>38</sup> Article 194 (2) states that energy measures “shall not affect a Member State’s right to determine the conditions for exploiting its energy sources, its choice between different energy sources and the general structure of its energy supply”, but refers also to the possibility to adopt measures on the basis of the environmental competence, particularly Article 192 (2) © TFEU.

<sup>39</sup> For a fantastic historical background of the integration approach and its enshrinement as a EU Constitutional Principle, see, J.H. Hans, “Stop the integration principle?”, *Fordham International Law Journal*, vol. 33, issue 5, (2011). . It suffices to say that elements of it can already be found in Principle 13 of the 1972 Declaration of the United Nations Conference on the Human Environment (the so called “Stockholm Declaration”): In order to achieve a more rational management of resources and thus to improve the

Furthermore, the environmental integration principle according to title II of the TFEU has, together with some other integration principles, become a provision of general application. In fact, at the time the environmental integration principle was inserted in the EEC Treaty by the SEA, it was the only integration principle significant. Nowadays, the environmental integration principle is only one among many other integration principles<sup>40</sup>. In our view, what makes the difference is the association of such principle to sustainability for the sake of giving coherence to the whole Constitutional project of the EU, even, if “under the disguise of integration certain environmental standards will be diluted or off set against other interests and policy considerations”<sup>41</sup>.

Following the thread of the holistic approach of sustainable development that the new Constitutional setting brings about (TEU, TFEU and EUCHR), we should turn our attention to Article 3(3) of the Treaty on the European Union. It mandates the establishment of an internal market based on the “sustainable development of Europe” based on: 1. “Balanced economic growth and price stability”; 2. “a highly competitive social market economy aimed at achieving full employment and social progress”, and 3. “a high level of protection and improvement of the quality of the environment”. Thus, the historical objective of the EU, which accordingly aims at the creation of an internal market, must be accomplished incorporating sustainable development’s principles of

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environment, States should adopt an integrated and coordinated approach to their development planning so as to ensure that development is compatible with the need to protect and improve environment for the benefit of their population.

<sup>40</sup>J. H. Jans, “Stop the integration principle?”, *Fordham International Law Journal*, vol. 33, issue 5, (2011), The Lisbon treaty brought about a proliferation of ‘integration’ principles. Let’s start with article 7 TFEU, the Union shall “ensure consistency between its policies and activities, taking all of its objectives into account and in accordance with the principle of “conferral of powers”. Article 8 TFEU requires that the Union “[i]n all its activities . . . shall aim to eliminate inequalities, and to promote equality, between men and women.”<sup>63</sup> Article 9 TFEU states: “In defining and implementing its policies and activities, the Union *shall take into account* requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health.” This is followed by article 10 TFEU: “In defining and implementing its policies and activities, the Union *shall aim to combat* discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.” Furthermore, article 12 establishes “[c]onsumer protection requirements *shall be taken into account* in defining and implementing other Union policies and activities” according to article 12 TFEU. Finally, article 13 TFEU requires that “*full regard*” is being paid to the welfare requirements of animals. As Jans, argues, everything has to be taken into account with everything.

<sup>41</sup> Jans, *ibid*, p. 1445.

balancing economic growth in a social market economy with a high level of environmental protection. Additionally, it defines sustainable development in the EU context by outlining the three objectives described above. There on, Article 3 (5) of the TEU fosters some sort of global and transboundary ‘solidarity’ by requiring the EU to contribute to “the sustainable development of the Earth” through its international relationships. Article 21 (2) of the TEU mandates EU States to “foster sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty”, furthermore, sustainable development must be ensured using international cooperation to “preserve and improve the quality of the environment and the sustainable management of global natural resources”.

There it comes Article 6 (1) of the TEU that incorporating into EU law a recognition of “the rights, freedoms and principles of the Charter of Fundamental Rights of the European Union” brings into the “constitutional” scenario, Article 37 of the Charter, placed under the “solidarity” title of the Charter of Rights and reads as follows, “[a] high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development”. From a legal point of view, it is probably more important to ascertain the normative achievement at Constitutional level as a whole, than making emphasis on considerations such as the downgrading of the integration principle of environmental nature contained in either article 11 of the TFEU and the Charter of Rights. According to Jans,

“[F]rom a non-binding declaration, the Charter became a document with the same legal status and hierarchy as the TEU post-Lisbon and the TFEU. That triggers the question of what might be the legal consequences of the differences between Article 11 TFEU on the one hand and Article 37 of the Charter on the other. As the obligation contained in article 37 of the Charter seems to be more limited than the one in article 11 TFEU [...]”<sup>42</sup>.

Thus, what we see is that, despite of the fact that the Treaty of Amsterdam succeeded in making decision-making in the context of the Title on the Environment less complex, is the Lisbon Treaty that aims at a more ambitious plan, and as a consequence it settles the basis for a more reliable model of “governance”<sup>43</sup> introducing competences with a well-structured decisional

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<sup>42</sup> J.H. Hans, “Stop the integration principle?”, *Fordham International Law Journal*, vol. 33, issue 5, (2011), p. 1544.

<sup>43</sup> See further, K. Bosselman, *The Principle of Sustainability. Transforming Law and Governance*. Ashgate, (2008).



model for each one of those competences. Still, we should bear in mind that in the field of Environment and Energy Law (and not only) there are some institutional and cultural complexities that have not been resolved by the Treaty of Lisbon and so forth, the consolidated version of the Treaties.

Our question is, would a specific protocol on Sustainable Development further clarify the nature of actions that the EU would need to undertake to accomplish this respect at institutional and normative level? Would the integrating principle encapsulated on a truly holistic regulatory approach foster the right legislative framework to enforce more rigid objectives towards the conversion of our economies and societies to renewable energy sources? It all depends on the normative instrument that will be chosen next in order to further regulate future phases of the Climate mitigation Policies, fossil fuel reduction or total elimination of it; as well as the legal basis that will be selected for next regulatory frameworks aiming at sustainability in the areas of Energy and Environment (e.g. Renewable Energies establishing criteria after the period covered by the current regulation (2030)).

#### V. A unique Governance Model on Sustainability in Europe: Weaknesses of this model.

Whilst sustainable development has a welcoming place in the new EU Constitution, it emerges a failure to include in it the ecological dimension that should emerge from every related policy, this is 'protection and improvement of the quality of the environment', on equal footing with the economic and social components of sustainable development. It is not by chance that, one of the main difficulties environmental law has been facing up till now is related to the fact that the legal order of the EU is conceptualised in terms of economic integration<sup>44</sup> particularly at stake when it comes to energy topics.

Greater integration guided by sustainability either perceived as an objective, or as a principle (being already developed as a concept despite of the lack of its concrete nature) should further simplify the procedural mechanisms behind the EU administrative body and EU policy action. The integration principle fosters the proactive nature of 'sustainability' on the basis of the conciliatory nature of 'sustainability' that the Court has already

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<sup>44</sup> See generally on this argument and the evolution of Environmental law in relation to the Energy market, Nicolas de Sadeleer, *EU Environmental Law and the internal market*, Oxford, 2014.

ascertained<sup>45</sup> in the past, in the case *First Corporate Shipping*<sup>46</sup>. By doing this, there is no risk of discarding the 'environment' as a primary interest to be protected<sup>47</sup>, especially if one was to assert the need to conciliate the three pillars of the sustainable development advocated by article 3 (3) TFEU.

But, hurdles lie elsewhere. Perhaps the first symptom of contradictory nature on the EU sustainable governance model lies on the inclusion of the Euratom Treaty, promoting nuclear energy at Community level, as an annex to the EU Constitution virtually unchanged. It is difficult not to speak of European Union legislation and Environmental Law without considering so many topics at once. Especially when we talk about environmental legislation under the new clothes of climate change policy and greenhouse gas reduction.<sup>48</sup> The lack of a coherent, systematic and efficient policy is displaced by a prolific growth of norms of different rank. Under environmental challenges we now address unsustainable patterns of consumption especially in the food, energy and transport sector (more evident after the economic and financial crisis).

In Europe and elsewhere there is already a prolific literature on sustainable development understood as a holistic framework in which to operate, what Jeff Sachs calls, "a normative outlook on the world", meaning "a set of goals to which the world should aspire", but still an empty chapter towards how this holistic approach should be enforced by courts through specific 'legal interests' to be protected is missing, and its most crucial aspect concerning energy is an open door for 'discussion'. In Europe things are clearly, more and more,

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<sup>45</sup> The interpretation given by Advocate General Léger to 'sustainable development' in its opinion in *First Corporate Shipping*, a case on development taking place in protected birds' habitats is a testament of the conciliatory nature of 'sustainability'. See case C-371/98 *First Corporate Shipping* [2000] E.C.R. I-9235. Paragraph 54.

<sup>46</sup> *Ibid* opinion of AG Léger, the AG stressed in paragraph 54, "the concept of "sustainable development" does not mean that the interests of the environment must necessarily and systematically prevail over the interests defended in the context of other policies pursued by the Community...On the contrary, it emphasizes the necessary balance between various interests which sometimes clash, but which must be reconciled.

<sup>47</sup> See De Sadeleer, on *supra* note 36, p. 50. Sadeleer fears that such conciliatory nature of Sustainable development might water down environmental protection.

<sup>48</sup> EU leaders agreed on 23 October 2014 the domestic 2030 greenhouse gas reduction target of at least 40% compared to 1990 together with the other main building blocks of the 2030 policy framework for climate and energy, as proposed by the European Commission in January 2014. This 2030 policy framework aims to make the European Union's economy and energy system more competitive, secure and sustainable and also sets a target of at least 27% for renewable energy and energy savings by 2030.

taking this “normative outlook on the world”. But, the lack of emphasis on a truly ecological dimension is certainly missing when it comes to the EU market dimension and its shift to a clean, low-carbon energy system for the sake of a ‘high’ preservation of the environment and natural resources. Here is where the EU constitutional approach exhibits its weakness for being so much dependant on market mechanisms and geopolitical interests of MS. It remains to be seen whether the political agenda is willing to foster more ambitious legislation at EU level aiming at the reduction of greenhouse gases and willing to touch upon the topic of competences when it comes to environmentally related renewable energy measures.

Still, what is needed is greater involvement of civil society and local forms of governance, that after the Paris meeting and COP21 seems to strengthen the local dimension that brings more public participation into play, transparency and long-lasting efficient mechanisms that build on sustainable solutions. On a more institutional level means widening the governance dialogue to ensure a diversification of stakeholder involvement. It is at local level that many crucial problems of environmental nature should be dealt with.<sup>49</sup> The ambitious outcomes of Paris COP 21 dealing with Climate Policies in Europe are accused of not being currently strong enough to deliver on the Paris Pledge. This affirmation gives evidence of the need for more ambitious and coordinated plans at local level despite of the current existing action on this at European level.<sup>50</sup>

Other drawbacks in the implementation of sustainability are found on the crucial institutional role disclosed by the Court of Justice of the European Union (CJEU). It has not made efforts to define or give concrete substance to the sustainability concept as it was done in the past by the memorable case

*Comission v Denmark*<sup>51</sup> (returnable bottles case that gives life to the ‘integration principle’) by which environmental protection was accepted as a mandatory requirement capable of justifying restrictions on Article 34 and 35 TFEU even if environmental protection is not one of the grounds of justification mentioned in Article 36 of the TFEU. The ‘entering into life’ of the integration principle has produced a fertile body of environmental legal enforcement at European level, still when it comes to energy (considered as a good), nor the RES directive, nor the free movement of goods provision related to renewable energy produced interchangeably by MS the European Court has given proof of a consistent case law building on the creation of a solid internal energy market. Instead, The CJEU has shown a clear deference towards national support schemes regarding the production of renewable energy at national level without considering the distorting nature of such mechanisms for the creation of the Internal Energy Market. The CJEU has decided not to act as a corrective organ to remove technical obstacles for cross-border electricity trade and grid access. In case of conflict between contradictory assessments of EU secondary law (such as the RES Directive and the provision of the TFEU for the free movement of goods), the CJEU in *Ålands Vindkraft* decided in favour of allowing MS the freedom to set down in the considerations for the Renewable Energy Directive (Article 3(3) of the RES Directive 2009) granting them the right to solely subsidize power production taking place in its sovereign territory. Only the Advocate general, against the majority opinion, noted that the technical obstacles for cross-border electricity trade that still exist, especially difficulties with grid access and the absence of alliance are an indication that the creation of a single EU electricity market remains incomplete<sup>52</sup>. The case of *Ålands and Vindkraft* is just one decision on the top of a list of case that give evidence of a clearly “uncommunautaire”<sup>53</sup> thinking<sup>54</sup>. The European

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<sup>49</sup> Along with Twining reasoning, we understand that against the intense contemporary flow of legal phenomena beyond the nation-state boundaries (whether international, transitionally private, regional, etc..) what is more interesting, is the resulting dense layering and interweaving of regulatory activity that is far from being ‘nested in a single vertical hierarchy’, in which the planetary level has the highest ranked place. Local initiatives today are showing us the importance of joining efforts at global level. See, W. Twining, *Globalisation and Legal Scholarship*, Cambridge University Press, 2000, pp. 24-5.

<sup>50</sup> Within the EU, there are many independent sustainability councils operating at national or regional level. Thirteen advisory bodies from nine European countries are member of the European Environment and Sustainable Development Advisory Councils (EEAC) Network. With representatives from academia, civil society, the private sector and public bodies the EEAC network brings together experts with years of experience producing independent advice. See, <http://eeac-network.eu/>

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<sup>51</sup> *Commission v. Denmark (Danish Bottles)*, Case 302/86, [1988] E.C.R. 4607.

<sup>52</sup> Opinion of Advocate General Bot delivered on 28 January 2014, Case C-573/12 *Ålands Vindkraft AB v Energimyndigheten* EU:C:2014:37. See further, Steinbach and Bruckmann, “Renewable Energy and the Free Movement of Goods”, *Journal of Environmental Law*, Issue I, 2015.

<sup>53</sup> Quoting H. Vedder on his work “Good Neighbourliness in a Sustainable European Internal Electricity Market: A Tale of Communities and Uncommunautaire Thinking”, in D. Kochenov, E. Basheska, (ed). *Good Neighbourliness in the European Legal Context*, Nijhoff, 2015.

<sup>54</sup> See Case C-213/96 *Outokumpu Oy* [1998] ECR I-1777 and *Svenska Kraftnät* case. Commission Decision in Case COMP/39.351 *Swedish Interconnectors*, where the market test notice was published in [2009] OJ C239/9. Commented by Hans HB Vedder ‘Competition in the EU Energy Sector

Court's inclination towards regional restrictions is inappropriate for promoting environmental protection (opinion already disregarded by the Court in *Essent Belgium*). In *Essent Belgium* AG Bot suggested that an EU-wide subsidy system would lower the costs for the expansion of renewable energies by allowing a more rational choice of generation sites<sup>55</sup>. It is widely accepted now that the CJEU has shown more restraint in these cases concerning 'energy' topics than in other proportionality tests in the area of environmental law<sup>56</sup>.

We also know that little has been gained from the conclusion that the integration requirement is an objective and not a principle<sup>57</sup>. To go beyond the ambit of environmental and energy law will be difficult as long as the Court will not take a strong position towards creating grounds of protection for the promotion of sustainability as a principle, an objective or as an 'interpretation criteria'. So, what it is essential to us here, is to underline the distinction that Sadeleer<sup>58</sup> rightly draws between the environmental approach and the sustainability approach when integrating Energy and Environmental policies. The 'protection of the environment' would provide us a defensive approach, whereas 'sustainability' would trigger a proactive approach calling for the integration of environmental requirements into the economic growth with the limits already settled by the court on the promotion of economic interest balanced against the objectives of social policy<sup>59</sup>.

## **VI. The hurdles to achieve a truly ecological content of the EU energy policy: Challenges of the Internal Energy Market**

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– An Overview of Developments in 2009 and 2010' in Martha M Roggenkamp and Ulf Hammer (eds) *European Energy Law Report VIII* (Intersentia, Antwerp 2011) 8-11.

<sup>55</sup> Opinion of Advocate General Bot delivered on 8 May 2013, Joined Cases C-204/12-C208/12 *Essent Belgium NV v Vlaamse Reguleringinstantie voor de Elektriciteits-en Gasmarkt* EU:C:2013:294 [107].

<sup>56</sup> See further, P. Oliver, *Oliver on Free Movement of Goods in the European Union*, 5<sup>th</sup> ed. Hart Publishing, 2010, p. 219, 303.

<sup>57</sup> On this see, S. Kingston, *European Perspectives on Environmental Law and Governance*, Routledge, (2013).

<sup>58</sup> N. De Sadeleer, *Ibid op. cit.*, p.50.

<sup>59</sup> In the past the CJEU has already strongly stands in front of the idea that the EU has not only an economic but also a social purpose (Case C-43/75 *Gabriele Defrenne v Société anonyme belge de navigation aérienne Sabena*, [1976] E.C.R. I-455.paragraph 12 ) and accordingly the rights under the provisions of the treaty on the free movement of goods, person, services and capital must be balanced against the objectives pursued by social policy (Case C-438/05 *Viking Line*, [2007] E.C.R. I- 10779 p. 79; Case C-341/05, *Laval un Patneri Ltd. V Svenska* [2007] E.C.R. I-11767, paragraph 105; Case C-319/07, 3 f v *Commission*, [2009] E.C.R. I-000, paragraph 58. On this see Sadeleer, *Ibid cit.* p. 50.

The Internal Energy Market (IEM) within the EU is simultaneously a source of legal confusion in the midst of divergent traditions and ideologies and fertile road towards juridical convergence into a common regulatory culture. The need for regulation and for the well-functioning of independent regulatory authorities (such as the Agency for the Cooperation of Energy Regulators (ACER)) is in conflict with the legal orders of some Member States of the EU<sup>60</sup>, but not only. The truth is that there is a lot of controversy around one of the most crucial regulatory instruments to build the energy transition towards a Sustainable Europe, the RES Directive. We should not forget that the central elements for the well-functioning of the EU market in the context of energy, however, are the market integration and sustainability objectives that the EU has set itself.

Instead, as we have already seen, the mechanisms are clearly focused on the strengthening of national regimes and the current regulatory environment does not properly reflect externalities of energy production in market prices, including environmental, social, innovation and economic externalities. Complex administrative procedures for renewable energy deployment at national and local level have not yet been eliminated and there is a strong necessity to adapt the market design and remove barriers<sup>61</sup>. The existing policy framework (the 3<sup>rd</sup> Energy Package) does not address uncertainties with regard to national policies, governance and regional cooperation to ensure a timely and cost effective target achievement for the period after 2020. So, it means that in order to face future challenges we need new legislation, but also new enforceable solutions that move on the direction of removing obstacles for renewable cross-border electricity trade and production without fiscal differences, and further enhancement of grid access and regional cooperation. It does not matter that the RES Directive ensures that all MS will contribute to

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<sup>60</sup> Hans Vedder, "The Constitutionality of Competition. European Internal market law and fine line between markets, public interests, and self-regulation in a changing constitutional setting", in F. Amtenbrink and P. Van den Berg (eds), *The Constitutional Integrity of the European Union*, T.M.C. ASSER PRESS, 2010, p. 204 *et seq.*

<sup>61</sup> For a deeper discussion on the market-based provisions of the RES Directive and their compatibility with the free movement of goods within the EU, see A. Johnston and others, "The Proposed new EU Renewables Directive: Interpretation, Problems and Prospects" *EEELR* 17, 2008, p.126.S. Penttinen and k. Talus, "Development of the Sustainability Aspects of EU Energy Policy", University of Eastern Finland, Legal Studies Research Papers, Paper No. 16, 2014, p. 14.

reaching 20% renewables at EU-level by 2020. We need a more ambitious plan to reinforce EU governance on sustainability. As highlighted in the 2030 climate and Energy framework the current legislation will not be sufficient for this purpose<sup>62</sup>. The European council agreed that at least 27% share of renewables by 2030 would reflect a cost-optimal way of building a secure, sustainable and competitive energy system capable of fighting climate change.

It is true that since the first Energy Directives for electricity (1996) and gas (1998) were passed, the utility scene in Europe has been transformed with the massive unbundling of transmission networks and the expansion of the largest companies outside their home markets. Liberalisation and decarbonisation policies have changed the way electricity is generated. Moreover, an ambitious legislative agenda for the creation of the Energy Union has been adopted by the EC for the years 2015 and 2016<sup>63</sup>. Nonetheless, the primary objectives of the EU constitutional setting on sustainability and Energy Directives have not been achieved, this is, transforming the electricity and gas industries from regulated monopolies to competitive markets and the creation of a single European energy market. Regulation seems not to guarantee a safe pool for investments (either national, foreign or private), and the free movement of goods under the EU Treaties is a “long lost treasure”<sup>64</sup>. It is still under discussion whether, in the absence of the need to mitigate climate change, the model proposed by the Commission could have worked, for instance, in order to intensify relationships between the nominated electricity market operators (NEMOS) and Transmission operator systems (TO’s). The regionalisation of transmission system operators should be conjoined with the supervision of such initiatives by ACER.<sup>65</sup> Interestingly, the regionalisation of ENTSO-E is

not matched to the same extent within ACER.<sup>66</sup> The regional initiatives adopted by ENTSO-E should also be monitored by ACER, which also addresses regional initiatives<sup>67</sup>. These regional initiatives could be bottom-up governance structures that involve the regulators, TSO, energy exchanges and other relevant parties with a view to create greater market integration. However, for many years to come, climate change objectives are only likely to be met using policy instruments that over-ride the market. Despite this, the Commission is still focused only on trying to make markets work, sometimes at the expense of constitutional premises that have enhanced a sustainability objective without providing for specific enforcement instruments. In any case renewable energy sources have grown rapidly and 26% of the EU’s power is generated from renewables and 10% of total electricity is now sourced from intermittent sources, such as wind and solar<sup>68</sup>. Things seem to become even more complicated when it comes to safeguard security of electricity supply (capacity mechanisms). The Commission itself has shown concerns that capacity mechanisms may unduly favour particular producers or technologies and they may create obstacles to trade in electricity across borders<sup>69</sup>. Lessons learned from the sector enquiry launched by the Commission itself should help to support the development of more regional approaches to security of supply, as where capacity mechanisms are used they will increasingly need to be opened up to allow participation across national borders. The Commission has ascertained that when introduced prematurely, without proper problem identification or in an uncoordinated manner, and without taking into account the contribution of cross-border resources, there is a risk that capacity mechanisms distort cross-border electricity trade and competition. They may reward new investments only in certain types of generation or exclude demand response. Thus, in a nutshell we could say that at the moment MS solution to use capacity mechanism in order

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<sup>62</sup> As highlighted in the baseline scenario of the 2030 climate and energy framework (COM (2014) 15 final).

<sup>63</sup> Including: (i) an amendment to the Regulation on the security of supply of electricity (ii) an amendment to the Third Energy Package to *inter alia* strengthen the powers of the Agency for Cooperation of Energy Regulators; (iii) the issuance of guidelines on regional cooperation and strengthening coordination of the energy policies of MS; (iv) the adoption of a new list of major energy infrastructure which will be considered as Projects of Common Interest and thus eligible for EU funding; and (v) the preparation of a comprehensive strategy on liquefied natural gas and its storage.

<sup>64</sup> Peter Oliver, “Free Movement of Goods in the Labyrinth of Energy Policy and Capacity Mechanisms”, on Leigh Hancker, A. De Hauteclouque, and Malgorzata Sadowska (eds.), *Capacity Mechanisms in the EU Energy Market*, Oxford University Press, 2015.

<sup>65</sup> ACER is established by Regulation 713/2009, OJ 2009 L 211/1.

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<sup>66</sup> ACER has as one of its objectives the promotion of cooperation between national regulators at regional and community levels, Regulation 713/2009, Article 7(3).

<sup>67</sup> *Ibid*, Article 6(9).

<sup>68</sup> European Commission ‘Renewable energy progress report’ 15<sup>th</sup> June 2015, COM (2015) 293.

<sup>69</sup> Interim Report of the Sector Inquiry on Capacity Mechanisms. Report from the Commission C(2016) 2107 final Brussels, 13.4.2016. {SWD(2016) 119 final} [http://ec.europa.eu/competition/sectors/energy/capacity\\_mechanism\\_report\\_en.pdf](http://ec.europa.eu/competition/sectors/energy/capacity_mechanism_report_en.pdf) last accessed on the 5<sup>th</sup> August 2016. Over the past year the Commission has collected a large amount of information on existing and planned capacity mechanisms in 11 Member States. It has investigated why Member States implement capacity mechanisms, how these mechanisms are designed and what their effects are on competition and trade in the internal electricity market.

to guarantee security of supply may lead to unsurmountable disadvantages for the objectives of an integrated energy market at European level henceforth compromising the EU governance model on sustainable development that should start by empowering consumers and strengthen regional cooperation. Capacity mechanisms through tailor-made solutions by single Member States bring uncertainty for investors and limit the Commission control on crucial public service obligations. Great expectations should come due to the role of ACER in order to leave behind the administrative differences and difficulties of MS on implementing regional projects and market coupling. ACER has an important role on implementing cross-border Electricity Exchange regulation and transparency regulation by speeding up projects, permits and administrative procedures<sup>70</sup>. Concerning gas, the problematic issues diverge, it has already been suggested that regional and EU interests should be well accounted for, and an obligation modelled on Art 36 (8) and (9) of the Gas Directive to request an opinion from ACER or the Commission could be introduced in order to enhance the integration of the energy market. There are important differences between the hub-based Western markets and the isolated Eastern markets on the pipeline distribution and the differences of the role of gas in MS' economies.

As a matter of fact European Union member states have many differences in terms of their energy security and, in particular, in their degree of exposure to a possible disruption of gas supplies from Russia. There are many European States importing gas from Russia having formal and Long-term gas contracts with Gazprom and this has proven to be a problem for the European market dimension<sup>71</sup>. Nonetheless some of those states are protected from disruptions either because they have sufficient storage capacity, or, as in the case of Italy and Germany have had traditionally an established commercial and political relationship with Russia, or at the same time have internal supplies or liquefied natural gas (LNG) facilities to diversify away from Russia, which is the case of France, the Netherlands, Italy and Greece. The big problem remains for those countries that are very dependent on Russian gas supplies

<sup>70</sup> [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 (Text with EEA relevance).

<sup>71</sup> On Long-term Gas import contracts see, A. de Hauteclocque, I. Conti, J-M. Glachant, "From a Reactive to a Proactive EU Regulatory Framework for Long-term Gas Import Contracts", *Florence School of Regulation, Policy Brief*, Issue 2015/02 October 2015.

(Estonia, Lithuania, Finland, Czech Republic, Slovakia, Bulgaria, Hungary and Latvia)<sup>72</sup>. In addition, coal dominates the economies of Estonia, Poland, Czech Republic and Bulgaria, so if European climate policy happens to be effective their exposure to natural gas supply security will grow and the need for security of supply mechanisms led by solidarity criteria would be urgently needed if we want to keep the leadership on a sustainable governance of our resources in Europe. Last August the European Commission finally allocated €187.5 million for the construction of the *Balticconnector*, the first Estonia-Finland gas pipeline<sup>73</sup>. It is remarkable that Finland has had up till now a single pipeline connected with the Russian gas supplier. The transition towards a new market model in the EU should affect existing pricing mechanisms and contracts, considering the above gas market situation for the Russian gas export monopolist (Gazprom) a separation between pipeline capacity and commodity markets also generates risks of capacity-supply mismatch and constitutes barriers to new pipelines projects<sup>74</sup>. At some point, we need to face up to the reality that the transition to a fully competitive energy market advocating for sustainability at the same time is still a long way to go.

## VII. Conclusions

European integration in the area of Energy law shows some important paradoxes that we cannot ignore. On the one hand, energy policy in the EU has traditionally been rather insignificant despite of the fact that two of the three original treaties, the European Coal and Steel Community and EURATOM<sup>75</sup> both, concerned Energy. So, we could say that energy had been the main cause of European integration, and it has been at the heart of the integration process since the start. 'Paradoxically', on the other hand, neither the energy security, nor the energy market regulation had ever become the subject of the EU supranational policy and we are far from gaining satisfactory results in terms of achieving a much more coordinated Energy

<sup>72</sup> IEA 2016 Natural Gas Information available on: [http://wds.iea.org/wds/pdf/Gas\\_documentation.pdf](http://wds.iea.org/wds/pdf/Gas_documentation.pdf)

<sup>73</sup> According to <https://www.neweurope.eu/article/eu-funds-estonia-finland-pipe-lessen-gas-dependence-russia/> published on the 13<sup>th</sup> of August 2016. Last Accessed 17<sup>th</sup> of August 2016.

<sup>74</sup> According to A. Belyi, "Gazprom: slow to adapt and unable to exert influence", *Florence School of Regulation, Policy Brief Energy and Climate*, Issue 2016/05, April 2016.

<sup>75</sup> Authors have observed the difference between the proclaimed aims of European Integration in energy issues at its very beginning and the real outcome after several decades. See, Andrei Belyi, "EU External Energy Policies: A Paradox of Integration", in *Europe's Global Role*, Jan Orbie (ed.), Ashgate (2008), p. 203. A. Belyi, "New Dimensions of Energy Security of the Emerging EU and their impact on Relations with Russia", *Journal of European Integration*, 12/2003, 25 (4), pp. 351-369.

policy today even under a strong sustainability paradigm enshrined by the EU Constitutional framework.

The truth is that the success of the environmental governance at EU level has convinced us of the idea that there exist the right legal basis for reconciling environmental protection with energy policy, also integrating social and economic considerations<sup>76</sup> and all together establish regional cooperation on Climate change initiatives<sup>77</sup> with a direct effect on energy markets. The truth is different.

The EU is of course given evidence of an engaged primary and secondary law towards such common achievements but there are also different indications towards the contrary coming along from EU legislation, National laws and CJEU case law. Our focus has been placed on the paradoxes offered by the recently

welcomed competence of the EU on Energy and the challenges that the secondary legislation on Renewable Energy Directive poses creating a long list of legal conflicts still unresolved. The RES Directive, which is seen as a clue legal instrument to undertake a social transformation towards clean energy, gives signs of weaknesses by rooting its legal basis on environmental competences of the EU, not solving the problems of a fragmented EU internal energy market. This, of course, puts at risk the whole integration process and the integrity of a solid Energy market that should aim for one important ‘mandatory’ direction: “sustainability”.

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<sup>76</sup> The success of environmental governance at EU level is determined by its strong initial integration level. We could say along with Krämer, that “the EU is the only region in the world which has publicly committed itself to try to reconcile economic growth, social concerns and environmental protection”, see, Ludwig Krämer, “European Environmental Law: Innovative, integrative but also effective? In European legal Dynamics” Revised and updated Edition of *Thirty Years of European Legal Studies at the College of Europe*, edited by P. Demaret, I. Govaer and D. Hanf, Brussels: P. I. E. Peter Lang, pp. 345-356, p.355. After a slow start in the 1970s to tackle trans-boundary environmental issues and level the playing field for European businesses, EU environmental policies now cover water, air or noise pollution; habitat and biodiversity preservation; sustainable production and consumption and the fight against climate change. This afterthought of European integration – the environment wasn’t even mentioned in the EU’s founding Rome Treaty in 1951 – has now become central to the E

U’s international affairs. For a more recent analyses on the EU Environmental Policy and its influence on the EU Energy policy see further, Emanuela Orlando, “The Evolution of the EU Policy and law in the Environmental field: Achievements and Current Challenges”, in C. Bakker and F. Francioni, in *The EU, the US and Global Climate Governance*, Routledge 2014, pp. 61-81. On this topic, see also, A. Jordan and A. Lenschow, “Environmental Policy Integration: A State of the Art Review”, 2010 *Environmental Policy and Governance* 2010, 20 (3), pp. 147-158.

<sup>77</sup> Not by chance, the most notorious aspect of EU environmental policy in this phase remains the actions and initiatives in response to climate change, defined in the 7<sup>th</sup> Environment Action Programme. The three main objectives: (1) to protect, conserve and enhance the Union’s **natural capital**; (2) to turn the Union into a **resource-efficient**, (3) green, and competitive low-carbon **economy**; (4) to **safeguard** the Union’s citizens from **environment-related pressures** and risks to health and wellbeing

Four so called "enablers" will help Europe deliver on these goals.

DECISION No 1386/2013/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 20 November 2013 on a General Union Environment Action Programme to 2020 ‘Living well, within the limits of our planet’ (Text with EEA relevance), on <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32013D1386>; see also, <http://ec.europa.eu/environment/action-programme/>