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Enhancing Energy Security in the European Union: Pathways to Reduce Europe's Dependence on Russian Gas Imports

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Abstract

Should Russia escalate the Ukraine crisis, or threaten other states in post-Soviet space, the EU will need to be able to apply hard-hitting sanctions against Russian energy exports. However, the divergent dependence of European states on Russian gas imports will make it very difficult to achieve consensus on such sanctions. This article analyses the recent measures that the EU Commission has initiated to help reduce the dependence of European states on Russian gas. It explores the scope of EU competence to reduce Member-State dependence on Russian gas in three key areas: promoting the use of renewable and energy efficiency; completing the internal energy market and strengthening the EU's position vis-à-vis external gas suppliers. The article's conclusions examine the political factors which will hinder or enable the EU to promote greater gas supply security and highlight the importance of political communication in enhancing EU legal competence in energy security.

Introduction

This article examines the measures that the EU can take to enhance security of its gas supply and thereby enhance its ability to apply effective sanctions against Russia.¹ It focuses, in particular, on the intersection between the legal and political dimensions of energy security. An analysis of the interaction between EU law and the political drivers of EU energy policy is essential in understanding the state of play in European energy security. The 2014 Energy Security Strategy and 2015 Energy Union indicate

¹ Energy security has two key dimensions: security of supply and acceptable cost. See G. Bahgat, "Europe's energy security: challenges and opportunities" (2006) 82 (5) *International Affairs* 965.

that the European Commission is increasingly determined to use competition law and antitrust legislation to restrict the leverage of Gazprom on the European gas market. The Ukraine-Russia crisis has also led the Commission to be more willing to push ahead with the internal energy market by enforcing competition law and by ensuring binding EU energy efficiency and renewables targets are met. At the same time, many European states are resistant to these efforts by the Commission due to a variety of short-term economic and political incentives, including the desire to protect national energy industries and jobs and to ensure low energy prices over the short-term. The formal competence of the EU Commission in energy policy will, therefore, be a key determinant of the EU's ability to promote the implementation of the important measures contained in the Energy Security Strategy and the Energy Union, especially the completion of the internal energy market and strengthening the EU's position vis-à-vis external energy suppliers.

The article begins by undertaking an overview of EU competence in the field of energy. It then highlights the urgency of tackling energy insecurity in the EU by exploring the implications of European states' dependence on Russian gas for the EU's ability to tackle Russian revisionism. The article proceeds by analysing the measures which the EU has proposed to enhance Europe's security of gas supply since the onset of the Ukraine-Russia crisis: the Energy Security Strategy and the Energy Union. It highlights that while progress has been made in areas such as gas infrastructure, other areas, such as diversifying gas supplies, creating an internal EU energy market and fostering a stronger level of European energy efficiency and self-sufficiency are taking longer to implement.

The article then considers the legal competence of the EU in three key areas which will be central to European energy security: promoting the use of renewables and enhancing energy efficiency; completing the internal energy market and strengthening the EU's position vis-à-vis external gas suppliers. The article concludes by reflecting on the factors which will facilitate the Commission to help foster greater security of energy supply in Europe, with a particular focus on the role of political communication.

An overview of EU's legal competence in the field of energy

The EU's competence on energy

One experiences a certain degree of *de-ja-vu* in current EU deliberations about a single energy market. This is because energy monopolised Europe's early integration agenda manifested in the establishment of the so-called European Coal and Steel Community (ECSC) in 1951, and the EURATOM in 1957. The ECSC Treaty is symbolic of the early stage of European integration, where Member States undertook the task of pooling their coal and steel resources together and lifting restrictions on imports and exports, thereby creating a single coal and steel market.

Similarly, under EURATOM, the European Commission obtained the status of a supranational regulatory authority in three areas: radiation protection, supply of nuclear fissile materials and nuclear safeguards. Since the Treaty made no reference to fixed criteria as regards the standardisation of design, operation and maintenance of nuclear installations, regulatory activities in the sphere of nuclear energy evolved by means of the national authorities and to a lesser degree by International Organisations and Agencies.² The co-existence of European, international and national actors as well as the potential legislative bases to the energy sector inherent in EURATOM (Articles 31, 32 Euratom) and the former EC Treaty (Articles 95, 152 and 175(1) EC) posed questions as to the most appropriate legislator in the area of nuclear law.

The above competence conundrum remained unresolved for years to come. For instance, at the time of the UK's accession to what was then the European Economic Community (EEC) in 1973, the Treaty maintained no express legal basis that would enable the EU to adopt energy measures. Instead, a range of general provisions based on substantive law (such as the four freedoms) of the EEC Treaty provided the legal

² The Convention on Nuclear Safety was adopted in 1994 by a diplomatic conference convened by the International Atomic Energy Agency. It was ratified by all Member States and entered into force in 1996.

basis for legislation in the field of energy. These included specific powers under the Treaty that enabled the EU legislature to regulate the Single Market or general powers to pursue the then Community's objectives. While the EU could therefore act peripherally touching upon areas connected to energy in order to liberalise the European energy market, the lack of an express provision in the field confirmed that energy as a policy area remained in the sovereign reserve of the Member States. When it came to energy security, for instance, the majority of the Member States favoured the conclusion of a multilateral treaty which took the form of the Energy Charter Treaty (ECT) that came into force in 1998. The ECT was signed by fifty-two states, the EU and Euratom and provided a legal framework for international energy cooperation. It set a commonly accepted foundation observed by the participating governments, thus 'minimising the risks associated with energy-related investments and trade.'³ Russia accepted provisional application of the ECT – it initially signed the ECT but officially refused to ratify it and proposed a new energy charter in 2009.⁴

While the ECSC Treaty expired on 23 July 2002, the Euratom Treaty stayed in force maintaining the same aim of developing EU nuclear industry. It still remains an independent settlement and has not been reformed by an Intergovernmental Conference. This confirms the EU's unsettled legal jurisdiction in the area of nuclear safety but, as mentioned above, did not necessarily suggest the lack of legal bases in the former EC Treaty with an indirect relevance to nuclear sector standards. For instance, although the EC Treaty did not include a specific Title on Energy that would enable it to promote internal energy market liberalisation, there were still avenues for the EU legislature to push legislation carrying such an impact.

For instance, former Article 95 EC (the current Article 114 TFEU internal market legal basis) was available and could be employed to protect the consumer, once

³ The ECT is available at <http://www.ena.lt/pdfai/Treaty.pdf> [Accessed October 19, 2015]. See for an analysis of the ECT: P.D. Cameron, "The EU and Energy Security: a Critical Review of the Legal Issues" in A. Antoniadis et al, *The European Union and Global Emergencies: A Law and Policy Analysis* (Oxford: Hart Publishing, 2011). pp.127 onwards.

⁴ See for a brief summary: P. Roche and S. Petit, "Russia's withdrawal from the Energy Charter Treaty" Norton Rose Fullbright Publications, August 2009, available at <http://www.nortonrosefulbright.com/knowledge/publications/22691/russias-withdrawal-from-the-energy-charter-treaty> [Accessed October 19, 2015].

existing disparities in national product safety rules (e.g. the treatment of foodstuffs by ionising radiation) hindering the functioning of the internal market (e.g. the free movement of foodstuffs) created conditions of unequal competition.⁵ In the same vein, energy security legislation emerged in the form of secondary legislation, such as Directive 2001/77⁶ on renewables, Directive 2003/30⁷ on biofuels (both repealed by Renewable Energy Directive 2009/28⁸ and Directive 2004/67 concerning measures to safeguard security of natural gas supply (later replaced by Regulation 994/2010).⁹ It was adopted in 2004 with a view to foster an internal gas market between the Member States and provided for reporting obligations for national governments. Almost at the same time, a regional treaty between EU Member States and eight countries of South-East Europe was agreed in 2005 in order to create a regional gas market – the Energy Community (of South East Europe).

Four years later, the Treaty of Lisbon, which came into force in 2009, resolved the EU's legal jurisdiction in the field of energy. It provided for the first time a Title in the Treaty proper in the field of energy. Article 194 TFEU creates a new competence for the EU legislature with the aim to ensure that Member States can diversify their energy supplies and improve competitiveness:

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

⁵ See *European Parliament v. Council* (Chernobyl) (C-70/88) [1990] E.C.R. 1-2041. Treaty legal bases on Environment, Transport and Common Commercial Policy also provided opportunity for energy-related measures.

⁶ [2001] O.J.L. 283/33.

⁷ [2003] O.J.L. 123/42.

⁸ [2009] O.J.L. 140/16.

⁹ [2004] O.J.L. 127/92. Regulation 994/2010 concerning measures to safeguard security of gas and repealing Council Directive 2004/67/EC [2010] O.J.L. 295/1.

(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.

Indeed, Article 194 TFEU provides the EU and its Member States with a shared competence. As it is traditionally the case with all areas of shared competence, the Member States are pre-empted by the EU legislative Institutions' exercise of power. Having said that, EU competence in the field of energy is not unconstrained. There is an express caveat in the use of the EU's new energy competence. Article 194 (2) TFEU, reduces the pre-emptive effect of EU legislation in the field by confirming that 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.

Consequently, such measures 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. Hence, the bottom line is that whilst the EU possesses the constitutional and

institutional ammunition to act collectively on behalf of its Member States in the field of energy it does not have such competence in all fields of policy.

The above argument is crucial especially when it comes to energy security, one of the key aims of EU energy policy according to Article 194 (1) (b) TFEU). Energy security is commonly meant to entail, at least from a 'Brussels perspective', the EU's capacity to secure access to energy supplies in order to correspond to the energy needs of its Member States.¹⁰ In this context, energy becomes a strategic resource and, as such, internal energy market liberalisation falls short of addressing European energy security concerns, including security of supply. This is because there are developments beyond the international energy sector that transcend the economic terrain and pose numerous geopolitical challenges to the EU. For instance, there is little doubt that dependence on oil imports from rogue states constitutes a threat to EU security. The same applies to the dependence of a number of Member States on Russian gas.

In light of such threats, the externalisation or 'securitisation' of the EU's internal energy market has become a necessity in order to ensure pan-European (and by extension global) energy security. Indeed it would not be a fallacy to conceive the EU as a market power on the world stage with full capacity to externalise its (internal) market policies and regulations in a multilateral context.¹¹ Energy security provides a fertile ground where the EU can project itself as a (market-based) normative power outside the contours of Common Foreign and Security Policy (CFSP) and, therefore, externalise its constitutive market values. In contrast to the relatively limited ability of the EU to exert external influence through CFSP,¹² the EU possesses considerable power-tools to force its *modus operandi* externally due to its status as a large and established energy market. This occurs, for instance, via a combination of liberalisation of the energy market and the use of coercion against both Member

¹⁰ See R. Leal-Arcas and A. Filis, "Conceptualizing EU Energy Security Through an EU Constitutional Law Perspective" (2013) 36 *Fordham International Law Journal* 1225; P. Aalto and D. Korkmaz Temel "European Energy Security: Natural Gas and the Integration Process" (2014) 52 (4) *JCMS* 758.

¹¹ See C. Damro, "Market Power Europe: EU Externalisation of Market-Related Policies" MERCURY E-paper No 5, October 2010. Available at http://mercury.uni-koeln.de/fileadmin/user_upload/E-paper_no5_r2010.pdf [Accessed October 19, 2015]

¹² See for a detailed analysis of CSDP: T. Dyson and T. Konstadinides, *European Defence Cooperation in EU Law & IR Theory*. (Basingstoke: Palgrave Macmillan, 2013).

States and third countries vis-à-vis the security of EU's energy supplies. Indeed, the externalisation of internal market policies has often been described as the EU's most successful external action, premised on a core feature of the EU's identity – the prevalence of its market order.¹³

Whilst energy securitisation has boosted the EU's ability to develop a coherent external policy and become a global energy player,¹⁴ it has been noted in the past that 'the Member States remain divided by different economic and geopolitical interests and the EU has not yet been given enough competences to implement such a double-standard approach.'¹⁵ The following sub-section explores whether things are different now that the EU has obtained an express energy competence in the Treaty. It also discusses whether its energy competence extends to energy security and, therefore, provides the EU with a robust presence in the policy field.

Energy security as a new EU external policy

It is important to ascertain where the EU's legal authority lies in energy security as placed in the terrain of EU external competence. EU external competence in the field of energy security, or the lack of it, constitutes a major stumbling block for the EU's development and external profile-building in energy matters. This is the case despite the fact that the EU's action at the international level is augmented by the Treaty in the form of express provisions regarding its 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). As such, the EU may only employ its implied powers under

¹³ C. Carta and J-F. Morin, *EU Foreign Policy through the Lens of Discourse Analysis: Making Sense of Diversity* (London: Ashgate, 2014), p. 218 onwards.

¹⁴ See the Commission's 2015 energy strategy which aims to reduce dependence on Russia to a minimum. Available at <https://ec.europa.eu/energy/en/topics/energy-strategy/energy-security-strategy> [Accessed October 19, 2015]

¹⁵ R. Metais, "Ensuring Energy Security in Europe: The EU between a Market-based and a Geopolitical Approach", College of Europe EU Diplomacy Paper 03/2013, p.23.

Article 216 (1) TFEU in order to conclude international agreements in the field of energy. This provision provides that:

[t]he Union may conclude an agreement with one or more third countries or international organisations where the Treaties so provide or where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties, or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope.

Article 216 (1) TFEU therefore establishes that EU competence may emerge not only from an express conferment by the Treaty but may equally flow implicitly from other provisions of the Treaty (such as Article 194 TFEU in the context of energy) and from measures adopted within the framework of those provisions by EU Institutions.¹⁶ What is more, the CJEU has accepted that whenever EU law creates, for EU Institutions, powers within its internal system for the purpose of attaining a specific objective, the EU has authority to undertake international commitments necessary for the attainment of that objective even in the absence of an express provision to that effect. Hence, post-Lisbon, international agreements on energy security are based either on the objectives or on a decision adopted within the area of the energy provisions of the Treaty. This is because, as explained, despite the external character of energy policies, there is no express external competence for the EU to act in the field. Implied powers under Article 216 (1) TFEU may therefore be of use to the Council in this new field.

This section charted the journey from the early days of the EU to the present day. Since its inception in the form of Coal and Steel Community and Euratom, the EU has pushed for the establishment of a pan-European energy market. This endeavour became more manifest following the establishment of the European Community which promoted peripherally its internal market model in the field of energy through

¹⁶ See for an analysis of EU implied powers in the external field and their codification in Article 216 (1) TFEU: T. Konstadinides, "EU Foreign Policy under the Doctrine of Implied Powers: Codification Drawbacks and Constitutional Limitations" (2014) 39 (4) *European Law Review* 511.

inter alia Environmental and Competition legal instruments. In recent years, whilst keeping loyal to the maintenance of a functional internal energy market, the EU has become more ambitious especially with regard to ensuring security of supply and producing as well as the production and use of sustainable energy.

The current state of play in EU competence is capable of promoting the EU's post-Lisbon energy agenda on energy security and sustainable energy. Current Article 194 TFEU provides for a direct harmonised approach in energy policy where Member States seem to be transferring more control to the EU. At the same time, the Treaty also caters for a uniform approach vis-à-vis the security of energy supply. Article 122 TFEU provides a textual guarantee to Member States that – in a spirit of solidarity - they would receive assistance in case their energy supplies are cut off (in the occurrence of a similar scenario to the January 2009 Russia-Ukraine gas dispute).¹⁷ Both Articles 194 and 122 TFEU can also be utilised as *leges speciales* to promote energy efficiency and sustainable / renewable energy. The above competences of the EU are also significant to the conduct of EU external energy policy, especially EU's reliance on Russian energy the implications of which have significant ramifications for European security.

Energy security and EU leverage over Russia's economy and foreign policy

While the development of the EU's competence in energy security has been an incremental affair, the Ukraine-Russia conflict forms a critical juncture in EU energy security that highlights the urgent need to enhance and enforce the EU's competence in energy security.¹⁸ The 2006 and 2009 Ukraine-Russia gas disputes, which led to the reduction of gas supply to several EU member states, provided a first warning of the potentially negative implications of EU dependence of Russian gas. However, the impact of energy security concerns on the EU's response to the Ukraine-Russia

¹⁷ See on the 2009 dispute between Russia and Ukraine described as an 'emergency': P.D. Cameron, "The EU and Energy Security: a Critical Review of the Legal Issues" in A. Antoniadis et al, *The European Union and Global Emergencies: A Law and Policy Analysis* (Oxford: Hart Publishing, 2011). pp.130-134.

¹⁸ See for recent proposals on how can the EU reduce its dependency on Russian gas: R. Leal Arcas et al, "The European Union and its Energy Security Challenges" (2015) 8 (4) *Journal of World Energy Law ad Business* 291.

conflict has starkly exposed the negative foreign policy implications of gas supply insecurity.

Russia's use of military force to annexe Crimea and its support for pro-Russian separatists in Eastern Ukraine highlights its nature as a revisionist power that also poses a threat to other post-Soviet states with large Russian minorities.¹⁹ The ability of sanctions to achieve change to the foreign policy calculus of states has received a significant degree of attention in the scholarly literature.²⁰ However, the utility of military force in tackling Russian revisionism is limited, not least given Russia's nuclear capabilities. Hence sanctions, despite their questionable effectiveness, offer the best coercive tool for the EU and NATO in their attempts to force change to Russian policy in post-Soviet space.

To date, EU and US sanctions have focused on key individuals within the Russian business sector, military and foreign policy elite. Sanctions have also limited Russia's access to capital markets and to technology for oil exploration and production and have banned arms exports to Russia.²¹ However, these sanctions lack the necessary severity to incentivise a change of course in Russia's policy to Ukraine. Only sanctions which target Russia's energy sector, especially its oil exports, which comprise around half of the revenue of the Russian state, will be sufficiently coercive to force change in Russian foreign policy. Europe is well-placed to apply such sanctions as in 2013 80 percent of Russian oil exports went to European countries.²²

However, Europe has displayed little willingness to consider sanctions against Russia's oil exports. This is not due to fears about an oil crisis, as the EU would be

¹⁹ W. Mead, "The Return of Geopolitics: The Revenge of the Revisionist Powers", *Foreign Affairs* May/June, 2014.

²⁰ See, for detail: B. Early, *Busted Sanctions: Explaining Why Economic Sanctions Fail* (Stanford: Stanford University Press, 2015); D. Drezner, *The Sanctions Paradox: Economic Statecraft and International Relations* (Cambridge: Cambridge University Press, 1999).

²¹ See for current EU sanctions against Russia: N. Kushner, 'Sanctions and Export Controls Update' (2015) 129 *Compliance Office Bulletin* 1. See also 'Ukraine crisis: Russia and sanctions', BBC News, 19 December 2014. Available at <http://www.bbc.com/news/world-europe-26672800> [Accessed October 19, 2015].

²² S. Six, "Russia's Oil Export Strategy: Two Markets, Two Faces", CIEP Paper, 2015, p.15, available at <http://www.clingendaenergy.com/publications/publication/russias-oil-export-strategy-two-markets-two-faces> [Accessed October 19, 2015].

able to compensate for loss in Russian oil through tanker deliveries.²³ Instead it is a consequence of the difficulties that Europe faces in diversifying its gas imports.²⁴ The UK and France import a limited quantity of Russian gas, however Germany and a number of CEE states exhibit a high-level of dependence on Gazprom.²⁵ Germany imports 36 per cent of its gas imports from Russia and its energy companies have benefitted from a privileged relationship with Gazprom, having negotiated favourable energy prices when compared with CEE states.²⁶ However, affordability has come at the expense of Europe's supply security, highlighted most notably by the construction of the Nord Stream gas pipeline in 2005 that bypasses CEE states by transporting gas directly to Germany.²⁷

Divergence in dependence on Russian gas imports has had a significant effect on the willingness of Britain, France and Germany to enact sanctions on Russia's energy sector. Britain has been keen to limit the effects of sanctions on the City of London.²⁸ Hence during sanction negotiations in 2014 Britain sought tougher sanctions against oil and gas imports and arms exports.²⁹ France, with an eye on maintaining its

²³ Interview 1, Section A2, cooperation in the IEA and bilateral energy cooperation with non-OCED states, Ministry for Economic Affairs and Energy, Berlin, 13 August 2014.

²⁴ For further detail on deficits in EU gas supply security see the following section.

²⁵ In 2013 Russia exported 178.6 billion cubic meters (Bcm) of natural gas to Europe. 8.6 Bcm went to France; 41 Bcm to Germany and 16.6 Bcm to the UK. For information on the dependence of CEE states on Russian gas see R. Dickel et al, "Reducing European Dependence on Russian Gas", OEIS Paper, NG92, October 2014, p.3.

²⁶ R. Fuchs, "Germany's Russian energy dilemma", *Deutsche Welle*, 29 March 2014, available at <http://www.dw.com/en/germanys-russian-energy-dilemma/a-17529685> [Accessed October 19, 2015].

²⁷ "Duda slams Russia's second Baltic gas pipeline to Germany", *Euractiv* 09 September 2015, <<http://www.euractiv.com/sections/energy/polish-president-slams-russias-second-baltic-gas-pipeline-germany-317457>> [Accessed October 19, 2015].

²⁸ A. Monaghan and J. Rankin, J. "EU and US sanctions against Russia: who will they hurt more?", 30 July 2014, *Guardian*, available at <http://www.theguardian.com/business/2014/jul/30/eu-us-sanctions-against-russia-hurt>; N. Watt, "UK seeking to ensure Russia sanctions do not harm City of London", *Guardian*, 3 March 2014, available at <http://www.theguardian.com/world/2014/mar/03/uk-seeks-russia-harm-city-london-document>; "Russia's trade ties with Europe", *BBC News*, 4 March 2014, available at <http://www.bbc.com/news/world-europe-26436291>; "Europe's dependency on Russian gas may be cut by energy efficiency focus", *Guardian*, 9 September 2014, available at <http://www.theguardian.com/world/2014/sep/09/europe-dependency-russian-gas-energy-efficiency-eu> [All accessed 19 October 2015].

²⁹ R. Mason and P. Wintour, "UK to press European allies for tougher sanctions over MH17", *Guardian*, 21 July 2014, available at <http://www.theguardian.com/world/2014/jul/21/uk-europe-tougher-sanctions-russia-mh17-putin>; S. Wagstyl, "Merkel's harder stance on Russia fuels anxiety for companies", *Financial Times*, 3 July 2014, available at <http://www.ft.com/intl/cms/s/0/fa025df4-02b4-11e4-a68d-00144feab7de.html#axzz36mDPA3q7> [Both accessed October 19, 2015].

lucrative arms exports to Russia, has attempted to limit sanctions to financial sector.³⁰ Germany, the most exposed of the West European countries to Russian gas imports, has displayed the greatest reticence to apply sanctions against the Russian energy sector.³¹ In sanction negotiations Germany has been eager to ensure that sanctions would not harm the Russian energy sector and has attempted to limit sanctions to the financial sector.³² However, given Russia's contravention of the Minsk agreements and its willingness to use military force to seize territory, European states must be prepared to apply more far-reaching sanctions against the Russian oil and gas sectors. It is, therefore, imperative that Europe tackles its deficits in gas supply security.

The EU's energy security initiatives following the Ukraine-Russia crisis

Before and following the 2006/09 gas crises the European Commission has been vocal in its warnings about the dangers associated with the dependence of European states on Russian gas. The EU has undertaken several initiatives which have sought to enhance Europe's energy security in short-term gas supply crises. These initiatives include the abovementioned Directive 2004/67 (as replaced by Regulation 994/2010) that included the establishment of the Gas Coordination Group to foster a better information exchange information between member states, the Commission, industry and consumers.³³

The 2008 Commission Communication 'Second Strategic Energy Review: An EU Energy Security and Solidarity Action Plan' outlined, amongst a range of other

³⁰ S. Wagstyl, "Merkel's harder stance on Russia fuels anxiety for companies" FT, 3 July 2014, available at <http://www.ft.com/cms/s/0/fa025df4-02b4-11e4-a68d-00144feab7de.html#axzz3p3c9Bcsy> [Accessed October 19, 2015].

³¹ While the agreement of more recalcitrant European states such as Greece will be important in ensuring a coordinated EU approach to sanctions, the leadership of Britain, France and Germany will be essential in securing EU consensus. C. Oliver, "EU fails to agree new Russia sanctions", FT, 29 January 2015, available at <http://www.ft.com/cms/s/0/e95231f6-a7ae-11e4-8e78-00144feab7de.html#axzz3TDkZipb6> [Accessed October 19, 2015].

³² B. Benoit and A. Thomas, "Germany's Merkel walks fine line in Russia standoff", Wall Street Journal, 3 March 2014, available at <http://online.wsj.com/news/articles/SB10001424052702304585004579417242979382218> [Accessed October 19, 2015]; Interview 1. Please provide details of the interview as per above comment

³³ For further detail, see Council Directive 2004/67/EC concerning measures to safeguard security of natural gas supply, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32004L0067> [Accessed October 19, 2015]

measures, the need to diversify Europe's gas supplies through the Mediterranean and Southern Corridor.³⁴ Finally, the Third Energy Package of 2009 also attempted to enhance Europe's energy efficiency and self-sufficiency by pushing ahead with the internal energy market.³⁵ Yet, EU member states have been slow to implement these directives and policy recommendations and as a consequence the EU was largely unprepared for the energy security implications of the Ukraine-Russia crisis. Several major problems persist in EU energy policy which act to exacerbate dependence on Russian gas and weaken the EU's ability to challenge Russian revisionism.

First, the energy relations of European states with third parties remain highly fragmented, with individual member states negotiating separate deals with Gazprom and other energy suppliers. This not only increases the cost of gas for smaller European states, but also endows Gazprom with the ability to use the promise of lower gas prices to divide European states. Moreover, as outlined in the introduction, the EU has been slow to diversify its external gas suppliers, with Russia remaining the dominant source. The South Stream project – that would have supplied Europe with 63bn cubic meters of Russian natural gas per year – was cancelled by Russia in December 2014 in the face of opposition from the EU Commission that found the project in contravention of EU rules on the unbundling of gas supply and transport.³⁶ However, EU states have, on the whole, been very slow to act on the Commission's long-standing warnings about the potential security risks associated with increased dependence on Russian supplies. In addition, the EU has also faced problems in developing the infrastructure that will allow the EU to take advantage of LNG and ensure that gas can be transferred between EU states in the event of a crisis. It also

³⁴ See, "Energy Security and Solidarity Action Plan", available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=URISERV:en0003>; "Council Conclusions on 'Second Strategic Energy Review: An EU Energy Security and Solidarity Action Plan'", available at www.consilium.europa.eu/%2Fuedocs/%2Fcms_data/%2Fdocs/%2Fpressdata/%2Fen/%2Ftrans/%2F106196.pdf&ei=ZZ3dVfGADMX2UqnGrpgP&usg=AFQjCNErov_eINIEr9MSMPwxHxUv-GMPDg&sig2=RlwBqBM4DwMMO-MhNLEn-Q&cad=rja [Both accessed October 19, 2015].

³⁵ See, "Third Package, 2009", available at <https://ec.europa.eu/energy/en/topics/markets-and-consumers/market-legislation> [Accessed October 19, 2015].

³⁶ J. Farchy and C. Oliver, "Putin loses face with cancellation of 'pharonic' South Stream", FT, 2 December 2014, <http://www.ft.com/cms/s/0/ea6e69a8-7a43-11e4-8958-00144feabdc0.html#axzz3jv3NC5dT> [Accessed October 19, 2015].

urgently needs to improve its solidarity mechanisms in gas crises, including the collective purchasing of gas.

Furthermore, European states have made slow progress in developing the ‘hardware’ (electricity and gas transmission infrastructure) and the ‘software’ (the regulation) necessary to implement the internal energy market. This has led to the creation of separate national ‘energy islands’ which undermine energy efficiency, the roll-out of renewable energies and consequently reduce European energy self-sufficiency. Finally, for the internal energy market to work effectively Europe needs to improve its coordination in the decarbonizing of its economy and to ensure greater coherence between the environmental and security (both cost and supply security) dimensions of energy policy. For example, Germany whose *Energiewende* plans to achieve 30% of German gross energy consumption from renewables by 2020 and 60% by 2050, has made significant progress toward decarbonisation. However, other major EU states, such as France and the UK and are struggling to meet their commitment to the EU target of 20% renewables in the total primary energy supply (TPES).³⁷

Attaining greater energy self-sufficiency through renewable energy can only be achieved with more coordinated action to promote decarbonisation and energy efficiency. A more credible far-reaching European commitment to renewables would help create the political will necessary for the integration of energy markets and the development of electricity transmission networks. Two major EU energy initiatives since the onset of the Ukraine-Russia crisis have sought to address some of these outstanding issues, with mixed results.

The Energy Security Strategy

The first of these initiatives is the May 2014 Energy Security Strategy. The Energy Security Strategy proposed two measures to strengthen security of energy supply

³⁷ The UK’s 2011 Renewable Energy Roadmap outlines plans for 15% of total energy consumption to drive from renewables by 2020, however, the UK looks likely to miss this target. See ‘UK and France May Miss Renewable Energy Target’, *Guardian*, <http://www.theguardian.com/environment/2015/jun/16/uk-misses-eus-interim-renewables-target> [Accessed October 19, 2015].

overt the short-term (winter 2014/15), including enhancing cross-European coordination in crises and improving European gas infrastructure to facilitate the cross-border transfer of gas. The Energy Security Strategy also contains six proposals aimed at ensuring that Europe is in a stronger position to curb its dependence on Russian gas imports over the long-term.

First, the Energy Security Strategy outlines the need to moderate energy demand. It focuses on speeding up progress in meeting the EU energy efficiency target of 20% by 2020 by focusing on the implementation of the 2012 Energy Efficiency Directive and Energy Performance of Buildings Directive. The Energy Security Strategy also plans to ring-fence €27 billion of the European Structural and Innovation Funds to encourage private sector investment in energy efficiency.³⁸

Second, the Energy Security Strategy focuses on the urgent need to complete the EU internal energy market in electricity and gas. While noting progress in regional integration in the electricity and gas markets of Northern Europe through initiatives such as Nordpool (involving the integration of the Danish, Norwegian, Swedish and Finnish electricity markets) and the Pentilateral Forum (involving Austria, Belgium, France, Germany, Luxembourg and the Netherlands), the Energy Security Strategy recognizes the need for similar progress in the Baltic States and states of South East Europe to establish critical infrastructure and hasten the development of gas hubs.³⁹ The Energy Security Strategy therefore identifies 27 short and medium term priority projects of common interest (PCI) in gas infrastructure which build upon the interconnector and LNG terminal projects outlined in the EU's 'third package' of legislative proposals for electricity and gas markets.⁴⁰ The Energy Security Strategy

³⁸ "Communication from the Commission to the European Parliament and the Council: European Energy Security", Brussels, 28 May 2015, p.7. available at <https://ec.europa.eu/energy/en/topics/energy-strategy/energy-security-strategy> [Accessed October 19, 2015].

³⁹ European Energy Security Strategy, European Commission, Brussels, May 28, 2014, pp.8-9.

⁴⁰ PCIs refer to infrastructure projects which allow EU states to integrate their energy markets and diversify energy sources. They are eligible for funding from the Connecting Europe Facility. See Energy Security Strategy, pp.9-10.

also initiates six PCI interconnector projects in electricity infrastructure⁴¹ focusing on the Baltic States, central and southern Europe and Iberia.⁴²

Third, the Energy Security Strategy points to the need to increase energy production within the EU, in particular through increasing the proportion of renewable energy in the EU TPES from 14.1% in 2012 to 27% by 2030.⁴³ The Energy Security Strategy also gives a hesitant green light to the use of controversial technologies, such as the extraction of shale gas, to help to offset the decline of Europe's conventional gas reserves in the North Sea.⁴⁴

Fourth, the Energy Security Strategy highlights the necessity for greater support for new energy technologies to improve energy efficiency, enhance energy storage capacity and help to manage gas and electricity grids, arguing that that research in these fields should be prioritized in the Horizon 2020 Framework Programme for Research and Innovation.⁴⁵ Fifth, the Energy Security Strategy stresses the importance of diversifying external gas supplies, especially through a focus on improving supply infrastructure with Norway, the states of the Caspian Sea Basin and exploring the possibility for taking advantage of the increasing global market in LNG.⁴⁶

Finally, the Energy Security Strategy calls for greater coordination between EU member states in external energy policy. In particular it notes the importance of taking advantage of Decision no 994/2012/EU that established an information exchange mechanism for intergovernmental agreements between EU members and third states in energy and the consequent potential provided by the Decision to involve the Commission in negotiation processes. The Energy Security Strategy also outlines plans to investigate the possibility of developing a procedure similar to the

⁴¹ *Ibid*, pp.9-10.

⁴² *Ibid*, pp.22-34.

⁴³ *Ibid*, p.12.

⁴⁴ *Ibid*, p.13.

⁴⁵ *Ibid*, pp.14-15.

⁴⁶ *Ibid*, pp.15-16.

EURATOM Supply Agency's 'collective purchasing mechanism' that would allow the Commission to object to any contracts with third parties which may have especially negative implications for security of gas supply.⁴⁷

The Energy Union

The Energy Security Strategy was followed by the Energy Union initiative that was first proposed by the former Polish President, Donald Tusk, in April 2014. Tusk proposed that six principles should stand at the heart of the Energy Union: the joint negotiation of gas contracts with Russia; strengthening solidarity between EU states in the event of gas crisis; increasing the level of EU co-financing of storage gas capacity and interconnectors to 75%; focusing on the ability of fossil fuels to help diversify Europe's energy supply; signing joint agreements with key global gas exporters in LNG such as the US and Australia and finally, strengthening the Energy Community.⁴⁸

Two of the above proposals proved controversial with other EU member states, especially Germany. The Polish proposal for collective EU bargaining with Russia met with resistance from Germany due to its potential to contravene EU competition law and the difficulties that Germany would face in forcing companies, in a liberalised energy market, to form a consortium. The comparatively low prices that German companies pay for Russian gas in comparison with CEE states has also played an important role in reducing the incentive to pursue collective bargaining with Gazprom and to explore the diversification of pipeline supplies.⁴⁹ Furthermore, the Polish proposal that Europe should begin to explore the potential of coal and

⁴⁷ Ibid, pp.17-19.

⁴⁸ D. Tusk, "A united Europe can end Russia's energy stranglehold", FT, 21 April 2014, <http://www.ft.com/intl/cms/s/0/91508464-c661-11e3-ba0e-00144feabdc0.html#axzz3jv3NC5dT> [Accessed October 19, 2015]. The Energy Community is an international organisation that was established in 2005. It includes the EU and countries from the Black Sea region and South-East Europe and is tasked with extending the EU internal energy market to these states.

⁴⁹ Stefan Meister, 'Energy Union: the view from Berlin', *European Council on Foreign Relations* available from http://www.ecfr.eu/blog/entry/energy_union_the_view_from_berlin [Accessed October 21 2015].

fracking was anathema to German policy-makers given their commitment to the *Energiewende*.

Hence, the Commission's Energy Union Package of February 2015 waters down these two contentious proposals. Instead, the Package undertakes a number of measures which build upon the Energy Security Strategy by establishing – in a more explicit and detailed manner – a greater level of coherence between all dimensions of EU energy policy with ramifications for energy security. The Energy Union provides greater detail on how the EU plans to make progress in four key areas: diversifying supply and promoting greater European solidarity in negotiations with third parties; creating a fully integrated European energy market; moderating demand through energy efficiency and decarbonizing the economy and finally, improving research, innovation and competitiveness in energy.

First, the Energy Union Package highlights the need to diversify gas supply through increased LNG imports and imports through the Southern corridor, the Mediterranean and Algeria. The package notes the importance of including energy-related provisions in trade agreements with key potential energy suppliers in Europe's neighbourhood. It also emphasizes the importance of a stronger role for the Energy Community, in particular, enhancing the integration of the EU and Energy Community states by incentivizing energy market reforms and ensuring the implementation of the EU's energy, environment and competition acquis.⁵⁰ These goals will be outlined in a proposed resilience and diversification package in 2015-16 that will revise the existing security of gas supply regulation, alongside a comprehensive strategy for LNG and its storage. The Energy Union also includes measures to enhance the crisis-management ability of the EU in the event of a gas supply crisis, including a commitment to develop emergency plans which will include Energy Community members to create options for the collective purchasing of gas by member states where they are dependent on a single supplier (subject to compliance with WTO and

⁵⁰ European Commission, "Energy Union Package", Brussels, 25 February 2015, available at http://ec.europa.eu/priorities/energy-union/index_en.htm, pp.5-7 [Accessed October 19, 2015].

EU competition rules) as part of a revision of the Security of Gas Supply Regulation.⁵¹

In addition, the Energy Union develops proposals to strengthen the EU's ability to act more harmoniously in negotiations with third countries. It outlines, in particular, the need to strengthen the role of the Commission in intergovernmental agreements and commercial agreements in order to ensure that such agreements are in compliance with EU Law. Hence the package outlines the intention of the Commission to review the 2012 Intergovernmental Agreements Decision (994/2012/EU) that established an information exchange mechanism with respect to agreements between member states and third countries in energy. This review will focus on ensuring that the Commission has the power to ensure agreements are compatible with EU legislation before negotiations are concluded; on securing the involvement of the Commission in such negotiations; on developing standard clauses specifying EU rules and on increasing the transparency of commercial gas supply contracts.⁵²

Second, in order to help promote the use of renewable energies and develop the 'hardware' for the internal energy market, the Package proposes that a minimum interconnection target of 10% in electricity interconnection between member states be achieved by 2020, rising to 15% by 2030. Private sector investment is to be encouraged by funding from the European Investment Bank, Connecting Europe Facility, European Structural and Investment Funds and European Fund for Strategic Investments.⁵³

The Energy Union also provides further detail on its plans to ensure that the 'software' of the internal energy market is in place through the strict enforcement of the 3rd Internal Energy Market Package, especially in the fields of the independence of regulators and the unbundling of energy supply and distribution networks. It outlines the importance of using instruments such as antitrust enforcement to end territorial restrictions in supply contracts and the enforcement of competition law to

⁵¹ Ibid, pp.6-7.

⁵² Ibid, p.6.

⁵³ Ibid, p.8.

regulate the evolution and formation of energy prices. In addition, the Energy Union plans to push for the enhancement of the powers of the Agency for the Cooperation of Energy Regulators (ACER) that was established in 2010 by the 3rd Internal Energy Market Package. It is intended that these new powers will provide the ACER with the powers necessary to oversee the development of the market rules necessary for the completion of the internal energy market. These reforms to ACER will be delivered as part of a review of the regulatory framework of the 3rd Internal Energy Market Package, including a review of the role of the European Networks of Transmission System Operators for Electricity and Gas (ENTSO-E/G).⁵⁴

The Energy Union also outlines the intention of the Commission to more strictly enforce mechanisms such as the Environmental and State Aid Guidelines which were adopted in April 2014.⁵⁵ These rules on state-aid are designed to redress the distortions of the internal energy market which result from national subsidies for renewable energy, including the introduction of a competitive bidding process for state support in order to gradually expose renewables to the energy market.⁵⁶ In addition, the Energy Union emphasizes the intention of the Commission to use competition law to block the below-cost regulation of energy prices which can discourage both investment and the entrance of new companies to energy markets.⁵⁷

Third, the Energy Union includes a number of measures to promote energy efficiency in its review of the EU's 2030 energy efficiency target of 30%, including enhancing energy efficiency in the buildings sector and decarbonizing the transport sector. These aims will be delivered through ensuring that initiatives promoting building energy efficiency are able to access financing more easily and developing a comprehensive road transport package dealing with infrastructure, new transport solutions and energy

⁵⁴ *Ibid*, pp.9-10.

⁵⁵ *Ibid*, p.10

⁵⁶ "Guidelines on State aid for environmental protection and energy 2014-20" 28 June 2014, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52014XC0628%2801%29> [Accessed October 19, 2015].

⁵⁷ 'Energy Union', p.10.

efficiency. The Commission will also propose a new Renewable Energies Package in 2016-17 including a focus on sustainable biomass and fuels.⁵⁸

Finally, the Energy Union includes proposals to enhance innovation, research and competitiveness in the EU energy sector, including, amongst other issues, promoting greater coordination and focus in research to maximize the efficiency of spending on research. Hence in 2015-16 the Commission plans to propose a European energy R&I approach that updates the Strategic Energy Technology Plan and strategic transport R&I agenda.

Implementing the Energy Union: legal challenges

Having identified the main challenges to enhancing energy security in the EU, this section will now turn to focus on the legal competence of the EU in three key areas which will be central to European energy security: promoting the use of renewables; completing the internal energy market and strengthening the EU's position vis-à-vis external gas suppliers.

Promoting the use of renewables

At first glance, the lead role that the EU has played on efforts to tackle climate change suggest that optimism may be warranted about the potential for renewables to provide a partial solution to Europe's dependence on Russian gas by increasing Europe's energy self-sufficiency. However, while the Energy Union boldly claims that the 'EU is already on track to achieve its 2020 target of 20% renewable energy in its energy mix', the Commission's 2015 renewables progress report highlights that a number of key EU states, including France, Luxembourg, Malta, the Netherlands, the UK, Belgium, Spain, Hungary and Poland will all face difficulties in meeting the 20% target.⁵⁹ The Energy Union rightly includes measures to try to stimulate a greater use of renewables in the transport sector, where significant problems have occurred in

⁵⁸ Ibid, pp.12-14.

⁵⁹ See on the position in the Member States viz. renewables: M. Peeters, *Renewable Energy Law in the EU Legal Perspectives on Bottom-up Approaches* (Cheltenham: Edward Elgar Publishing, 2014)

meeting the 2020 goal of 10% renewables in this sector. It also sets out plans to foster more coherent pan-European research and innovation in renewable energy⁶⁰

However, the upmost priority for the Commission must be to ensure that it enforces the 2009 Renewable Energy Directive (2009/28) which sets national targets and measures for the use of energy from renewable sources to be achieved by 2020.⁶¹ Unlike its now repealed predecessors (Directive 2001/77 on renewables and Directive 2003/30 on biofuels), the language of the 2009 Directive is mandatory, not permissive. In particular, Article 4 obliges Member State to produce a renewable energy action plan setting national targets for the shares of energy from renewable sources in transport, electricity, heating and cooling. It also invites Member States to take measures in order to achieve those targets. Whether Member States will be apt to introduce pan-European measures effectively designed to ensure the share of energy from renewable sources depends, *inter alia*, on the powers and competences of the EU Institutions to enforce the Directive and how they can go about making more use of these powers.

In theory, the Commission can immediately initiate infringement proceedings under the (direct actions) Article 258 TFEU procedure against non-compliant Member States for failure to properly implement the Directive. However, the Directive is using a softer tone vis-à-vis enforcement, not the least because it falls short of providing the Member States with a list of interim targets between now and 2020. For instance, Article 4(4) of the Directive stipulates that Member States with a renewable energy sources share below the trajectory set out in the Directive (Part B, Annex I) need to submit within two years an updated action plan to the Commission. Similarly, Article 5(2) of the Directive provides that Member States must inform directly the Commission in case they are unable to meet their share of renewable energy targets as

⁶⁰ Renewable Energy Progress Report, European Commission, 16 June 2015, p.3.

⁶¹ For instance the Directive sets a target for the UK to achieve 15% of its energy consumption from renewable sources by 2020. See National Renewable Energy Action Plan for the United Kingdom, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/47871/25-nat-ren-energy-action-plan.pdf [Accessed October 19, 2015]

a result of *force majeure* (overriding necessity).⁶² The European Commission will then adopt a decision on whether a Member State has demonstrated that this is the case indeed and, if appropriate, modify its renewable energy targets.

The above alternative mechanisms raise serious legal questions as to whether absolute compliance with the Renewable Energy Directive is mandatory prior to the cut-off date of 2020. What is more, even if the Commission decides to litigate *en masse* against Member States prior to 2020 due to their failure to take effective measures for the use of energy from renewable sources, the lack of clarity in the Directive could provide an excuse for non-implementation. One could argue that Member States may even resort to the adoption of counter-measures against the EU by taking action against the EU Institutions under Article 263 TFEU due to an alleged violation of Article 7 TFEU by the EU legislature for failing to provide for consistency between EU energy policies and activities.⁶³

Another similar challenge for the EU is related to the enforcement of the more recent Energy Efficiency Directive which came into force in 2012 and establishes a set of binding measures to help the EU reach its 20% energy efficiency target by the abovementioned cut-off date of 2020.⁶⁴ Again, the question shifts to the extent that the EU has powers to enforce this Directive although still three years down the line Member States are still to fully address its correct implementation. The Commission has so far taken action against numerous Member States for failure to transpose the Directive in a timely manner.⁶⁵ Forcing an Energy Union through infringement proceedings against Member States, however, confirms the Member States' lack of engagement in the energy integration process and their sovereign preference for their

⁶² See for instance *Commission v Belgium* (the Belgium Wood Case) Case 77/69 [1970] E.C.R. 237 in which the Belgian Government pleaded the dissolution of Parliament and the separation of powers had forced the failure to implement an EU Directive.

⁶³ See E. Herlin-Karnell and T. Konstadinides, "The Rise and Expressions of Consistency in EU Law: Legal and Strategic Implications for European Integration" (2013) 15 *Cambridge Yearbook of European Legal Studies* 139.

⁶⁴ Directive 2012/27 on energy efficiency, amending Directives 2009/125/EC and 2010/30/EU and repealing Directives 2004/8/EC and 2006/32/EC Text with EEA relevance [2012] OJ L 315/1.

⁶⁵ J. Crisp, "27 Member States hit with EU legal action over energy efficiency" EurActiv, 26 March 2015. Available at <http://www.euractiv.com/sections/energy/27-member-states-hit-eu-legal-action-over-energy-efficiency-313293> [Accessed October 19, 2015].

choice of resources. This is despite the political capital invested by the EU to address energy security and the salience of further convergence in the field.

The Internal Dimension: Completing the internal energy market through competition law enforcement

Additional to the energy legislative packages and initiatives discussed previously, the enforcement of EU competition law is vital for promoting a single energy market. If the EU is to successfully enhance its energy supply security, the Commission will need to enforce and enhance the ‘software’ of the internal market: its regulatory powers which will be central in ensuring the completion of the internal energy market. Yet, the Commission’s ability to enforce Competition Policy in the field of energy has appeared relatively weak, with a number of pending investigations against Member States for failing to implement the provisions of the so-called 3rd Energy Package which included, amongst other measures, new provisions on unbundling allowing Member States to choose between ownership unbundling or setting up an Independent System Operator or an Independent Transmission Operator.⁶⁶

Furthermore, apart from these ‘positive integration’ steps, the Commission has utilised its ‘negative integration’ power tools. More specifically, Article 102 TFEU has proved to be an important regulatory tool to promote a single energy market by prohibiting the abuse of dominant position of energy companies operating in the EU internal market for both gas importation and supply. There are ongoing investigations against energy companies based in the Member States such as the Bulgarian Energy Holding, Bulgargaz and Bulgartransgaz for preventing competitors’ access to key gas infrastructures in Bulgaria.⁶⁷ Such investigations prove that the Member States’ traditional opposition against ownership unbundling has been met with resistance from the part of the Commission. The Commission has instead adopted a regulatory

⁶⁶ See Commission (EU), “Interpretative Note on Directive 2009/72/EC concerning common rules for the internal market in electricity and Directive 2009/73/EC concerning common rules for the internal market in natural gas – The unbundling regime” (Staff Working Paper) (2010).

⁶⁷ See Commission (EU) Press Release: “Antitrust: Commission market tests commitments by Bulgarian Energy Holding (BEH) concerning Bulgarian wholesale electricity market”, Brussels, 19 June 2015.

approach in order to end infringements and restore effective competition to the energy market.

During this decade, the Commission appears to have resolved most energy disputes under Article 102 TFEU via resort to Article 9 (1) of Regulation 1/2003 which obliges undertakings to offer binding commitments in order to meet the Commission's concerns. If an undertaking breaks such commitments, the Commission may impose a fine of up to 10% of the former's worldwide turnover, without having to find an infringement of the EU competition rules. Such commitment proceedings, although different to formal infringement proceedings (which often result to litigation and the imposition of fines), have contributed to an extent to the liberalisation of the EU energy markets because they have induced more uniform behaviour on the part of energy companies operating in the EU.⁶⁸

Commitments in high-profile cases, most recently evident in the *Google* case,⁶⁹ (Google had *inter alia* to notify website owners of the option to opt-out of display in Covered Web Pages of content crawled by the former's search user agents) have often been associated with the procedural modernisation of EU Competition law and antitrust enforcement.⁷⁰ Yet, in the last two years the Commission seems to have changed its enforcement tactics – it has gradually ceased to use commitments as a means to tramp the practice of dominant undertakings and has reverted to formal infringement proceedings.⁷¹ This is perhaps because commitment proceedings take time (the *Google* case took about four years to resolve). Such cases also do not reach the CJEU and thus make no contribution to the formulation of legal precedent and provide no formal guidance on future abuses of dominant position. It is therefore

⁶⁸ See for an in-depth analysis of how EU competition law has shaped EU energy markets: M. Ioannidou, "The application of Article 102 TFEU in the EU energy sector: mapping substantive and procedural enforcement" (2016, forthcoming - with the author)

⁶⁹ Case COMP/C-3/39.740 - *Foundem and others*

⁷⁰ D. Gerard, "The Google commitments and the transformation of EU antitrust enforcement" Kluwer Competition Law Blog, 17 February 2014. Available at: <http://kluwercompetitionlawblog.com/2014/02/17/the-google-commitments-and-the-transformation-of-eu-antitrust-enforcement/> [Accessed October 19, 2015].

⁷¹ The only case on commitments proceedings in 2014 was Case AT.39939, *Samsung*.

argued here that regulatory support needs to be coupled with strategic litigation in EU Courts in order to ensure the proper functioning of EU energy markets.

In addition to commitment proceedings, and most importantly for the purpose of this article, the EU has enforced EU law more strictly against external suppliers vis-à-vis territorial restrictions in gas supply agreements and charging unfair prices. In this regard, the EU has, more recently, shown signs of beginning to flex its regulatory muscles against gas producers and suppliers like Gazprom, as demonstrated by its successful opposition to South Stream's failure to unbundle gas supply and transport, as well as its pending anti-trust case against Gazprom opened in 2012 for alleged abuse of dominant position in eight EU Member States.

In essence, the Commission has argued that Gazprom has prevented cross-border trade, in particular gas flow from EU CEE Member States to their counterparts and has imposed territorial restrictions inclusive of export bans and destination clauses. Likewise, Gazprom has also contributed to market separation by charging Member States excessive prices.⁷² This is a very important case and has received increasing attention following the Commission's statement of objections to Gazprom on 22 April 2015; the war in Ukraine, which erupted a year earlier; and the EU sanctions imposed against Russia.

All in all, it appears that the Commission has taken an active stance using competition law enforcement to regulate the evolution and formation of energy prices. The law on abuse of dominance has also helped to stop instances of below-cost regulated energy prices which can discourage both investment and the entrance of new companies to energy markets. As previously outlined, for instance, the EU has proposed its intention to more strictly enforce and also to review the Environmental and State Aid Guidelines adopted in April 2014. These steps aim to simplify and target enforcement rules according to competition threat and impact on the single market posed by market fragmentation through national support measures.

⁷² Commission (EU), "Commission sends Statement of Objections to Gazprom for alleged abuse of dominance on Central and Eastern European gas supply markets" (Press Release, 22 April 2015) (IP/15/4828). See also See A Riley, "Commission v. Gazprom: The antitrust clash of the decade?" CEPS 285 (31 October 2012).

The external dimension of the internal market: The EU's position vis-à-vis external gas suppliers

The export and import of energy products from and to third countries and falls within the scope of Common Commercial Policy.⁷³ In November 2010, the European Commission Communication provided that the EU must formalise agency from the part of the Member States when they conclude bilateral energy relations.⁷⁴ It also established that the Commission should be charged with the role of aligning existing international agreements with internal market rules and enhancing cooperation between Member States for the conclusion of new ones. Additionally, the European Council of 4 February 2011, whilst being mindful of commercially sensitive information, invited all Member States to inform the Commission of all their bilateral energy agreements with third countries with a view to sharing them between them.

As a follow-up, EU legislation induced a compliance check of long-term bilateral agreements with the internal market. Decision 994/2012/EU on compliance of Intergovernmental Agreements with EU law exclusively addressed the Member States and provided, *inter alia*, for a framework on exchange of information between the Commission and Member States (Article 3) and confidentiality (Article 7) vis-à-vis past bilateral arrangements on reselling clauses; pricing clauses to name but a few areas. Member States must also inform the Commission of such future Intergovernmental Agreements that may impact the internal market or security of gas supply. The Decision also set 2016 as a date for review (Article 8) in order to update the Decision with a view to ensuring that the EU speaks with one voice in negotiations with third countries over energy matters.

⁷³ See S. Haghghi, *Energy Security: The External Legal Relations of the EU with Major Oil and Gas Supplying Countries* (Oxford: Hart Publishing, 2007) p.112.

⁷⁴ See also earlier attempts in 2008 Commission Communication “Energy Security and Solidarity Action Plan” available at <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52008DC0781>; 2009 Council Conclusions on “Second Strategic Energy Review – An EU Energy Security and Solidarity Action Plan”, available at http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/trans/106196.pdf [Both accessed October 19, 2015].

On the downside, the Decision leaves a wide margin for interpretation both in relation to the information that Member States should share with the Commission and the arrangements it considers to be compatible with the EU internal market. This legal uncertainty arising out of the text of the Decision does not immediately constitute a cause for concern for Member States because the Decision only has a programmatic / guidance value. Most importantly, the Decision does not provide for a robust enforcement mechanism in case a Member State does not aspire to the Commission's 'open access' policy.

The EU legislature needs to take into account the abovementioned problem areas during the revision of the Decision so that first, it creates a clear set of obligations for information sharing from the part of the Member States rather than a mere open invitation to share based on good will and solidarity aspirations. It should also inform Member States as to what arrangements are compatible with EU interests, so as to be able to enforce its internal energy market rules through the Third Energy Package and Environmental and State Aid Guidelines. Last, the Decision needs to include a systematised enforcement mechanism in case of breaches of these obligations in order to achieve maximum legal / regulatory certainty and project it towards both EU-based and third country undertakings.

The above sentiments aside, it is questionable whether a future upgrade to the Commission's enforcement powers under the reviewed Decision may bring more security and solidarity in the EU external energy market. The current lack of enforcement seems more political than due to the poor powers of the Commission. For instance, it is unlikely that the Commission's powers could be enhanced in the near future with respect to completing the internal market but also with respect to the proposed review of Decision 994/2012/EU given the position of Member States and the Eurosceptic European Parliament that recently voted down the Energy Security Strategy.

But what powers could the Commission be given ideally? The Energy Security Strategy seems to suggest that the EURATOM Supply Agency 'collective purchasing mechanism' provides a legal precedent for efforts to enhance the ability of the

Commission to object to or even lock agreements with third parties with negative implications for supply security. EURATOM Supply Agency's ability to intervene in supply contracts between EU utilities and third country producers appears sound in order to reduce dependency on Russia. A good example of its intervention is the nuclear-fuel supply deal signed in 2014 between Hungary and Russia, where the Agency asked for modifications in the fuel-supply contract of two 1,000 megawatt units at the Paks nuclear power plant.⁷⁵

Yet, there are two stumbling blocks in the work of the Agency in limiting EU utilities' dependency on larger amounts of Russian supplies. First, given its sour relationship with the EU, Russia is consistently dealing with Member States outside EU structures through the signing of bilateral agreements with them (the so-called Turkish Stream Project between Russia and Greece is one example⁷⁶). Second, Member States are eager to make up for lost energy production by relying on nuclear fuel from Russia by disregarding both EU competition rules (i.e. the potential of Gazprom to dominate both upstream gas supply and distribution) and the EU instructions to diversify their external energy supplies.

The EU also faces legal challenges in the diversification of external energy supply. While diversification of suppliers is worthwhile, especially from states in the Southern Corridor, this will be a long-term solution to reducing Europe's dependence on Russia gas and is associated with significant difficulties.⁷⁷ The ability of Europe to secure gas supplies from Central Asia has been restricted by disagreement over the

⁷⁵ The content of the intergovernmental agreement has not been made public. See 'Russian-Hungarian Nuclear Agreement', Centre for Eastern Studies (OSW), 15.01.2014. Available at: <http://www.osw.waw.pl/en/publikacje/analyses/2014-01-15/russian-hungarian-nuclear-agreement> [Accessed October 19, 2015].

⁷⁶ See "Greek energy minister unveils plan for €2bn gas deal with Russia", FT 09 July 2015, available at <http://www.ft.com/cms/s/0/c3e2221e-2639-11e5-9c4e-a775d2b173ca.html> [Accessed October 19, 2015].

⁷⁷ Turkmenistan holds the world's fourth largest gas supplies, 'Energy Union Package', European Commission, Brussels, February 25, 2015, p.4.

legal status of the Caspian Sea and problems attaining agreement from Turkmenistan which has focused on exports to China and Russia.⁷⁸

The ongoing Trans-Adriatic (due for completion in 2019) and Trans-Anatolian pipeline projects (set for completion in 2018), will supply Europe with 16bn and 10bn cubic meters of gas annually respectively.⁷⁹ Yet the cancellation of South Stream, which would have supplied Europe with 63bn cubic meters of Russia gas annually, delivers an opportunity to attain private sector investment for the Trans-Caspian Pipeline (TCP) which will import gas from Turkmenistan.

The imperative of increasing gas imports from the Caspian Sea region is magnified by the uncertainties of gas supplies from North Africa, Iran and Iraq due to instability and conflict in the MENA region, while Eastern Mediterranean reserves are only capable of supplying 10bn cubic meters of gas to the EU on a yearly basis.⁸⁰ Furthermore, Turkmenistan has become more receptive to diversifying its gas exports in recent months after Russia reduced its consumption of Turkmen gas exports.⁸¹

As Dickel et al note, the EU must now focus on helping to settle the legal status of the Caspian Sea, or at a minimum attain agreement from Azerbaijan and Turkmenistan that this will not be an obstacle to a TCP.⁸² The EU Commission Vice-President, Maros Sefovic has been making concerted diplomatic efforts to gain the support of

⁷⁸Interview 1, Section A2, cooperation in the IEA and bilateral energy cooperation with non-OCED states, Ministry for Economic Affairs and Energy, Berlin, 13 August 2014. ; R. Dickel et al “Reducing European dependence”, p.25.

⁷⁹ F. Dohmen and A. Jung, “Cold turkey: How Germany could end Russian gas dependency”, Spiegel Online 06 May 2014, available at <http://www.spiegel.de/international/business/german-alternatives-to-russian-gas-numerous-but-pricey-a-967682.html>; R. Dickel et al, “Reducing European dependence: Distinguishing natural gas security from geopolitics”, OIES Paper, October 2014, pp.24-25.

⁸⁰Ibid, R. Dickel et al, “Reducing European dependence”, pp.17-29; A. Nelsen, “Israel sees ‘stars aligned’ for new gas pipeline to Europe”, Guardian, 1 December 2014, available at <http://www.theguardian.com/world/2014/dec/01/israel-sees-stars-aligned-for-new-gas-pipeline-to-europe> [Accessed October 19, 2015].

⁸¹ C. Oliver, “EU courts Azerbaijan and Turkmenistan as links with Russia sour” FT, 25 February 2015, available at <http://www.ft.com/intl/cms/s/0/f73e0e3c-bc05-11e4-a6d7-00144feab7de.html#axzz3pCjUTv2t> [Accessed October 21, 2015].

⁸² R. Dickel et al, “Reducing European dependence”, p.25.

Azerbaijan and Turkmenistan for a TCP.⁸³ However, attaining agreement from Azerbaijan and Turkmenistan will be a difficult process due to their disputes over the distribution of Caspian Sea energy resources.⁸⁴

It is worth-noting that the legal status of the Caspian Sea vis-à-vis territorial ownership and navigational rights goes back in time to the St. Petersburg Treaty (1723), the Resht Treaty (1732) and the Treaty on Peace and Friendship (1921) where usage of the Caspian Sea was shared between the USSR and Persia (now Iran). Following the collapse of the USSR, new post-Soviet sovereign states—subjects to international law emerged (Russia; Azerbaijan; Kazakhstan; Turkmenistan). As such, the legal quest for an internationally accepted status, inclusive of multinational ownership of the Caspian Sea became subject to hard negotiation with the aim to sign a Convention on the Legal Status of the Caspian Sea.

Despite the signature of bilateral agreements and protocols (e.g. between Russia and Kazakhstan in 1998 and 2002 respectively on the delimitation of the Northern part of the Caspian Sea for subsoil use; and the aforementioned countries and Azerbaijan in 2003) the determination of the legal status of the Caspian Sea and division into sectors as well as definition of common spheres of joint activity (such as oil and gas rights; pipeline routes) remains a work progress.⁸⁵ It may therefore be that the launch of a TCP requires more concerted diplomatic leadership from Europe's political heavyweights – notably from Germany and Chancellor Angela Merkel – not least given the important potential role that Germany energy companies could play in the TCP.

⁸³ C. Oliver, "EU courts Azerbaijan and Turkmenistan as links with Russia sour" FT, 25 February 2015, available at <http://www.ft.com/intl/cms/s/0/f73e0e3c-bc05-11e4-a6d7-00144feab7de.html#axzz3pCjUTv2t> [Accessed October 21, 2015].

⁸⁴ O. Coblani, "Central Asian gas in Eurasian power game" (2014) 68 *Energy Policy* 351.

⁸⁵ See for more detail on the background issues related to the legal status of the Caspian Sea S. Yinogradov and P. Wouters, "The Caspian Sea: Quest for a New Legal Regime" (1996) 9 (1) *Leiden Journal of International Law* 87.

Conclusions: The Way Forward – Energy Security and the European Global Strategy

In June 2015 the European Council launched the development of the EU Global Strategy on Foreign and Security Policy to replace the 2003 European Security Strategy. The Global Strategy forms an opportunity for European states to ensure security of energy supply and thereby enhance autonomy in foreign and security policy decision-making by mitigating their dependence on foreign powers, especially Russia.⁸⁶ Two issues are of particular importance. First, the Global Strategy should focus on strengthening the EU's ability to undertake multilateral engagement with external energy partners.⁸⁷ Second, as Youngs argues, the EU Global Strategy must also '...spell out how it will tackle the more problematic linkages between internal and external EU policy dynamics' in the realisation of a truly common foreign and security policy. This imperative is especially relevant in the sphere of European energy security where the failure of European states to develop the internal energy market has very important knock-on effects for the dependence of European states on Russia.

International relations theory provides useful insights about the potential of the Energy Union and Global Strategy to support the development of the internal and external dimensions of the single energy market. Energy security sits uncomfortably at the nexus of 'high' and 'low' politics.⁸⁸ On the one hand, security of supply remains a vital national interest that has important implications for a state's relative power in the international system. Hence the actions of states in energy security can be understood through more traditional geopolitical analytical frameworks, such as

⁸⁶ S. Biscop, "Global and Operational: A New Strategy for EU Foreign and Security Policy" *Instituto Affari Internazionale Working Paper* 15, 27, July 2015, 6-9.

⁸⁷ R. Youngs and S. Far, "Energy Union and EU Global Strategy", *Carnegie Europe* 2 December 2015, <<http://carnegieeurope.eu/2015/12/02/energy-union-and-eu-global-strategy/imjs>> [Accessed December 08 2015].

⁸⁸ Hoffmann distinguishes between 'high politics' that concerns issues threaten the existence of the state and 'low politics' that concerns issues which affect welfare and affluence. S. Hoffmann, "Obstinate or Obsolete: The Fate of the Nation-State and the Case of Western Europe" (1995) 95 (3) *Daedalus* 862.

Neorealism.⁸⁹ Yet, on the other hand, security of cost has been pursued by liberalising energy markets and distancing the state from energy policy formulation and implementation. European energy policy has, therefore, become a poorly-steered system of ‘multi-level governance’ where important competences in security of cost (which also have implications for supply security) have been transferred ‘vertically’ to the supranational level and ‘horizontally’ to the private sector, while significant competence also remains at the national level.⁹⁰

European states have much to gain from the emergence of ‘governance’ in energy policy, especially from the ‘vertical’ diffusion of policy agenda-setting and implementation powers. The growth of EU competence in energy policy provides an important opportunity for stronger leadership to promote collective European action that will help ensure greater security of supply, reduce energy costs and tackle climate change. However, the ability of European states to maximize the gains from this collective action is undermined by the diverse economic and political interests which foster resistance to key initiatives in the Energy Union, despite their clear long-term benefits.

Germany provides an excellent example study of the political hurdles that must be overcome if the Global Strategy is to result in measures that will strengthen the Commission’s competence in shaping relations with external energy suppliers. Following Russian support for German reunification, Germany developed a high-level of dependence on Russian gas imports. This policy was underpinned by a ‘civilian-power’⁹¹ led foreign policy framework under the administration of Chancellor Gerhard Schroeder (1998-2005) which emphasised the ability of Germany to achieve political and social change with Russia through economic partnership.

⁸⁹ Neorealism argues that the behaviour of states is governed by the presence of an anarchic international system. This predisposes states to be highly-sensitive to losses in relative power. Kenneth Waltz, *Theory of International Politics* (Reading MA: Addison Wesley, 1979).

⁹⁰ On multi-level governance, see G. Marks et al, “European Integration from the 1980s: State-centric vs Multi-level Governance” (1996) 34 (3) *Journal of Common Market Studies* 341.

⁹¹ The civilian power model is based upon respect for law, social justice, sustainable development, and non-violent conflict resolution. It involves acceptance of the need for of international cooperation to achieve foreign policy objectives; non-military, mainly economic policy tools and willingness to use international institutions to address critical policy issues. H. Maull, “Germany and Japan: The New Civilian Powers” (1990/91) 69 (5) *Foreign Affairs*, 91-106;

Although proponents of ‘change through interdependence’ within the German core executive have now been side-lined in favour of a more sceptical view of Russia intentions, *rapprochement* with Russia has established deeply-embedded material path dependencies.⁹² In particular, the cheap gas prices negotiated with Gazprom combined with the benefits to the German energy industry of retaining its position as a key gas distribution hub have left Germany reticent to face up to the security implications of dependence on Russian gas.

Germany’s dependence on Russian gas has been compounded by poor planning in Germany’s transition to renewable energies. Launched in 2010, the *Energiewende* (energy transition) plans to achieve 30 per cent of German gross energy consumption from renewables by 2020 and 60 per cent by 2050.⁹³ However, the technical challenges of the *Energiewende* and the 2011 decision to phase-out nuclear power, which constituted 22 per cent of German electricity production in 2011, has left Germany struggling to meet these ambitions targets. Consequently, as the IEA notes in its 2013 report on Germany, it likely to be more dependent on gas imports in the coming years when offsetting fluctuations in solar and wind electricity generation.⁹⁴ Hence rather than diversify supply and promoting greater solidarity with CEE states, in June 2015 Germany agreed to develop a second Baltic gas pipeline bypassing Ukraine and Poland. The Nord Stream 2 pipeline will deliver 55Bcm of gas per year to Western Europe and strengthen Germany’s position as a gas distribution hub.⁹⁵

The negative impact of national economic and political interests in crafting a common European positions on the external dimensions of the single energy market are compounded by the slowdown of the integrative process in the context of the rise of

⁹² Interview 2, Division Energy and Raw Material Foreign Policy, Foreign Ministry, Berlin, 11 September 2014.

⁹³ Energy concept for an environmentally sound, reliable and affordable supply’, Federal Ministry of Economics and Technology, 28 September 2010, <https://www.germany.info/contentblob/3043402/Daten/1097719/BMUBMWi_Energy_Concept_DD.pdf> [Accessed December 08 2015], 5.

⁹⁴ ‘Energy policies of IEA countries: Germany 2013 review’, IEA <<http://www.iea.org/media/executivesummaries/GermanyExecSum.pdf>> [Accessed December 08 2015], 15.

⁹⁵ “Duda slams Russia’s second Baltic gas pipeline to Germany”, *Euractiv* 09 September 2015, <<http://www.euractiv.com/sections/energy/polish-president-slams-russias-second-baltic-gas-pipeline-germany-317457>> [Accessed October 19, 2015].

Euroscepticism in both established and new EU members.⁹⁶ This public opposition to EU integration – manifested for example in the European Parliament’s voting down of the Energy Security Strategy – makes it unlikely that the Commission will be able to attain many of new powers that the Energy Union envisages.⁹⁷ It will be especially difficult to gain greater competence in negotiations with external energy suppliers due to the sensitivities of states – and the European public – to the delegation of further decision-making powers in such foreign policy areas of ‘high politics’. However, the completion of the internal energy market and promotion of renewables falls further into the area of ‘low politics’ and therefore offers greater possibilities for action by the High Representative and Commission.

Faced with these economic and political ‘realities on the ground’ at the national level, it is unlikely that the EU Global Strategy will be able to deliver detail and coherence in support of the external dimensions of the Energy Union without the presence of significant crisis (such as a further escalation of Russian aggression in Eastern Europe). Yet, the High Representative and Commission have not yet recognised the implications of the rise of Euroscepticism. As Youngs highlights, the Global Strategy review paper released in summer 2015 ‘...rather breezily suggests that the crisis [in integration] is likely to prompt further integration and thus provide a positive opportunity for foreign policy’.⁹⁸ If the Energy Union is to lead to more substantial powers for the Commission and High Representative to enforce the internal and external dimensions of the single energy market, two key areas of activity will be necessary.

⁹⁶ M. Leonard, J. Ignacio Torreblanca, H. Kundnani and U. Guerot, “The Remarkable Rise of Continental Euroscepticism” *Guardian* 24 April 2015, <<http://www.theguardian.com/commentisfree/2013/apr/24/continental-euroscepticism-rise>> [Accessed December 8 2015].

⁹⁷ M. Poche, A. Fox and N. Sylikiotis, “EU energy security strategy fails to secure parliament’s support” *The Parliament Magazine* 12 June 2015, <<https://www.theparliamentmagazine.eu/articles/opinion/eu-energy-security-strategy-fails-secure-parliaments-support>> [Accessed December 8 2015].

⁹⁸ R. Youngs, “Will the EU’s Global Strategy Meet the Foreign Policy Challenges of the Future?” *European Politics and Policy Comment* 15 October 2015 <<http://blogs.lse.ac.uk/euoppblog/2015/10/15/the-eus-global-strategy-risks-being-too-inward-looking-to-meet-the-foreign-policy-challenges-of-the-future/>> [Accessed 07 December 2015].

First, the Commission must focus on undertaking more effective public diplomacy that sheds light on the need to complete the single energy market. ‘Input legitimacy’ forms a very important tool used by political leaders at the national level to justify the pursuit of short-term economic interests, such as protecting national energy industries from competition or ensuring low energy prices.⁹⁹ For the Commission to effectively assert a stronger role in shaping the internal and external dimensions of the single energy market it will need gain greater support amongst the EU public by enhancing EU citizens’ perception of the EU’s ‘output legitimacy’ in energy security. The raw material for compelling public diplomacy on behalf of the Energy Union and EU Global Strategy is present. The implementation of the Energy Union will bring lower prices for consumers and help keep Europe at the forefront of efforts to tackle climate change. It will also enhance the EU’s security by ensuring that European states are able to act in a unified manner and apply ‘hard power’ in the form of crippling sanctions against Russian energy exports.

Second, engagement with policy makers across EU member states will be essential to ensure that the Global Strategy is a document that has buy-in at the national level and that it delivers the strategic guidance and institutional processes necessary to facilitate the implementation of the internal and external dimensions of the single energy market. Attaining consensus amongst EU member states for an overarching strategy of engagement with Europe’s energy suppliers as part of the EU Global Strategy will be problematic, for reasons outlined above. Nevertheless, the Global Strategy offers a good opportunity to enhance European commitment completing the internal dimensions of the single energy market.

The emphasis of the Energy Union on tackling climate change, improving energy efficiency, cost and supply security provides an excellent basis for the Commission build support for its aims across the fields of economic, environmental and security energy policy at the national level. However, greater effort from the High Representative and Commission is required to establish support in these policy areas.

⁹⁹ Scharpf distinguishes between two forms of legitimacy: input legitimacy, which refers to the legitimacy that is conferred by the political representation of citizens in policy formulation and output legitimacy, which refers to the ability of a political entity to deliver effective public policy. See F. Scharpf, *Governing in Europe* (Oxford: Oxford University Press, 1999).

Indeed, the High Representative has attempted to instigate broader public engagement and consultation on the Global Strategy through high level-discussions conducted within the Brussels inner circle.¹⁰⁰ While self-congratulatory discussions are good for morale they have achieved little to no progress. Instead, the EU needs to reformulate its strategy vis-à-vis energy interdependence between Russia and the EU. It has to acknowledge that despite alternative forms of energy supply, it will continue to rely greatly, although not exclusively, on Russian gas as a matter of medium-term necessity. Likewise, it is imperative that Russia appreciates the EU's aspiration for diversification, market integration, and development of renewable energy as a matter of prosperity.

While the mutual energy relations between the EU and Russia are here to stay, the EU's capacity to contribute to external energy policies as a value actor is vital. The EU can indeed limit the harm caused by the current application of Russian strategy based on *inter alia* cutting of energy supplies and manipulating hub prices by ensuring that rule of law and common market principles are adhered to by Russia. This is because the EU has more leverage to change the mutual (but rather asymmetrical) EU-Russia dependency in the long term. Indeed, Russia appears more dependent on the EU as a consumer than the EU is on Russia as a supplier. The EU could thus strengthen the rule of law on the EU-Russia energy partnership by gradually emboldening Russia's adherence to the European energy trade regime.

In parallel, Member States, especially Russia's best European partners, would have to put self-interest behind (such as Russian subsidising gas prices) and make more use of the EU in a spirit of solidarity. Such a move would imply compromising their own sovereignty in voluntary ways and pushing daring regulatory proposals into the EU legislative process. Indeed, reducing regulatory uncertainty and enabling the EU to enforce its common legal instruments both internally and externally are within the EU's purview. Concerted action at the EU level will not only enhance energy security in Europe but will further contribute to setting international energy regulatory

¹⁰⁰ Aspen Institute, 'HRVP Mogherini stresses that Energy Security is a key concern in EU Global Strategy', Available from <https://europa.eu/globalstrategy/en/hrvp-mogherini-stresses-energy-security-key-concern-eu-global-strategy-0> [Accessed on 06.01.2015]

standards that when properly adhered to by Russia may restore its image as a reliable energy partner in the global market.¹⁰¹

¹⁰¹ See K. Talus, *EU Energy Law and Policy: A Critical Account* (Oxford: Oxford University Press, 2013), Chapter 8.