

Common Foreign and Security Policy and Energy Policy

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Introduction

Energy policy has always been part of the DNA of the European Union (EU) since its inception as a European Coal and Steel Community (ECSC) in 1951, and EURATOM in 1957. The focus was twofold: On the one hand, the ECSC paved the way for a single coal and steel market and on the other, the EURATOM established a nuclear safety framework.¹ While the EU is still very much focused on maintaining an integrated internal energy market, the scope of energy policy has expanded considerably from its market liberalisation origins. It has gradually lent itself to EU Common Foreign and Security Policy (CFSP). This is especially since the EU has become increasingly involved in securing access to energy supplies from abroad and corresponding to the energy needs of its Member States. In this foreign policy context, energy policy has also obtained a coercive character as the EU is not only looking for reliable and sustainable energy partners but also for partners which can comply with its regulatory framework. To ensure compliance the EU has developed means to enhance its ability to apply rigorous sanctions against both its Member States (e.g. for negotiating supply contracts without consulting the EU) as well as third countries (e.g. against external partners such as Russia for its activities in Ukraine which undermine EU values).

In face of recent geopolitical threats and vulnerabilities within the EU and the wider European region, energy policy in the CFSP context has focused on energy security. Indeed, energy security features high on the political agenda of the EU, gradually becoming a political priority for the establishment of a resilient Energy Union. Yet 'Energy security' is a multidimensional concept which can be hard to decipher in legal terms - it relates to security of supply as well as security of

¹ See especially Articles 31, 32 Euratom.

demand and it implies different measures to attain these objectives.² The purpose of this chapter is, therefore, to discuss the externalisation and securitisation of the EU's internal energy market. The main thread of the chapter is that EU energy security policy development has become an important variable in ensuring EU wider foreign policy objectives. While, in line with the theme of this volume we will be focusing on the CFSP liaisons with EU energy policy, the chapter will also discuss the securitisation of energy policy from the perspective of the internal market. We will be arguing that there is a very strong link between securitisation and competitiveness. As such, we will observe the EU's capacity to externalise its internal market policies both inside and outside the contours of CFSP by providing an overview of the existing CFSP framework and insight on the extraterritorial application and force of EU competition law to achieve CFSP objectives.

1. Energy Policy as an EU Competence

Since its inception EU energy policy has been characterised by a rather rickety legal competence framework, which owes to the lack of an explicit legal basis in the Treaty regarding the adoption of legislation in the field. In particular, the EEC Treaty did not provide an express legal basis that would enable the EU to adopt energy measures and subsequently push for internal energy market liberalisation. What the Treaty provided instead was a host of *leges speciales* that enabled the EU legislature to regulate the Single Market or certain *leges generales* to pursue supranational objectives viz. building an internal energy market; reducing carbon emissions; and setting renewable energy and efficiency targets.

Given the above competence patchwork, the EU legislature had to act peripherally if it was to legislate on a matter connected to energy. With reference to the *leges speciales* under the Treaty, the provisions on public health and environmental protection proved particularly useful in providing a platform for concerted action between the EU and the Member States. For instance, Article 152 EC was a supporting competence requiring a high level of human health protection to be ensured through cooperation (not harmonisation). Likewise, Article 175 (1) EC, a shared competence on the protection of the environment, enabled the Community to adopt legislation aimed at the promotion of renewable energy sources and energy efficiency. As mentioned, certain *leges generales* under the

² See e.g. B. Barton, C. Redgwell, A. Ronne and D. Zillman, who define it as a condition in which 'a nation and all, or most of its citizens and businesses have access to sufficient energy resources at reasonable prices for foreseeable future free from serious risk or major disruption of service' in B. Barton, C. Redgwell, A. Ronne and D. Zillman (Eds), *Energy Security: Managing Risk in a Dynamic Legal and Regulatory Environment* (OUP 2004) 4. See further, H Dyer and MJ Trombetta (Eds) *International Handbook on Energy Security* (EE 2013), Chapter 12.

Treaty (specifically a broad interpretation of Articles 95 EC and 308 EC – current Articles 114 TFEU and 352 TFEU), supplemented the Community with broad implicit legislative competences in the energy sector. For example, former Article 95 EC proved to be instrumental to protect the consumer, once 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. Its contribution was also significant for the promotion of renewable energy through a number of related Directives.³ Article 95 EC also formed the legal basis for the promulgation of the EU energy legislative packages, which sought to harmonise Member State laws.

The above process of harmonisation initiated by the Commission in the late 1980s⁴ and later on accelerated by the first (1996/98)⁵, second (2003)⁶ and third (2009)⁷ legislative packages, was frequently met with resistance by the Member States, ‘who were unwilling to surrender their “energy sovereignty” to the Commission.’⁸ This was especially the case in the early days, due to various historical and institutional realities. More specifically, in the devastated from the Second World War Europe, energy was very much tied to national sovereignty, and state-owned, vertically integrated energy monopolies were established as the main vehicle to rebuilt the countries’ economy. In contrast to the slow progress made in the creation of a single market for energy, measures to promote energy security were put in place since the very beginning of European

³ See Directive 2009/28/EC on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC OJ L 140, 5.6.2009, p. 16

⁴ See Completion of the Internal Market in Electricity and Gas (Com (1989)) 332 final and 334 final; COM (1991) 548 final).

⁵ The first legislative package comprised Directives 96/92/EC [2003] OJ L176/37 concerning common rules for the internal market in electricity and 98/30/EC [2003] OJ L176/57 on common rules for the internal market in natural gas.

⁶ The second legislative package was enacted in 2003 and enabled new gas and electricity suppliers to enter Member States’ markets as well as consumers (industrial consumers from 1 July 2004 and domestic consumers from 1 July 2007) to choose their own gas and electricity suppliers. It consisted of Directive 2003/54/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for internal market in electricity and repealing Directive 96/92/EC [2003] OJ L176/37 and Directive 2003/55/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in natural gas and repealing Directive 98/30/EC [2003] OJ L176/57.

⁷ In April 2009, a third legislative package seeking to further liberalise the internal electricity and gas market was adopted, amending the second package. The Third Package comprises two Directives and three Regulations: Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC [2009] OJ L211/55 (Electricity Directive 2009); Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC [2009] OJ L211/94 (Gas Directive 2009); Regulation (EC) No 714/2009 on conditions for access to network for cross-border exchanges in electricity and repealing Regulation (EC) No 1228/2003 [2009] OJ L211/15 (Electricity Regulation 2009); Regulation (EC) 715/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the network for cross-border exchanges in electricity and repealing Regulation (EC) 1775/2005 (Gas Regulation 2009) and Regulation (EC) 713/2009 establishing an Agency for the Cooperation of Energy Regulators [2009] OJ L211/1.

⁸ K Talus, *EU Energy Law and Policy: A Critical Account* (OUP 2013) p. 17.

integration, rendering security of supply the main pillar of a common energy policy.⁹ This was owing to the major oil crises (i.e. Suez Crisis in 1956-1957; OPEC oil crisis 1970), which exposed EU's dependency to varying degrees on energy imports of oil, gas, coal and electricity. This in turn triggered efforts to create an EU-wide emergency system, which continues to evolve.¹⁰ More recent initiatives in the fields of renewables energy¹¹, energy efficiency¹² and internal energy market also aim at securing energy.

The Treaty of Lisbon, which amended the EC Treaty, resolved the competence conundrum in the field of energy. For the first time, 'energy policy' features as an area of EU competence under Article 4 (2) (i) TFEU while Article 194 TFEU creates a new competence in the field of energy which is shared between the EU and the Member States. It states the following:

1. In the context of the establishment and functioning of the internal market and with regard for the need to preserve and improve the environment, Union policy on energy shall aim, in a spirit of solidarity between Member States, to:

- (a) ensure the functioning of the energy market;
- (b) ensure security of energy supply in the Union;

⁹ See Decision 68/416/EEC on minimum stocks of crude oil and petroleum products and Council Directive 73/238/EEC of 24.6.1973 on measures to mitigate the effects of difficulties in the supply of crude oil and petroleum products, OJ 1973, L 228, p.1.

¹⁰ Directive 68/414 of 20.12.1968 about minimum storage requirements for oil and oil products, OJ 1968, L 308, p.14 was promulgated as a response to the second Suez crisis. The 1968 Directive was subsequently amended by Directives 72/425/EEC of 19.12.1972, OJ L291/154 and 98/93/EC [OJ L358/100] both of which were later codified by Directive 2006/67/EC [2006] OJ L217/8. The current legislation in force is contained in Directive 2009/119/EC [2009] OJ L265/9. Other measures include Regulation (EEC) No 1055/72 of the Council of 18 May 1972 concerning notification of imports of crude oil and natural gas [OJ 1972, L120/3]; Regulation (EEC) No 1056/72 of the Council of 18 May 1972 on notifying the Commission of investment projects of interest to the Community in the petroleum, natural gas and electricity sectors, [OJ L 120/7]; Directive concerning measures to weaken the impact of difficulties of supply with oil and oil products, OJ 1973, L228. The Community developed its own emergency system in the light of the oil shocks at the end of the 1970s and in the wake of the Iranian revolution and subsequent war with Iraq by adopting two decisions: one on the export of crude oil and petroleum products from one Member State to another in the event of supply difficulties (Council Decision 77/186/EEC [1977] OJ L61/23, as amended by Decision 79/879/EEC [1979] OJ L250/58) and another to cut back consumption of primary energy resources in the case of supply difficulties (Council Decision 77/706/EEC [1977] OJ L292/9, implemented by Commission Decision 79/639/EEC [1979] OJ L183/1). During the 1970s oil crisis, a limitation of Article 34 regarding free and competitive trade through EU secondary legislation was tolerated in the light of security of supply fears, see Council Directive 77/186/EEC [1977] OJ L 61/23 amended by Council Decision 79/879/EEC [1979] OJ L 270/58; these provisions have since been abolished.

¹¹ Proposal for a Directive amending Directive 98/70/EC relating to the quality of petrol and diesel fuels and amending Directive 2009/28/EC on the promotion of the use of energy from renewable sources COM/2012/0595 final - 2012/0288.

¹² Communication from the Commission to the Council and the European Parliament of 6 October 2006: 'Mobilising public and private finance towards global access to climate-friendly, affordable and secure energy services: The Global Energy Efficiency and Renewable Energy Fund' COM (2006) 583 final.

(c) promote energy efficiency and energy saving and the development of new and renewable forms of energy; and

(d) promote the interconnection of energy networks.

2. Without prejudice to the application of other provisions of the Treaties, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall establish the measures necessary to achieve the objectives in paragraph 1. Such measures shall be adopted after consultation of the Economic and Social Committee and the Committee of the Regions.

Such measures shall not affect a Member State's right to determine the conditions for exploiting its energy resources, its choice between different energy sources and the general structure of its energy supply, without prejudice to Article 192(2)(c).

3. By way of derogation from paragraph 2, the Council, acting in accordance with a special legislative procedure, shall unanimously and after consulting the European Parliament, establish the measures referred to therein when they are primarily of a fiscal nature.

Indeed, like many other TFEU provisions, Article 194 (1) TFEU is not explicit about covering exclusively the internal dimension of EU energy policy leaving open questions about employing it in order to achieve CFSP objectives. This issue can be somewhat easily resolved by reading Article 194 TFEU in the light of Article 40 TEU which constitutes a ‘mutual’ non-affectation clause triggered when a legal act touches upon both CFSP and non-CFSP fields. Article 40 TEU, therefore, protects the integrity of the CFSP from the TFEU as much as it protects the TFEU from possible encroachment by the CFSP.¹³

In the TFEU context, as soon as the Treaty of Lisbon came into force, the EU Institutions made use of the new energy competence under Article 194 TFEU in 2010 and adopted a Regulation (994/2010) on security of gas supply under Article 194 (2) TFEU requiring Member States to put in place internal measures with a view to create an action plan (prevention and emergency).¹⁴ Article 194 (2) TFEU raises particular interest because it reduces the pre-emptive effect of EU legislation in the field of energy by confirming that the adoption of measures which: ‘affect a Member State’s

¹³ See more about the history of Article 40 TEU: Case C-91/05 *Commission v Council* (ECOWAS) [2008] ECR I-3651; A. Dashwood ‘Article 47 and the Relationship between First and Second Pillar Competences’ in A. Dashwood and M. Maresceau (eds), *Law and Practice of EU External Relations* (Cambridge: Cambridge University Press, 2008) p.99

¹⁴ Regulation (EU) No 994/2010 concerning measures to safeguard security of gas supply and repealing Council Directive 2004/67/EC O.J. L 295/1 12.11.2010, art. 4.

right to determine the conditions for exploiting its energy resources, its choice between different energy sources and the general structure of its energy supply' is prohibited. Accordingly, EU secondary legislation in these areas 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. Overall, as a result of the Lisbon Treaty reforms the EU possesses the constitutional and institutional tools to act collectively on behalf of its Member States in the field of energy. Although, this is a welcome development, the EU does not yet possess competence in all fields of energy policy and, therefore, often lacks the capacity to mobilise resources.¹⁵

In the CFSP context, although energy constitutes a strategic foreign policy resource for the EU, in terms of legal competence, the Treaty remains silent on energy as an aspect of EU external policy. Additionally, there has been no legal transfer of competence to that effect from what is dealt with under the CFSP framework to the TFEU as a field of shared competence between the EU and the Member States. Although there is no express CFSP-TFEU energy nexus in the Treaty,¹⁶ one can still identify CFSP links in EU secondary legislation adopted under the new energy competence in the TFEU. The above-mentioned Regulation 994/2010 on security of gas supply adopted under Article 194 (2) TFEU is a good example. In particular, while the Regulation imposes substantive obligations on the Member States, such as to ensure bi-directional capacity of gas infrastructure (Article 6 and 7), it also makes reference to 'energy security' as an aspect of EU security policy in its Preamble:

The Report on the Implementation of the European Security Strategy... highlights the growing reliance on imported energy as a significant additional risk for the Union's security of energy supply and stresses energy security as one of the new challenges for security policy. The internal gas market is a central element to increase the security of energy supply in the Union, and to reduce the exposure of individual Member States to the harmful effects of supply disruptions.¹⁷

¹⁵ This is an argument often made by Lindseth viz. that if EU is not prepared to deal with its functional demands then a strategic retreat is necessary. PL Lindseth, 'Equilibrium, Democracy, and Delegation in the Crisis of European Integration' (2014) 15 (4) *German Law Journal* 529, 533.

¹⁶ See contribution by Eckes in this volume. Eckes points out that the only legal bridge between CFSP and TFEU is in the field of sanctions (state and individual / smart).

¹⁷ Ibid. Preamble 11.

The CFSP undertone of EU energy activity under the TFEU becomes more transparent if we take into account the EU's reliance on imported energy. Having said that, we cannot claim that the Regulation on security of gas supply creates the possibility of implied external competences in the field of energy security. It boosts, however, the presence of energy in the EU foreign policy terrain strengthened further by other TFEU aspects of external relations law. We shall note, for instance, that the export and import of energy products from and to third countries falls within the scope of EU Common Commercial Policy (CCP) which under Article 207 TFEU grants the EU the power to conclude tariff and trade agreements and adopt autonomous measures with regard to all aspects of CCP (goods, services, commercial aspects of IP).¹⁸ What is more, energy-related aspects can become part of Partnership and Cooperation Agreements (PCA). These are individual international cooperation mechanisms predominantly occupied with establishing a free trade area. PCAs were originally concluded as mixed (cross-pillar) agreements between the EU, the Member States and the newly independent states that emerged after the fall of the Soviet Union.¹⁹ They are now concluded on the basis of Article 212 TFEU which provides that 'the Union shall carry out economic, financial and technical cooperation measures, including assistance, in particular financial assistance, with third countries other than developing countries'.²⁰ The EU-Russia PCA, which expired in 2007, is perhaps the most well-known one. Negotiations on a new EU-Russia Agreement were suspended in 2014 due to, inter alia, the negative interdependency with Russia and Russia's annexation of Crimea.²¹

With reference to CFSP under the TEU, which is strictly separated from CCP within the TFEU framework, energy security has for a while been a marginal competence and until recently rarely evoked by the EU's High Representative or the External Action Service²². This has now changed with the growing externalisation of the EU's internal targets which means that the EU can now

¹⁸ 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.

¹⁹ Borrowing from C Hillion, G De Baere calls these agreements 'proto cross-pillar' because at the time PCAs were concluded, the EU did not have legal personality to enter into treaties (they were concluded on behalf of the EC). Yet again PCAs provided a model for bridging cross-pillar objectives such as promoting trade and combating crime. Post-Lisbon, cross-pillar mixed agreements declined because all international agreements are now signed by the EU. Still, however, a certain fuzziness is maintained in lieu of the retention of CFSP in the TEU and thus its firm separation from the rest of the TFEU policy areas. See G De Baere, *Constitutional Principles of EU External Relations* (Oxford University Press, 2008), p. 297.

²⁰ See for an extensive study of PCAs: C Hillion, *The Evolving System of EU External Relations as Evidenced in the EU Partnerships with Russia and Ukraine* (Ph.D thesis, Leiden, 2005).

²¹ For more information on the state of EU-Russia relationship see: House of Lords, European Union Committee, 'The EU and Russia: Before and Beyond the Crisis in Ukraine', February 2015, <https://www.publications.parliament.uk/pa/ld201415/ldselect/lddeucom/115/115.pdf>

²² B Van Vooren (2012), *Europe unplugged: progress, potential and limitations of EU external energy policy three years post-Lisbon*, Sieps working paper

adopt autonomous instruments in the field of energy security (under Article 194 TFEU) as well as conclude international agreements (e.g. bilateral agreements with third countries) to this end. International agreements can be conducted through the EU classic range of instruments via Article 24 TEU (EU competence in matters of CFSP) and Article 37 TEU (conclusion of agreements with one or more states). Yet, Article 37 TEU states that the EU may only conclude international agreements in areas covered by the Treaty's CFSP Chapter. As such this enabling provision has to be read in the light of both Article 23 TEU (EU action on international scene) and Article 24 TEU (CFSP competence). Article 23 TEU, for instance, states that CFSP action shall be guided by the principles in Article 3 TEU (promotion of EU values), and the objectives inherent in Article 21 TEU (democracy, rule of law, human rights). Yet, none of these values or objectives mentions 'energy security'. As such, Article 194 (1) (b) TFEU (security of energy supply in the Union) has to be brought in as it provides the EU's 'energy' canvas for any action at the EU level – whether internal or external.

Aside the aforementioned CFSP legal bases, international agreements can benefit from the CJEU's established case law which provides that even if an express 'energy security' competence is not granted to the EU as such, it can still make use of its implied external powers under Article 216 (1) TFEU.²³ Like Article 194 TFEU, Article 216 (1) TFEU was also introduced by the Lisbon Treaty in a shorthand attempt to codify the CJEU's voluminous case law on the EU's external implied powers. In summary, Article 216 (1) TFEU constitutes a residual competence under which the EU may conclude an international agreement with one or more third countries or international organisations in the following three situations: i) where the Treaties so provide, ii) where the conclusion of an agreement is necessary in order to achieve, within the framework of the EU's policies, one of the objectives referred to in the Treaties (also known as the principle of *necessity*), and iii) [where the conclusion of an agreement] is provided for in a legally binding EU act or is likely to affect *common rules* or alter their scope.

The analysis of the CJEU's case law on implied powers has been thorough elsewhere.²⁴ Suffice to say here that the EU has competence to act autonomously and advance its external energy policy.

²³ The Treaty only provides for express provisions regarding the EU's legal personality (Article 47 TEU), the capacity to negotiate agreements with third countries or international organisations (Article 218 TFEU) and the possibility to pursue common policies and actions to safeguard EU values, fundamental interests, security, independence and integrity (Article 21 (a) TEU).

²⁴ T Konstadinides 'EU Foreign Policy under the Doctrine of Implied Powers: Codification Drawbacks and Constitutional Limitations' (2014) 39 (4) *European Law Review* 511.

The above implied competence aside, Article 194 (2) TFEU will provide a platform for the adoption of intra-EU specific measures that would, nonetheless, regulate the conditions for exploitation of the Member States energy resources when they act in the foreign domain.²⁵ So far, the CJEU has been effective in managing mixity by pointing Member States to the duty of sincere cooperation enshrined in Article 4 (3) TEU and the requirement of unity in the EU's international representation. At another level, it has recognised mixity as a means of safeguarding national competences in the absence of implied pre-emption emanating from EU external action.²⁶ Hence, albeit the EU external energy policy has not been an evident step at the beginning of the process, it is now taking a certain shape. Two factors have been crucial in this development: first, the securitisation of the CFSP framework and second, the externalisation of the EU's internal market policies. We will hereafter consider each of those factors in turn.

3. The Securitisation of CFSP

Energy constitutes a key area for EU external relations policy and has been as much a source of cooperation as well as conflict. The external reliance of the EU to its energy needs has inevitably created a linkage between EU foreign policy and energy policy and, therefore, an interest to deploy external instruments in order to address energy security issues. Having said that, energy security can be supported by different external instruments and policies ranging from CFSP to development policy. Such instruments can be added to the economic initiatives and measures discussed later in the Chapter since energy security involves inter alia the security of supply and demand, as well as the reliability of contractual arrangements on energy and the interplay between national and supranational energy policies.

Almost ten years ago, in his capacity as High Representative for the CFSP, Javier Solana highlighted the importance of CFSP in establishing a 'united policy on energy questions'.²⁷ Likewise, in its Green Paper of March 2006, while recognising the importance of the realisation of its internal energy market, the Commission stressed that 'Member States should promote the principles of the internal energy market in bilateral and multilateral fora, enhancing the Union's

²⁵ See K Haraldsdóttir, 'The Limits of EU Competence to Regulate Conditions for Exploitation of Energy Resources: Analysis of Article 194(2) TFEU' (2014) 23 (6) *European Energy and Environmental Law Review* 208.

²⁶ See T Konstadinides, 'In the Union of Wine: Loose Ends in the Relationship between the European Union and the Member States in the field of External Representation' (2015) 21 (4) *European Public Law* 679.

²⁷ J Solana, Energy in the Common Foreign and Security Policy in G Austin et al. (eds.) *Energy Conflict Prevention*, (Brussels: Madariaga European Foundation, 2007).

coherence and weight externally on energy issues.’²⁸ Last but not least, the 2008 European Security Strategy, which provides the CFSP’s conceptual framework, emphasised that given the EU’s energy dependence increase (which was predicted to reach 75% by 2030) ‘our response must be an EU energy policy which combines external and internal dimensions.’²⁹ The above milestones serve to illustrate that, already prior to the Treaty of Lisbon, the focus was on a coherent approach to ensuring energy security as a part of the CFSP.

While post-Lisbon energy has gained more visibility in the Treaty, there are two main challenges with reference to CFSP ‘energy’ competence. The first relates to the question of how to combine the CFSP legal basis, the new energy legal basis, and the Treaty’s Article 40 TEU non-affectation clause as the legal foundation for both internal and external energy security instruments. Indeed, a challenge posed by the Lisbon Treaty on the use of implied powers is related to the choice of legal basis for cross-sectoral international agreements involving multiple objectives such as CFSP and energy. In this case, a dual legal basis, namely Article 194 TFEU and Articles 24 TEU and 37 TEU or Article 216 (1) TFEU (in case external action on energy is implied) may be the way forward to sign energy agreements (viz. gas transits; interdependence) since Article 40 TEU excludes that external competence can be implied for external energy measures under Article 194 TFEU alone. Nonetheless, international agreements would have to be carefully worded in order to avoid potential annulment actions against the secondary legislative provision (e.g. a Council Decision) which gives them effect. Such annulment may arise, for instance, due to encroachment by the general exercise of EU power on the CFSP.³⁰ This is all the more important because the drafting of Article 216 (1) TFEU hints that the provision may be employed to pursue equally CFSP as much as non-CFSP objectives. As such, the mutual non-affectation clause of Article 40 TEU has to be used prudently by the CJEU as a means of ring-fencing any potential expansion of the scope of EU implied powers under Article 216 (1) TFEU by the EU legislature.³¹

²⁸ European Commission Communication to the European Council, ‘External energy relations – from principles to action’, 12.10.2006, COM (2006) 590 final.

²⁹ European Council, ‘Report on the Implementation of the European Security Strategy - Providing Security in a Changing World’ Brussels, 11 December 2008 S407/08.

³⁰ See Case C-91/05 *Commission v Council (ECOWAS)* [2008] ECR I-3651. CJEU annulled the contested Council Decision. It held that under former Article 47 TEU, the EU could not have recourse to a legal basis falling within the CFSP in order to adopt provisions which also fall within a competence conferred by the former EC Treaty on the Community. Current Article 40 TEU, however, does not provide for such one-sided protection of the TFEU from possible encroachment by the CFSP.

³¹ Article 40 TEU provides: The implementation of the CFSP shall not affect the application of the procedures and the extent of the powers of the institutions laid down by the Treaties for the exercise of the Union competences referred to in Articles 3 to 6 of the Treaty on the Functioning of the European Union. Similarly, the implementation of the policies listed in those Articles shall not affect the application of the procedures and the extent of the powers of the institutions laid down by the Treaties for the exercise of the Union competences under this Chapter.³¹ See in this regard A.

The second challenge to CFSP ‘energy’ competence relates to the caveat in Article 194 (2) TFEU on Member States’ right to determine the conditions for exploiting their energy resources. This is crucial especially when it comes to energy security. Energy security constitutes one of the key aims of EU energy policy according to Article 194 (1) (b) TFEU. It is commonly meant to entail the EU’s capacity to secure access to energy supplies in order to correspond to the energy needs of its Member States. According to neorealist thought, however, energy resources constitute power components of national foreign policy often utilised by states to exert their external influence upon their counterparts.³² Such a reading of energy security is crucial for the future CFSP involvement in the field.

The above argument aside, there are certain positive developments. The 2014 Energy Union Initiative emphasised 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 in order to ensure that such agreements are in compliance with EU Law.³³ 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 energy agreements between Member States and third countries.³⁴ This Decision provided that Member States should submit to the Commission all the intergovernmental agreements they have concluded within the meaning of Article 25 of the Vienna Convention on the Law of Treaties. The review of the Decision will focus on ensuring that the Commission has the power to *inter alia* ensure agreements are compatible with EU legislation before negotiations are concluded and securing the involvement of the Commission in such negotiations. It is important to note that in its statement on subsidiarity in the proposal for a new Intergovernmental Agreements Decision, the Commission has acknowledged that ‘the Decision stands at the cross-roads of the external dimension (as it involves agreements with third countries) and of the internal market (as non-compliant provisions such as destination clauses have a negative impact on the free flow of energy

Dashwood “Article 47 and the Relationship between First and Second Pillar Competences” in A. Dashwood and M. Maresceau (eds), *Law and Practice of EU External Relations* (Cambridge: Cambridge University Press, 2008) p.99; P. Eeckhout, “The EU’s Common Foreign and Security Policy after Lisbon: From Pillar Talk to Constitutionalism” in A. Biondi and P. Eeckhout (eds), *EU After Lisbon* (Oxford: Oxford University Press, 2012), p.272.

³² See T Dyson, *Neoclassical Realism and Defence Reform in Post-Cold War Europe* (Palgrave Macmillan, 2010).

³³ Communication from the Commission: A Framework Strategy for a Resilient Energy Union with a Forward-Looking Climate Change Policy COM/2015/080 final.

³⁴ The Commission produced a proposal to that effect on 16 February 2016. See Proposal for a Decision on establishing an information exchange mechanism with regard to intergovernmental agreements and non-binding instruments between Member States and third countries in the field of energy and repealing Decision No 994/2012/EU COM/2016/053 final.

products within the internal market).'³⁵ The Commission has therefore identified 'a clear added value to reinforce the cooperation and transparency at EU level in the framework of this proposal.'³⁶

4. The CFSP dimension of market liberalisation

Any limitations posed by the CFSP framework can be addressed by the externalisation of the EU's market 'constitution'. In this regard we may confidently refer to a CFSP dimension of market liberalisation. The externalisation of internal market policies is evident in the introduction of the so-called 'Third Party Clause', otherwise known as the 'Gazprom clause' provided in the Third Energy Package.³⁷ Under this provision, a Transmission System Operator (TSO) controlled by a third-country supplier that wishes to perform its functions on the territory of a Member State must receive certification prior to its establishment in the EU. The certification procedure aims to satisfy that the TSO complies with the unbundling requirements of the Third Package.³⁸ Unbundling is a market liberalisation tool and refers to the process of separation of energy supply and generation from the operation of transmission networks. This is seen as an appropriate mechanism to remove the conflict of interest that may arise if a single company operates a transmission network and generates or sells energy at the same time.³⁹ In such a scenario, the vertically integrated company may have an incentive to obstruct competitors' access to infrastructure, preventing competition in the market and leading to consumer detriment in the form of higher prices. Under the Third Package unbundling must take place in one of the three following ways: Ownership Unbundling (OU), where all integrated energy companies sell off their gas and electricity network; Independent System Operator (ISO), where energy supply companies may still formally own gas or electricity transmission networks, but must leave the entire operation to an independent company; and Independent Transmission Operator (ITO), where energy supply companies may still formally own gas or electricity transmission networks but must leave the entire operation and investment in the grid to an independent company.

³⁵ Decision of the European Parliament and the Council on establishing an information exchange mechanism with regard to intergovernmental agreements and non-binding instruments between Member States and third countries in the field of energy and repealing Decision No 994/2012/EU, COM (2016) 53 final.

³⁶ Ibid, See Subsidiarity heading.

³⁷ Electricity Directive 2009 (n 7), article 11. See further Recital 22, Electricity Directive 2009 and Recital 25 Gas Directive 2009.

³⁸ See Electricity Directive 2009 (n 7) and Gas Directive 2009 (n 7), articles 9-23 regarding ownership unbundling of production, supply and network assets within the controlling undertaking.

³⁹ See Electricity Directive 2009 (n 7), Recital 11.

Under the Third Party Clause, when a third country entity seeks certification as a Transmission System Operator (TSO), Article 11 in each Directive requires a detailed assessment by the National Regulatory Authority (NRA) to ensure that the unbundling obligations are met and that security of energy supply of the Member State and the EU will not be put at risk. The burden of proof lies with the respective TSO. A prior Commission opinion must be sought before certification and the NRA must take ‘utmost account’ of that opinion when adopting its final decision. Each Member State retains the ultimate power of veto when its security is at stake. All in all, the purpose of this political, one may argue, provision is to ensure that EU interests will be secured and to avoid situations where an external, non-EU (vertically integrated) undertaking has control over EU networks.⁴⁰

Security of supply is closely interrelated and dependent upon the effective functioning of the internal market and the greater integration of Member State’s markets. In parallel with the provisions of sector-specific regulation relating to unbundling and third party access, the application of EU competition law also plays an important, complementary role in safeguarding and promoting security of supply. EU competition law is found in Articles 101 TFEU, which prohibits agreements between undertakings, which may affect trade between Member States and distort competition in the internal market and 102 TFEU, which prohibits the abuse of a dominant position by an undertaking within the internal market or in a substantial part of it. The EU Merger Regulation (EC) No. 139/2004 is also powerful tool.⁴¹

As will be shown, competition law has attained a disciplinary function in allegations involving activities performed by third-country gas undertakings on the EU territory. As the European Commission has repeatedly stated, trade relationships with foreign energy suppliers have to abide with EU Competition law rules.⁴² EU’s jurisdiction in such cases derives from the territoriality principle under public international law. According to the territoriality principle, EU may exercise its executive and judicial jurisdiction over violations committed on its territory, irrespective of the

⁴⁰ For an analysis of the origins of the Third Party Clause see Monica Waloszyk, *Law and Policy of the European Gas Market* (EE 2014) 69-73. For the relationship between the Third Party Clause and the European Charter Treaty see K Talus (n 8) 84-5 and Van Hoorn, ‘Unbundling’ Reciprocity and the European Internal Energy Markets: WTO Consistency and Broader Implications for Europe’ 18 *European Energy and Environmental Law Review* (2009) 51-76.

⁴¹ Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) [2004] OJ L 24/1.

⁴² GFU, Case COMP/36.072; Territorial restrictions 1) Algeria gas transport contracts, 2) Expansion of TAG pipeline, Case COMP/37.811; Territorial restrictions – Austria (Gazprom/OMV), Case COMP/38.085; Territorial restrictions in Germany (Ruhrgas/Gazprom), Case COMP/38.307. See further M. Lindroos, D. Schnichels and L.P. Svane, ‘Liberalisation of European Gas Markets - Commission settles GFU case with Norwegian gas producers’ (October 2002) 3 Competition Policy Newsletter 50 available at http://ec.europa.eu/competition/publications/cpn/2002_3_50.pdf (last accessed 27 January 2016).

nationality of the offender. Article 7 of Regulation (EC) No. 1/2003, the procedural framework governing EU competition law, states that ‘the Commission, when finding that there is an infringement of [Articles 101 and 102 TFEU], may impose on the relevant undertakings any behavioural or structural remedies which are proportionate to the infringement committed and necessary to bring the infringement effectively to an end’.⁴³

Hence, the Commission has repeatedly examined under Article 101 TFEU trade agreements concluded between EU-based undertakings and large external producers and suppliers of gas, such as Gazprom (Russia) and Sonatrach (Algeria). Such vertical agreements, typically referred to as long-term energy contracts, are a pervasive feature of the European energy sector. For a long time, they were considered as the cornerstone of security of supply in European countries. This is because they allowed the EU buyers, typically the national energy monopolies, to secure energy supply and the external suppliers to secure energy demand that was necessary financing for developing infrastructure. Following the liberalisation of the energy markets, however, long-term energy contracts came under scrutiny by the European Commission. Because long-term energy contracts typically tie a large percentage of market demand, they may result in upstream market foreclosure and violate competition law rules, particularly when the supplier has market power.⁴⁴ Furthermore, such agreements typically contain a number of clauses, which may be anticompetitive in nature; such as territorial sales restrictions, profit-splitting mechanisms, long-term exclusive purchase obligations and use restrictions. Most crucially, such clauses may indirectly undermine the objectives of security of supply and diversification of gas supplies by impeding the entry of new market players, as the Energy Sector Inquiry revealed.⁴⁵

Hence, in 2003, the Commission negotiated the removal of territorial restriction clauses from the agreements between Gazprom and some of its EU trading partners such as ENI (Italy)⁴⁶, OMV

⁴³ Council Regulation (EC) 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2013] OJ L 1.

⁴⁴ For an analysis see K Talus, ‘Long-term natural gas contracts and antitrust law in the European Union and the United States’ (2011) 4(3) *The Journal of World Energy Law & Business* 260. See further the Commission’s final report from the sector inquiry into energy markets showing that long-term agreements foreclose both upstream and downstream markets, resulting in persistent market division and reinforcement of concentration levels and K Talus, ‘Long-term gas agreements and security of supply-between law and politics’ (2007) 4 *European Law Review* 535.

⁴⁵ Inquiry pursuant to Article 17 of Regulation (EC) No. 1/2003 into the European gas and electricity sectors (Final Report) (COM/2006/851 final) 10 January 2007.

⁴⁶ Commission Press Release, ‘Commission reaches breakthrough with Gazprom an ENI on territorial restriction clauses’ IP/03/1345, 6.10.2003.

(Austria)⁴⁷ and E.ON Ruhrgas (Germany).⁴⁸ Such clauses, otherwise known as ‘destination clauses’, prevent the buyer from reselling the gas outside a certain geographic area thus undermining the creation of a pan-European energy market. For example, ENI was prevented from selling gas bought from Gazprom outside of Italy and Gazprom could not sell gas to other Italian customers without ENI’s consent. Furthermore, the Commission has successfully negotiated the removal of other anticompetitive clauses such as use restrictions, included in agreements with the Norwegian companies Statoil and Norsk Hydro⁴⁹ as well as profit sharing mechanisms⁵⁰ included in agreements with the Algerian company Sonatrach.⁵¹ In the latter case, negotiations between the European Commission and the Algerian government lasted over 7 years and Sonatrach undertook inter alia to delete territorial restriction clauses from all existing contracts and not to insert such clauses in any future contracts nor to employ profit sharing clauses in any existing or future gas supply contract. Similarly, in December 2002, the Commission ended its investigation of sales by Nigerian gas company NLNG into the EU following the latter’s agreement to release one of its European customers from a clause preventing the customer from selling outside of its national borders.⁵² NLNG further undertook not to introduce territorial restrictions clauses, use restrictions or profit splitting mechanisms in future contracts. The only cases to close with a formal decision were the GDF/ENEL and GDF/ENI cases.⁵³

Most recently, Article 102 TFEU has also played an important role in disciplining the behaviour of foreign undertakings so as to promote inter alia energy security in the EU gas market.⁵⁴ In September 2012, the European Commission opened a formal investigation of Gazprom’s business

⁴⁷ Commission Press Release, ‘Competition: Commission secures improvements to gas supply contracts between OMV and Gazprom’ IP/05/195, 17.2.2005. 17 February 2005.

⁴⁸ Commission Press Release, ‘Competition: Commission secures changes to gas supply contracts between E.ON Ruhrgas and Gazprom’, IP/05/710, 10.6.2005.

⁴⁹ Commission Press Release, ‘Commission successfully settles the GFU case with Norwegian gas producers’, IP/02/1084, 17.7.2002.

⁵⁰ Profit sharing mechanisms (PSMs) oblige the buyer/importer to share a certain part of the profit with the supplier/producer if the gas is sold on by the importer to a customer outside the agreed territory or to a customer using the gas for another purpose than the one agreed upon. PSMs have been used as an alternative to territorial restrictions clauses.

⁵¹ Commission Press Release, ‘Commission and Algeria reach agreement on territorial restrictions and alternative clauses in gas supply contracts’ IP/07/1074, 11.07.2007.

⁵² Commission Press Release, ‘Commission settles investigation into territorial sales restrictions with Nigerian gas company NLNG’ IP/02/1869, 12.12.2002.

⁵³ Case COMP/38.662, GDF- décision GDF/ENEL, 26 October 2004 and COMP/38.662, GDF- decision GDF/ENI, 26 October 2004.

⁵⁴ See e.g. the *Marathon cases*, where the systematic refusal of five gas companies in continental Europe to grant access to their gas pipelines to a Norwegian subsidiary of an American oil and gas producer was considered by the Commission as a potential abuse of dominant position *Marathon/Ruhrgas / GDF et alia*, Case COMP/36246

practices in the EU.⁵⁵ Gazprom is one of the EU's largest gas suppliers and the dominant natural gas supplier in all Central and Eastern European countries. As such, its role in ensuring security of supply in the EU is essential. The Commission alleges that some of its business practices in Central and Eastern gas markets constitute an abuse of its dominant position in breach of Article 102 TFEU. In particular, the Commission accuses Gazprom of pursuing an overall strategy to partition Central and Eastern gas markets by imposing territorial restrictions in its supply agreements with gas wholesalers and with some industrial customers. These territorial restrictions include export ban clauses, destination clauses and other measures preventing the cross-border flow of gas. As a result of this market partitioning, Gazprom may have been able to charge unfair prices in five eastern EU member states 'by charging prices to wholesalers that are significantly higher compared to Gazprom's costs or to benchmark prices'.⁵⁶

According to the Commission's preliminary findings, Gazprom may be leveraging its dominant market position by making the supply of gas to Bulgaria and Poland dependent on obtaining unrelated commitments from wholesalers concerning gas transport infrastructure. For example, gas supplies were made dependent on investments in a pipeline project promoted by Gazprom or accepting Gazprom reinforcing its control over a pipeline. Such behaviour, if confirmed, impedes the cross-border sale of gas within the Single Market thus lowering the liquidity and efficiency of gas markets. It raises artificial barriers to trade between Member States and results in higher gas prices. Should it be confirmed that Gazprom has abused its dominant position, the Commission may impose a fine of 10 per cent of the undertaking's total turnover, order interim measures or accept a commitment to terminate anticompetitive behaviour.⁵⁷

Furthermore, merger control has also emerged as a powerful tool in promoting energy security. Under article 2(3) of the Merger Regulation, the Commission is entitled to declare a concentration that causes significant impediments to effective competition incompatible with the internal market, particularly if it concerns the strengthening of a dominant position in the market. A recent case concerns the proposed acquisition of the only Greek gas transmission system operator DESFA by SOCAR, the State Oil Company of Azerbaijan Republic is pending approval by the European

⁵⁵ Commission Press Release, 'Commission sends statement of objections to Gazprom for alleged abuse of dominance on Central and Eastern European Gas Supply Markets IP/15/4828, 22.4.2015.

⁵⁶ Ibid.

⁵⁷ See Council Regulation 1/2003 (n 39) articles 8, 9 and 23.

Commission since January 2015.⁵⁸ According to the Commission, there is preliminary evidence that the proposed merged entity ‘may have the ability and the incentive to hinder competitive upstream gas suppliers from accessing the Greek transmission system, in order to reduce competition on the upstream wholesale gas market in Greece. This could reduce the number of current and potential suppliers and the amount of natural gas in Greece and lead to higher gas prices for clients’.⁵⁹

Finally, it is also possible that activities conducted by foreign undertakings in the energy sector, through for example international mergers amongst incumbents, may have an impact upon competition within the EU territory, even if no Member State or its territory is involved. In such cases, a question arises as to whether the EU competition law rules could apply extraterritorially against an undertaking in another country, where the latter behaves in an anticompetitive manner having adverse effects on the EU territory (‘effects doctrine’).⁶⁰ So far, the CJEU has not ruled specifically on whether there is an ‘effects doctrine’ under EU law, since it has been possible under Articles 101 TFEU and 102 TFEU to extend the territorial jurisdiction of EU competition law based on the ‘single economic entity doctrine’ or the ‘implementation doctrine’. According to the former, parents and subsidiaries are considered to form the same undertaking for the purposes of applying competition law rules so the parent can be held responsible for the unlawful conduct of the subsidiary.⁶¹ According to the latter, the EU may assert jurisdiction over foreign undertakings in relation to their foreign conduct if that conduct was implemented in the EU.⁶²

In its recent judgment in *Intel*⁶³ the General Court ruled that the jurisdiction of the EU is justified under public international law either by the implementation doctrine or by the ‘qualified effects’ doctrine, that is to say, the criteria of ‘immediate, substantial and immediate effects’.⁶⁴ The latter has been invoked in the context of mergers outside the EU and the most important pronouncement

⁵⁸ Commission Press Release, ‘Commission opens in-depth investigation into proposed acquisition of Greek gas transmission system operator DESFA by SOCAR’ IP/14/1442, 5.11.14.

⁵⁹ *Ibid.*

⁶⁰ For a general discussion on the extraterritorial application of EU Competition Law see R Whish and D Bailey, *Competition Law* (8th edn, OUP 2015) Ch 12. For a discussion in the context of the Gazprom investigation see M Martyniszyn, ‘On Extraterritoriality and the Gazprom case’ (2015) 37(6) *European Competition Law Review* 291-294.

⁶¹ Cases 48/69 etc *ICI v Commission* [1972] ECR 619 (Dyestuffs).

⁶² Cases 114/85 etc *A Ahlström Oy v Commission* [1988] ECR 5193

⁶³ Case T-286/09 *Intel v Commission* – The General Court’s judgment on this issue has been appealed to the CJEU, Case C-413/14, R, not yet decided.

⁶⁴ *Ibid.*, paras 233-236 and 243-244, on appeal to the CJEU on this point. See further, Case C-413/14 P *Intel Corporation Inc. v. European Commission* (not yet decided), Opinion of AG Wahl (20 October 2016), paras 278-327.

was given in the *Gencor v Commission* case.⁶⁵ The extraterritorial application of competition law in that case prevented the merger between two South African mining companies, which would have left them with 30-35% of world production. On appeal, the General Court found the application of the EU Merger Regulation justified under public international law ‘when it was foreseeable that the proposed merger would have ‘an immediate and substantial effect in the Community’.⁶⁶

Conclusion

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

Both the securitisation of EU energy policy and law and the CFSP dimension of the internal market have helped built rules and procedures and have established a legal platform for comprehensive approach to external action in the field of energy. For instance, The EU’s third energy package and its Gazprom clause constitute examples where not only does the EU confirm its presence as a global economic actor but also emerges as a disciplinarian in the field of external relations. The disciplinary influence of the restrictive measures adopted under the TEU against third countries such as Russia or Iran in conjunction with competition rules under the TFEU are bound to impact upon current and future EU energy partnerships. The legal challenges ahead are of course numerous. From a policy standpoint, action in the field of energy via resort to CFSP instruments or competition law may not be easily distinguished. From a legal perspective, however, we have to deal with the perennial issue of legal competence which has occupied much of the scholarship on

⁶⁵ Case T-102/96 *Gencor Ltd v Commission* [1999] ECR II-753. See further, M Broberg, ‘The European Commission’s Extraterritorial Powers in Merger Control. The Court of First Instance’s Judgment in *Gencor v. Commission*’ (2000) 49(1) *ICLQ* 172.

⁶⁶ *Ibid.*, para.90.

the law of EU external relations. The nuance between TFEU and TEU in the field of energy takes place in an environment where EU competence is not clear-cut and perhaps it is bound to remain uncertain due to the Member States' desire for mixity in CFSP and the deeply politicised (and intergovernmental) context within which CFSP rules are applied. The same is true about the commitments for neighbouring states under the Energy Community Treaty. By way of conclusion, it is argued, therefore, that energy action under the TFEU, including the CJEU's jurisdiction, cannot achieve CFSP objectives single-handedly. By contrast, an energy legal basis in the TEU recognising energy policy as part of the CFSP *acquis* would be desirable. Such an innovation would add legal certainty in the implementation of a comprehensive approach to EU external action in the field of energy and, in particular, for the future CFSP legal framework at large.