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Bart Van Vooren

Europe Unplugged

Progress, potential and limitations of EU external energy policy three years post-Lisbon

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Preface

Energy has always had a prominent place in the European integration process. And yet, the establishment of an EU energy policy is relatively recent, particularly in its external dimension. Increasing energy needs, and the imperative to secure supply in a changing geopolitical context may explain this recent development. To be sure, the Treaty of Lisbon has endowed the European Union with an express competence in the field. The object of the present report is to examine the impact of this innovation on the EU ability further to develop an external energy policy.

"Europe Unplugged – Progress, potential and limitations of EU external energy policy three years after Lisbon" is the second report – after "The External Dimension of the EU's Area of Freedom, Security and Justice" – published in the context of the SIEPS research project *The EU external action and the Treaty of Lisbon.* It provides a well-timed evaluation of the implications that the Lisbon Treaty has had on the external posture of the European Union, in a particularly sensitive area.

Anna Stellinger
Head of Agency

SIEPS carries out multidisciplinary research in current European affairs.
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About the author

Dr. Bart Van Vooren is Assistant Professor of European Law and Integration at the University of Copenhagen. He holds an LLM in international legal studies from New York University School of Law (2006), and received his PhD in EU law from the European University Institute (2010). His area of specialization is EU external relations law, and he has published in this field in the European Foreign Affairs Review, the European Law Review, and the Common Market Law Review. His book on the European Neighbourhood Policy was published with Routledge in December 2011. Two forthcoming books include "The EU's role in global governance: the legal dimension" (Oxford University Press, 2013) and "EU External Relations Law: Text, Cases and Materials" (Cambridge University Press, 2013).

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List of abbreviations

CFSP	Common Foreign and Security Policy
CLIMA	Climate
COMP	Competition
DG	Directorate General
EC	European Community
ENV	Environment
ECSC	European Coal and Steel Community
ECT	Energy Community Treaty
EEAS	European External Action Service
EEC	European Economic Community
ENER	Energy
ETS	Emissions Trading Scheme
EU	European Union
HR/SG	High Representative/Secretary General
HR/VP	High Representative/Vice President
LNG	Liquefied Natural Gas
MD	Management Desk
MoU	Memorandum of Understanding
NESCO	Network of Energy Security Correspondents
RELEX	External Relations
TEC	Treaty on European Community
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the Union
TREN	Transport and Energy

Executive summary

European cooperation in the field of energy lies at the heart of European integration itself, going back to 1951. However, it is only with the Lisbon Treaty that a competence in the field of energy was explicitly conferred on the Union, and, *anno* 2012, the European Union is still very much in the process of formulating and implementing a common external energy policy worthy of the name. This report focuses on three main obstacles to achieving a visible, effective, and coherent EU external energy policy. The report first looks at these three obstacles as they appeared prior to December 2009, and then looks at the impact of the Lisbon Treaty. First we look at the ability of the EU institutions, and their individual Directorates General, to agree on the direction of EU external energy policy. Post-Lisbon we must examine the impact of the setting up of the European External Action Service (EEAS), the increased powers of the European Parliament, and the continued role of the rotating Presidency. Second, in substance there used to be thorough disagreement on whether EU external energy policy should predominantly focus on externalizing the internal market on the basis of legal binding instruments, or should rather focus on energy diplomacy involving deals with third countries to ensure EU supply security. Essentially, the report queries whether the new competence has provided an impetus to reconcile these two approaches. Third and finally, we look at the Member State relationship with the EU common interest in energy policy, which we term 'the vertical dimension'. Here the report points out that the internal market has long suffered from limited Member State compliance with Union law, stemming from the continued presence of Member State national interests. In the external dimension this translates into a continued tension between individual national policy priorities and the common good of the Union as a whole. In this report we take a thorough look at the instrument adopted on 4 October 2012 which sets up a vertical 'information exchange mechanism' which it is hoped will improve compliance and strengthen coordination between the Member States and the Union.

The report reaches the following conclusions:

In the institutional dimension, the EEAS finds itself excluded from the policy-making process concerning EU external energy relations. Specifically, the examination of the soft legal documents signed as part of the EU external

energy policy have shown that the Commission remains firmly in the driving seat, and that the Member States' role through the rotating Presidency remains. The report observes that, when the EEAS was set up, energy policy initially figured more strongly within the mandate of the High Representative, but that this position soon waned as the inter-institutional dust settled. Subsequently, the Commission's proposal for a 'Strategic Group for International Energy Cooperation' was welcomed, and the report argues that this group should include the EEAS fully in its work. As regards the role of the European Parliament, it has been shown that the Lisbon Treaty will have a significant impact in the near future. A number of legally binding agreements are planned or are under negotiation, and under Articles 194 and 216 TFEU these require the consent of Parliament. Taking a cue from common commercial policy or the external dimension of the areas of freedom, security and justice, Parliament is sure to use its new powers to effect.

In substantive terms, the paper welcomes the new-found strategic thinking in EU external energy relations. It is clear that more prioritization has now been infused into EU external energy relations. Thus, while the report finds that cooperation between the EEAS and the Commission may be lacking, in substantive terms EU external energy policy has seen several improvements. While not perfect, the Council conclusions do more than before to set out an explicit strategy in EU external energy relations, including defining the nature of different partners, the EU's objectives in relation to those different partners, and the instruments through which to realize those objectives. This should be welcomed, but now action must be taken to make the relevant Council conclusions concrete. Therefore, the report calls for the EEAS and the Commission to draft a joint communication, which maps the short-, medium- and long-term objectives of EU external energy policy specifically for each region, country and strategic partner and which includes targets and a specific timeframe for the implementation of those targets.

In the final section of this report, the relationship between the EU and the Member States is examined. The newly-adopted instrument is welcomed, but thorough scrutiny reveals a number of deficiencies which may detract from its proper functioning. Several of its obligations were made contingent on Member State agreement on a case-by-case basis. Notably and unfortunately, the Council Decision leaves it to the Member States to make an initial assessment of whether agreements actually 'impact' the internal market and

EU supply security, and whether they should be notified to the Commission. Furthermore, the obligations of compliance and means of enforcement were not always made clear. Thus, assistance and advice provided by the Commission in the context of international negotiations will not necessarily provide legal certainty or exclude infringement proceedings against a Member State.

In conclusion, the findings comparing the pre- and post-Lisbon era remain mixed. The report finds most progress as regards strategic thinking on policy objectives and instruments in EU external energy relations. The vertical EU-Member State relationship was slightly more problematic, but the new legally binding Decision is a highly welcome instrument and is sure to develop into a well-functioning structure in the coming years. Most problematic was the horizontal inter-institutional relationship, where it is clear that institutional schisms have been deepened post-Lisbon, which may cause lost potential and resources for the Union. Thus, the report recommends the following:

- Institutionally, at the level of the High Representative, the total absence of energy security issues from her discourse should be resolved. At service level, it is necessary that the regionally organized desks of the European External Action Service be more closely involved in the work of the thematically organized Directorate-General for Energy within the Commission.
- Substantively, a first concrete policy proposal to overcome the present institutional schism is to draft a Joint Communication containing a clear road map whereby short-, medium- and long-term objectives are formulated more specifically for each region, country and strategic partner, and targets and a specific timeframe for their implementation are included. In this fashion the Commission and the EEAS will be able to implement the strategic choices previously made in the Council, and create a culture of intra-EU cooperation in EU external energy policy.
- Vertically, the new Decision setting up an information exchange mechanism on intergovernmental agreements provides a good basis for EU-Member State coordination. However, given that it is formulated in open-ended and optional terms, the danger remains that lack of loyal, and full, cooperation with the new structure will obstruct its objectives. The Commission could force such cooperation through the infringement procedure, but it is highly desirable that matters should not come to that.

1 Introduction*

Developments in the EU internal energy market have been on-going since the end of the 1980s, but the creation of a common EU external energy policy lagged behind. Only from 2005-2006 onwards did the creation of a truly common external policy move up the EU's political agenda, mainly under the stimulus of the successive energy delivery cessations from Russia and the rapid increase in energy prices over the previous decade. Attaining a coherent and effective EU external energy policy has been fraught with problems: disagreement over the strategic and/or market-based means to achieve the supposedly common EU interest; inter-institutional coordination issues and turf battles; and disagreement on whether the EU should act at all in the face of Member States' national interests. In December 2009 the Lisbon Treaty explicitly conferred a shared competence in the sphere of energy to the European Union (Art 194 TFEU), and made other important changes to EU external relations such as establishing the European External Action Service (EEAS). Over the last three years a policy process has unfolded with the goal of stabilising the Lisbon innovations, and according to the Council this is being done *"in order to ensure a strong and coherent EU position in international energy relations"*.[1] The goal of this report is to explore the initiatives which have been taken since December 2009, in order to answer the following question: *What were the main pre-Lisbon obstacles to an effective and coherent EU external energy policy, and have these obstacles been satisfactorily overcome in exercising the new EU energy competence?*

In sections II and III, this paper first outlines the core *internal* and *external* developments in EU energy policy, and concludes that prior to the Lisbon Treaty there were three main obstacles to a coherent and effective energy policy. The next three sections then examine these three obstacles in the post-Lisbon landscape:

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* I am indebted to Amelia Hadfield, Jan Frederik Braun, Joris Larik, Peter Van Elsuwege and the anonymous reviewers for their thoughtful comments on this paper, and to Christophe Hillion and SIEPS for their support in writing this paper. Any omissions remain my own.

1 Council Conclusions, Strengthening the external dimension of the EU Energy Policy, Brussels, 24 November 2011, at 1.

(1) *Institutional Dimension*: Pre-Lisbon, there was disagreement between DG RELEX and DG TREN in the Commission, relevant personnel within the Council General Secretariat and various Member States on where the emphasis in EU external energy policy should lie. We will study the impact of the reshuffled institutional landscape resulting from the Lisbon Treaty, looking specifically at the setting up of the EU External Action Service (EEAS), the role of the High Representative/Vice President of the Commission, and the strengthened presence of the European Parliament in external EU energy policy.

(2) *Substantive Dimension*: Since the purpose of the Lisbon Treaty was to strengthen coherence in EU external relations,[2] we will briefly examine policy coherence in EU external energy policy from different perspectives, with a focus on the different dimensions of the relationships between energy diplomacy, security of supply, and the law-based market-oriented approach. Essentially, we ask whether the new competence has allowed for a more integrated approach between the different objectives of EU energy policy.

(3) *Vertical Dimension*: The progressive advancement of the internal market suffered from a limited political recognition of the need for a fully-fledged external dimension, as well as from lack of Member State compliance with Union law; these both stemmed from the continued precedence of Member States' national interests over the common EU interest. We will examine the newly-adopted 'information exchange mechanism' which it is hoped will improve compliance and strengthen coordination between the Member States and the Union.

The paper ends with a section which draws mixed conclusions on all three points.

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[2] B. Van Vooren, *EU External Relations Law and the European Neighbourhood Policy: A Paradigm for Coherence* (2011) Routledge, at 49-54.

2 Objectives and challenges of EU internal energy policy

2.1 Three main challenges of EU internal energy policy: institutional, substantive, vertical

A true EU external energy policy worthy of the name only began to develop from around 2005-2006 (see section III.1 below), following several decades of E(E)C/EU efforts to develop the internal energy market. While this paper will not provide a complete inquiry into the path and obstacles towards completing the internal market for energy, it is important to highlight a few key features. This is because EU external energy policy is very much the external projection of the internal market, and hence intra-EU policy considerations are pertinent where the Union seeks to act as a coherent and effective international actor. In essence, completing the internal energy market has faced a number of key obstacles which are also particularly relevant to EU external energy policy.

First, whereas this paper examines EU 'energy policy', a distinction must be made between different sources of energy. Indeed, there are significant differences between natural gas, electricity, oil, coal, nuclear, wind, biofuel and solar power: electricity and gas, for example, share the need for transportation infrastructure, with natural monopolies as a consequence, whereas oil transportation occurs largely through means which can easily be re-routed across the globe. The consequence is that investment incentives and cost and market structures differ significantly. Furthermore, each of these energy sources has different environmental challenges, and poses different geographic and geopolitical questions from the perspective of energy security. Together, the complex of energy sources from which a Member State fuels its economy and warms its households is termed the 'energy mix'. Importantly then, according to the second indent of Article 194 (2) TFEU, a Member State retains the "*right to determine the conditions for exploiting its energy resources, its choice between different energy sources, and the general structure of its energy supply*".[3] In other words, the Netherlands is free to decide the extent to which it exploits its natural gas resources in the North Sea, Germany is free to decide to phase out nuclear energy and rely more on

[3] This is without prejudice to Article 192.2(c) TFEU, which allows for the adoption of environmental policy provisions through the special legislative procedure and the Council acting by unanimity.

increased energy production through gas imports, and so on. The consequence of this retained competence is that one finds hugely diverse energy mixes across the EU Member States, and the Member States have diverging national interests and priorities.[4] This, in turn, has as its consequence that the Member States may seek to upload and project their own priorities through EU (internal and external) energy policy, and pursue their national interests with disregard for the 'common interest': Germany may be more interested in relations with Russia, thereby offending Poland, and disregard the opinions of other EU Member States; Greece may look warily at imposing limits on oil imports from Iran, whereas Spain may be most interested in the impact of EU energy policy on Algerian imports; and Italy could be wary of losing investments in Libya and the consequence of this on oil imports from that country.

Second, EU energy policy has over the past six decades been characterized by a continuing search for a balance between security of supply, environmental goals, and market liberalisation goals. Whereas the energy crises of the 1970s saw an emphasis on security of supply, in the 1980s and 1990s it was quite straightforward to embrace market liberalisation as prices were low and supplies abundant.[5] With prices having skyrocketed in the past decade, and easily accessible and stable sources under pressure, security of supply has again taken a front row seat. Together, these three considerations form the 'three pillars of EU energy policy', and at the beginning of this century the search for a balance between them is as salient as ever.

Third, this presence of national interests in the way of a common EU energy policy implies that there is a persistent tension between EU regulatory activity required to create a fair and competitive internal energy market, and what is called economic nationalism – e.g. state activism in defence of the national interest and the interests of national energy champions.[6] Such action of Member States and their energy champions is often at odds with EU law (since it may include price fixing, market sharing, abuse of dominant

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4 E. Van der Meulen, *EU Energy Policy: The conflict between an internal liberalisation agenda and external security of supply*, in C. Stolte, T. Buruma, R. Runhardt and F. Smits (eds.), *The Future of the European Union* (2008) Sidestone Press, at 47.

5 F. McGowan, *Can the European Union's Market Liberalism Ensure Energy Security in a Time of 'Economic Nationalism'?* (2008) Journal of Contemporary European Research 4, at 93.

6 *Ibid*, 90-106.

position, illegal state aid, and so on[7]). There have thus been several waves of EU legislative efforts towards completing the internal market and ensuring Member State compliance with common objectives. However, the tension for Member States between European economic integration which they have signed up to and their national reflexes in energy policy, persist to this day. It should then be clear that 'the Council' or 'the Member States' do not always represent unified fronts throughout all these developments. Member States such as the UK and the Netherlands have held prominent positions in supporting EU energy market liberalisation – largely due to pre-existing perceptions of how the sector should be regulated. Similarly, the European Parliament has been transformed from a sceptic in the 1990s into a strong ally of the Commission, in its efforts towards market liberalisation, this century.[8] Within the Commission, too, the action during much of this century has stemmed from an intense cooperation between DG COMP and DG TREN (now ENER).[9] Understanding these kinds of (shifting) alliances between groups of Member States, institutions, and even specific services within institutions, is integral to a good understanding of the development of EU internal and external energy policy.[10]

2.2 The three main challenges, and piecemeal progress towards an internal market for energy

With the European Coal and Steel Community (1952) and the European Atomic Energy Community (1958), two of the three foundational treaties for European integration concerned energy products. Coal rapidly waned in importance, and nuclear energy did not deliver on the promises of the 1950s. As oil (from the mid-1960s) and later natural gas (in the early 1970s) became the dominant energy sources for most Member States, Community institutions did not gain powers over oil, gas or electricity generation

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7 A. Riley, *EU Energy Liberalisation: Coming to a Member State Near You!* (2008) Competition Law Review 4(2), at 73-77. See the damning report of the Commission: Commission Communication, *Inquiry Pursuant to Article 17 of Regulation (EC) No 1/2003 into the European Gas and Electricity Sectors*, Brussels, 10 January 2006, COM(2006) 851 final. See also the high number of investigations into anti-competitive behaviour in the sector (e.g. IP/10/494 of 4 May 2010).

8 See note 5.

9 See note 5. DG Transport and Energy has, since the Lisbon Treaty, been split into two parts.

10 J. F. Braun, *EU Energy Policy under the Treaty of Lisbon Rules - Between a New Policy and Business as Usual* (February 2011) CEPS Working Paper No 31, at 4-5.

which were similar to the powers they had had over coal a decade earlier.[11] This was not for want of trying,[12] but initiatives resulted solely in general agreement on the common priorities of the Member States' energy policies. For example, during the oil shocks of the 1970s the Member States relied on the framework proposed by the US rather than the Community framework,[13] in spite of existing Community legislation requiring that Member States maintain oil stocks for at least 65, and later at least 90, days.[14] Riding on the wave of political momentum towards the 1992 internal market objective, in 1988 the Commission proposed the application of the principles of the 1985 White Book to the energy sector,[15] to cover coal, oil, natural gas, electricity and nuclear energy. Negotiations took several years,[16] and resulted in the

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11 J. Duffield and V. Birchfield, *The Recent Upheaval in EU Energy Policy*, in V. Birchfield and J. Duffield (eds.), *Toward a Common European Union Energy Policy* (2011) Macmillan, at 2-3.

12 Commission Memorandum, *First Guidelines for a Community Energy Policy*, 18 December 1968 COM (68) 1040 final.

13 J. Duffield and V. Birchfield, see note 11, at 4.

14 Shortage of oil supplies has been a concern of the Community since the end of the 1960s. The first obligation to maintain strategic oil stocks was laid down in a Directive of 1968 requiring stocks at a level corresponding to at least 65 days of average daily consumption. In 1972, a new Directive raised the obligatory minimum stocks of crude oil and/or petroleum products to 90 days. These two directives were consolidated in a 2006 Directive, which will be repealed by a new Directive taking effect from 31 December 2012. This latter Directive seeks to 1) align the EU stockholding calculation methodologies with those of the International Energy Agency (IEA); 2) organize the creation of 'central stockholding entities' which have as their main purpose the acquisition, maintenance and sale of oil stocks held for the purpose of the Directive or the IEA obligations; and 3) organize information about and management of the stocks held. Council Directive 68/414/EEC of 20 December 1968 imposing an obligation on Member States of the EEC to maintain minimum stocks of crude oil and/or petroleum products. *OJ L 308, 23.12.1968, 14–16. And* Council Directive 72/425/EEC of 19 December 1972 amending the Council Directive of 20 December 1968 imposing an obligation on Member States of the EEC to maintain minimum stocks of crude oil and/or petroleum products *OJ L 291, 28.12.1972, 154–154 Repealed by, and consolidated in* Council Directive 2006/67/EC of 24 July 2006 imposing an obligation on Member States to maintain minimum stocks of crude oil and/or petroleum products (Codified version) (Text with EEA relevance) *OJ L 217, 8.8.2006, 8–15. To be repealed by* Council Directive 2009/119/EC of 14 September 2009 imposing an obligation on Member States to maintain minimum stocks of crude oil and/or petroleum products *OJ L 265, 9.10.2009, 9–23.*

15 Commission Communication, *The internal market for energy*, Brussels, 2 May 1988, COM (88) 238 final.

16 Energy Charter negotiations were ongoing in the same period.

1996 Electricity and 1998 Gas Directives known as the 'first package'.[17] The results were lacklustre: there was no true liberalisation of the sector, which was characterized by vertically integrated companies dominating national electricity production and/or gas imports, often with *de iure* or *de facto* monopolies over delivery infrastructure (gas pipelines or transmission networks).[18] The second package was adopted in June 2003 and consisted of two Electricity and Gas Directives which required fully open electricity and gas markets for professional and private consumers by 2004 and 2007 respectively.[19] It also sought to counter vertical integration by requiring legal unbundling of the entities operating transmission activities and those operating production activities. By 2007 the Commission acknowledged that real choice for all EU consumers and fair and free cross-border trade had not yet been achieved,[20] leading to the negotiation and adoption of the third legislative package by 2009.[21] With its proposals for a third set of legislative measures, the Commission strongly pursued vertical unbundling, but Member State lobbying yet again halted the logical conclusion of the EU internal market. Unbundling entails the legal and functional separation

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17 'First legislative package': Directive 98/30/EC of the European Parliament and of the Council of 22 June 1998 concerning common rules for the internal market in natural gas *OJ L 204 , 21.07.1998, 1 –12 [now repealed];* Directive 96/92/EC of the European Parliament and of the Council of 19 December 1996 concerning common rules for the internal market in electricity *OJ L 27, 30.1.1997 [now repealed].*

18 P. Eikeland, *EU Internal Energy Market Policy: Achievements and Hurdles*, in V. Birchfield and J. Duffield (eds.), *Toward a Common European Union Energy Policy* (2011) Macmillan, at 14.

19 'Second legislative package': Directive 2003/55/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in natural gas and repealing Directive 98/30/EC, *OJ L 176, 15.7.2003, 57–78 [now repealed];* Directive 2003/54/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity and repealing Directive 96/92/EC, *OJ L 176, 15.7.2003, 37–56 [now repealed].*

20 Commission Communication, *An Energy Policy for Europe*, Brussels, 10 January 2007, COM(2007) 1 final, at 6.

21 'Third legislative package': 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 (Text with EEA relevance) *OJ L 211, 14.8.2009, 94–136;* 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 (Text with EEA relevance) *OJ L 211, 14.8.2009, 55–93.*

of companies producing energy and those supplying that energy.[22] This was viewed as necessary because a vertically integrated company has a built-in incentive to under-invest in new energy transit networks, as it fears that such investment would support its energy producing competitors, and seeks to privilege its own sales when it comes to network access. In October 2008, the Council approved a watered-down version of this clause because Germany and France had fiercely lobbied against this initiative for fear of weakening the bargaining positions of their national energy champions.[23]

In conclusion, the creation of the internal market has a number of defining characteristics which are potentially also important for EU external energy policy.

- **Substantive:** Regulatory activity in the internal market has differed according to the energy source at issue. The three legislative packages concerned electricity and gas, but not oil; the ECSC has ceased to exist after 50 years, while Euratom is still going strong, with a fresh flurry of activity in the sphere of energy efficiency and renewable energy (wind, biofuels, solar power etc.).[24] In the external domain, it is thus necessary to take into account the state of EU activity for each energy source individually. Legally, due to the different application of the implied powers doctrine and the principle of pre-emption,[25] and politically, due to the diverse market (etc.) structures of different energy products, the diverse policy approaches they require, and the need for coherence between different initiatives.

- **Institutional:** Within the internal market there is a structural, systemic tension between market liberalisation, environmental sustainability and the security of supply objectives, which expresses itself in different

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22 Draft explanatory memorandum to the proposal for the third package of energy market liberalisation, at 4-5. Available at: http://ec.europa.eu/energy/electricity/package_2007/doc/2007_09_19_explanatory_memorandum_en.pdf [Last accessed 29 September 2012].

23 Euractiv, *Energy ministers clinch deal on liberalisation*, 13 October 2008; EUobserver.com, *EU weakens 'Gazprom clause' on foreign energy investors*, 13 October 2008.

24 Commission Communication, *Renewable Energy: A major player in the European Energy Market,* Brussels, 6 June 2012, COM(2012) 271 final.

25 Case 22/70, *Commission v. Council (European Road Transport Agreement)* [1971] ECR 263.

forms. It can create alliances or become a divisive issue between groups of Member States within the Council: there are Member States who support liberalisation fully and Member States who support it with little enthusiasm, Member States who emphasize coal in their energy mixes might have less appetite for some of the EU environmental objectives, and so on. Similarly, within the institutions substantive disagreements have the potential to create alliances or divisions between different sub-divisions (notably different Directorates General - DGs). Depending on the specific issue, DG competition, energy or internal market (and formerly DG RELEX) may be more favourable to approaches in line with their respective competence descriptions, with DG climate change or DG environment proposing different emphases. Post Lisbon the role of the European Parliament has been strengthened and the EEAS has been created, further stirring up the inter-institutional dust.

- **Vertical:** Structural tension is most visible in the relationship between the common 'Union interest', and the continued pursuit of national Member State interests. This is expressed through the carving out of the full competence for a Member State to decide on its own energy mix, but is equally felt in the lack of implementation of and compliance with the internal market legislative packages by energy companies and the Member States. Thus, in the external domain it will be important to seek other means of Member State compliance with energy policy objectives, beyond the threat of the infringement procedure.

In the following section I briefly outline the policy choices which have been made over the past few years in EU energy policy. The purpose is to bring together the systemic tensions identified above with the substantive policy outcomes and the choices made in the past. This complete picture of pre-Lisbon developments then provides the starting point for the post-Lisbon assessment.

2.3 The means and ends of EU energy policy

2.3.1 Supply Security, Environmental Sustainability, Competitiveness: Instrument or Objective?

A key pre-Lisbon point of reference is the ambitious 2007 'First Strategic Energy Review' drawn up by the Commission. Not inappropriately, that

document opens with a quote from the 1955 Messina Declaration: *"to these ends, the ministers have agreed on the following objectives:...putting more abundant energy at a cheaper price at the disposal of the European economies"*.[26] Aware of the historical calling of a common EU energy policy, it signals the fact that concerns over security of supply and free and fair market competition have been at the heart of the EU from the early days. Since then, environmental sustainability has been added to the mix, and together these form the three central challenges/objectives the EU hopes to tackle with its energy policy. Respectively, they entail *"combating climate change, limiting the EU's external vulnerability to imported hydrocarbons, and promoting growth and jobs, thereby providing secure and affordable energy to consumers"*.[27]

- The objective of environmental sustainability revolves around the 20-20-20 targets: a reduction in EU greenhouse gas emissions of at least 20% below 1990 levels; 20% of EU energy consumption to come from renewable sources; and a 20% reduction in primary energy use compared to business-as-usual levels, achieved through increased energy efficiency.[28]

- Security of supply concerns stem from the EU's import dependence, which was 50% in 2007 and is projected to increase to 65% by 2030. Reliance on gas imports is expected to increase from 57% to 84% by 2030, and for oil these figures show an increase from 82% to 93%.[29] Such dependence creates economic and political risks, requiring action in terms of demand-side and supply-side security of supply.

- Competitiveness entails reducing EU exposure to the price rises and price volatility on international energy markets which affect the economic situation of EU companies and citizens. Tackling this problem is expected to boost the EU economy by freeing up wealth for job creation, innovation promotion and the knowledge-based economy of the EU.[30]

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[26] See note 20, at 3; see also Green Paper, *A European Strategy for Sustainable, Competitive and Secure Energy*, Brussels, 8 March 2006, COM(2006) 105 final.

[27] See note 20, at 5.

[28] For an overview of all EU climate-related acquis see: http://ec.europa.eu/dgs/clima/acquis/index_en.htm

[29] See note 20, at 3.

[30] See note 20, at 4.

In these three dimensions of EU energy policy, it is not always made clear what is an objective, and what is an instrument to attain an objective. In essence, EU energy policy (internal and external) consists of a complex tangle of intertwined means-ends relationships between sustainability-security-competitiveness. In the following three paragraphs I briefly explain these interconnections.

Starting with sustainability, the Emissions Trading System (ETS) provides a good example, with the 'double dividend' it is expected to create. The ETS functions through creating financial incentives for companies to reduce their CO_2 emissions,[31] thereby working towards the EU's 20-20-20 objective and environmental sustainability. Such reductions in emissions can partially be attained if EU companies consume less energy. Therefore, this market-based scheme also aims to address demand-side supply security: if the EU uses less energy, it will be less dependent on imports.[32] Thus, we can see that the objective of energy sustainability can serve as a goal in itself, but that it is also viewed as a means to realize the EU's energy security. This, then, is attained through setting up legal structures which create market-based economic incentives. These kinds of means-ends interconnections of security-environment-market are the bread and butter of policy discourse on EU energy policy.

Security of supply, encompassing both demand-side security and supply-side security, is the next element of EU energy policy. Demand-side security includes intra-EU initiatives, and is closely tied to an internal market that is fully functioning not only in economic terms but also in political terms. For example, it includes inter-Member State solidarity, given that a number of Member States are highly or completely reliant on a single gas supplier such as Russia or Algeria.[33] Other concerns include, notably, foreign control over intra-EU energy assets; these assets may be held for economic but also for

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[31] The financial incentive works in a negative and a positive way, based on the 'cap and trade principle': companies are given a quantity of emissions allowances free of charge, which they must surrender at the end of each year. Heavy fines are imposed if insufficient allowances are surrendered, but a company may purchase further allowances for its emissions above the limit, or it may work to reduce its emissions below the threshold. It may then keep its allowances for the future, or sell them to other companies.

[32] See note 20, at 14.

[33] See note 20, at 10.

political reasons, and former High Representative Solana called this control "*Gazprom's strategic spending spree abroad"*.[34] Aside from such intra-EU concerns, supply-side security also focuses on the lack of investment by third country actors in tapping new sources. Indeed, supply-side security encompasses continued assurance that demands stemming from the EU's import dependence will continue to be met in the medium to long term through sufficient investment in production in third countries.[35] In general terms, security of supply entails addressing risks related to supply fluctuations or cessations, regardless of their natural, political, or technical, and intra- or extra-EU, origins.

Last but not least the competitiveness dimension, where the lack of separation between means and ends becomes most perceptible. On the one hand, the completion of the internal energy market (IEM) is an end in itself – as free and fair competition across Member State borders is the essence of European integration. On the other hand, competitiveness also entails the use of market principles not as a stand-alone goal, but as a means to other ends. The ETS is an obvious example, but the Commission has often argued that the IEM is supportive of almost any element of security of supply and environmental sustainability as well: notably, a well-functioning internal market based on long-term, stable regulatory provisions creates the investment climate necessary to create environmentally friendly technologies. Subsequently, the development of those technologies "will potentially" contribute to economic growth, increased international trade and more jobs in Europe.[36] Because these technologies lead to lower energy consumption within the Union, demand-side security objectives are met through requiring fewer imports. Decreased imports mean less dependence on international price volatility or geopolitical considerations, but they also mean reduced 'loss of wealth' which can then again be instrumentalized towards competitiveness.

In conclusion, in EU energy policy, the security, economic and environmental aspects are deeply intertwined, and cannot be detached from each other. It is

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[34] Speech by Javier Solana, former EU High Representative, *The External Energy Policy of the European Union*, delivered at the Annual Conference of the French Institute of International Relations (IFRI), Brussels, 1 February 2008. http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressdata/EN/discours/98532.pdf [Last Accessed 19 October 2012]

[35] See note 20, at 4.

[36] See note 20, at 5.

then not always clear which is a means, or which is an end, amongst the three dimensions of 'sustainability, supply security and competitiveness'. What is certain, however, is that the golden thread of EU energy policy is that the Union seeks to realize its secure and affordable energy through a *market-based methodology* which draws heavily on stable regulatory frameworks (regulations, directives, bilateral and multilateral agreements, etc.). Legal frameworks then function to enable market mechanisms which provide dividends on all fronts: they provide a safe investment climate through long-term stability in the regulatory environment and allow for emissions trading to the benefit of the environment, a well-functioning and interconnected market can cope more smoothly with sudden shifts in energy supplies, and so on.

The following table briefly summarizes (some of) the key interconnections between the key challenges of EU energy policy, and the three substantive dimensions of that policy. This overview will then aid us in understanding how these considerations are played out in the external dimension of EU energy policy.

2.3.2 Overview Table – EU Internal Energy Policy: Challenges and Policy Dimensions

		Three Main Challenges		
		Institutional	**Substantive**	**Vertical**
Three Dimensions	**Security of Supply**	Member State national interests uploaded through the Council, presence of HR/VP and the EEAS.	Interconnecting infrastructure, reliable flow of energy into EU, concern over strategic acquisitions, decreasing EU demand.	Inter-Member State Solidarity; Protection of energy champions' interest as national interest.
	Environmental Sustainability	DG Clima, DG Env or DG ENER: diversity of views on priorities and vision.	Reduced emissions, energy efficiency, 20-20-20, ETS.	Member State shift in energy mixes towards renewable sources.
	Market/ Law-based approach	Inter and intra-institutional diversity and possible disagreement on whether market-approach should dominate.	Recruitment of market principles as a means for all other ends, and an end in itself.	Member States and energy companies' compliance with and enforcement of EU law.

3 A coherent and effective EU external energy policy: internal challenges ”externalised”

3.1 Key moments of EU external energy policy pre-Lisbon

The 2003 European Security Strategy did not include energy security in its threat assessment, and instead was dominated by the aftermath of 9/11. Only in the introduction to the Strategy do we find that *“Energy dependence is a special concern for Europe”*.[37] Since 2003, much has changed. At the Hampton Court informal European Council of October 2005, the leaders agreed that the Union would need to define a common European energy policy. In response, the Commission published a Green Paper in March 2006, which was endorsed by the European Council the same month.[38] Numerous policy documents followed, notably the October 2006 Communication entitled ‘External energy relations – from principles to action’,[39] the January 2007 Communication ‘An Energy Policy for Europe’ (commonly known as the first Strategic Energy Review),[40] the 2007-2009 Action Plan of the European Council,[41] and the second Strategic Energy Review of November 2008[42], with these being but a selection of the ‘overarching’ strategic energy policy documents. By the time of the 2008 review of the European Security Strategy, energy was mentioned as the *“artery of the European economy”* facing a wide array of security challenges and *“our response must be an EU energy policy which combines external and internal dimensions”*.[43]

After the entry into force of the Lisbon Treaty in December 2009, the new legal basis was supposed to create the momentum for a grand launch of a revamped

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37 European Security Strategy, *A Secure Europe in a Better World,* Brussels, 12 December 2003, at 4. http://www.consilium.europa.eu/uedocs/cmsUpload/78367.pdf [Last Accessed 19 October 2012]

38 Conclusions of the European Council, 23-24 March 2006, DOC 7775/1/06 REV 1.

39 Commission Communication, *External energy relations – from principles to action,* Brussels, 12 October 2006, COM(2006) 590 final.

40 See note 20.

41 Annex 1 to the Brussels European Council, Presidency Conclusions, *Action Plan 2007-2009, An Energy Policy for Europe,* 8-9 March 2007. http://register.consilium.europa.eu/pdf/en/07/st07/st07224-re01.en07.pdf [Last Accessed 19 October 2012]

42 Commission Communication, *Second Strategic Energy Review, An EU Energy Security and Solidarity Action Plan,* Brussels, 13 November 2008, COM(2008) 781 final.

43 Report on the implementation of the European Security Strategy, Brussels, 11 December 2008, S407/08, at 1 & 8.

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EU energy policy. Initially the momentum was lost due to the Arab Spring and the sovereign debt crisis, which pushed energy policy down the priority list of the EU leadership. In November 2010 the Commission published a Communication setting out the EU's 'Energy Strategy for 2020', [44] which was to be endorsed at an *Energy Summit*, a European Council organized solely for the purpose of discussing EU energy policy, on 4 February 2011. While that Summit did take place, and the Conclusions did contain a number of guidelines for energy policy, much of the discussion and final outcome concerned the EU's response to the aforementioned crises. As a consequence, weight shifted to the ministerial level, namely the Energy Council which, on 28 February 2011, adopted a set of formal conclusions endorsing the Energy 2020 programme.[45] The February 2011 'Energy Summit' requested that the Commission submit, by June 2011, *"a communication on security of supply and international cooperation aimed at further improving the consistency and coherence of the EU's external action in the field of energy"*.[46] To that end the Commission opened public consultations, which ended on 7 March 2011, and on 7 September 2011 finally issued a Communication together with a proposal for a new binding instrument regulating the relationship between the EU and its Member States in external energy relations.[47] On 24 November 2011 the Energy Council adopted meticulously drafted and extensive Conclusions on 'Strengthening the external dimension of the EU energy policy',[48] which were finally endorsed by the European Council on 9 December 2011. The proposed Decision on the EU-Member State relationship was adopted by the Council on 4 October 2012.

In the next sub-section, I shall briefly elaborate on how the three main obstacles to EU energy policy applied to EU external relations, pre-Lisbon. In this fashion, we will have a complete understanding of the key elements of EU

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44 Commission Communication, *Energy 2020, A strategy for competitive, sustainable and secure energy,* Brussels, 10 November 2010, COM(2010) 639 final.

45 Council Conclusions, *Energy 2020: A Strategy for competitive, sustainable and secure energy,* Brussels 28 February 2011.

46 Conclusions of the European Council, Brussels, 4 February 2011, DOC EUCO 2/1/11, at 4.

47 Commission Communication, *On security of energy supply and international cooperation - "The EU Energy Policy: Engaging with Partners beyond Our Borders"*, Brussels, 7 September 2011, COM(2011) 539 final.

48 Council Conclusions, *On strengthening the external dimension of the EU energy policy,* Brussels, 24 November 2011.

external energy policy prior to the explicit conferral of energy competence through Article 194 TFEU, allowing us to make a full comparison of the pre- and post- Lisbon evolutions and to consider the continued challenges for EU external energy policy.

3.2 The substantive, institutional and vertical challenges externalised

The March 2006 Green Paper, which initially outlined the three substantive dimensions of EU energy policy, recognized that "*a coherent external policy is essential to deliver sustainable, competitive and secure energy*", adding that "*it would be a break from the past, and show Member States' commitment to common solutions to shared problems*".[49] The European Council of June 2006 endorsed the content of the Green Paper at the highest level, and, in preparation for this June 2006 meeting, the Commission and the Secretary General/High Representative jointly wrote a paper for the European Council entitled 'An external policy to serve Europe's energy interests'.[50] The authors of the paper wished to show *"how EU external relations, including CFSP"* could be used effectively towards securing the three pillars of energy policy, and were frank in their assessment that an effective external energy policy depends on being able to harness the EU's collective resources and "*put them at the service of shared interests*".[51] The five-page paper was divided in a fashion reminiscent of a CFSP-type strategic approach: a risk assessment, a statement on guiding principles, and a statement on how to 'get results' at the bilateral, regional and multilateral levels. The paper summed this up as follows:

> *[An EU external energy policy] must be* ***coherent*** *(backed up by all Union policies, the Member States and industry),* ***strategic*** *(fully recognizing the geo-political dimensions of energy-related security issues) and* ***focused*** *(geared towards initiatives where Union-level action can have a clear impact in furthering its interests). It must also be* ***consistent with the EU's broader foreign policy objectives***

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[49] Commission Green Paper, see note 26, at 14.

[50] Report from the Commission and the Secretary General/High Representative to the European Council, *Joint Paper 'An external policy to serve Europe's energy interests'*, Brussels, 30 May 2006, DOC 9971/06.

[51] *Ibid.,* 3.

such as conflict prevention and resolution, non-proliferation and promoting human rights. An external energy policy has to be based on a clear prior identification of EU interests, and reliable risk assessments. (emphasis added)[52]

In light of this, we can transfer the internal challenges we have identified into the external context, with the added complexity that they are now played out in the international arena as opposed to the EU legal order:[53]

(1) Substantive: There is an absence of a consistent, long-term political agreement on whether it is in the Union's best interest to pursue a predominantly market-based approach, or whether the exigencies of international energy relations require an approach which focuses on the geopolitical and strategic dimension of relations with producer and transit countries.[54] The latter implies a continuation of an approach based on political or strategic rationales. It implies deal-making, price-setting, market sharing, investment decisions and even unilateral action in relation to the production, transit or supply of energy products which do not reflect an economic reality but are based on political or strategic considerations. In the market-based approach, the energy actors (energy producers, transit companies, etc.) make those same decisions based on economic and commercial considerations within a regulatory environment which is characterized by the rule of law, by long-term, stable regulatory conditions and by a long-term, stable investment climate. The last two of these are what the internal energy market aims to ensure, and as the foundation of EU external energy policy this translates into a strong focus on the creation of an international legal framework within which market principles can bring

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52 *Ibid*.,3.

53 B. Van Vooren, *EU Energy Policy and the European Neighbourhood Policy: Added-Value or Emulating its Deficiencies*, in A.D. Casteleiro and M. Spernbauer (eds.), *Security in EU External Relations*, (2009) EUI Law Working Paper 2009 No. 1; R. Youngs, *Europe's External Energy Policy: Between Geopolitics and the Market* (2007) CEPS Working Documents, 20.; R. Youngs, *Energy Security - Europe's New Foreign Policy Challenge*, (2009) Routledge; S. Haghighi, *Energy Security: The External Legal Relations of the European Union with Major Oil- and Gas-Supplying Countries* (2007) Hart Publishing; J. Wouters, S. Sterckx, S. de Jong, *The 2009 Russian-Ukrainian Gas Dispute: Lessons for European Energy Crisis Management after Lisbon* (2010) European Foreign Affairs Review 15 (4), at 511-538.

54 Jacques Delors, *Towards a European Energy Community: A Policy Proposal* (2010) Notre Europe No 76.

secure energy supplies at low prices.[55] The Energy Charter[56] of the mid-1990s and the Energy Community[57] in South East Europe in the early years of this century are the prime examples of that. The fact that there are competing rationales in EU external energy policy is then clear from a comparison between the Commission-High Representative joint paper of 30 May 2006 and the Commission Communication on 'External Energy Relations' of October 2006.[58] The above quotation from the joint paper highlights the geopolitical dimension of energy, as well as the interconnections with other EU foreign policy objectives. Conversely, the October 2006 document squarely places the internal market front-and-centre:

> *A major potential strength of the Union lies in the realisation of its internal energy market. It reinforces economic competitiveness, increases diversity, improves efficiency, fosters investment and innovation and contributes to the security of supply. Member States should promote the principles of the internal energy market in bilateral and multilateral fora, enhancing the Union's coherence and weight externally on energy issues. The pull of the EU internal market will also be strengthened if interconnection is improved and competition rules are fully respected.*[59]

(2) Institutional: This substantive disagreement can be the consequence of and can also be reinforced by intra- and inter-institutional fragmentation within the Union. Within the Commission, intra-institutional disagreement may flow from the organisation of the DGs along thematic lines: DGs responsible for

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55 See note 39.

56 The Energy Charter was an expression of the EU's market-based approach in its relations with the wider world, and was first proposed in the early 1990s. The idea was to replicate the ECSC by bringing together Eastern and Western Europe on the basis of open markets, non-discrimination and access for foreigh direct investment in the energy sector. The Charter was signed in 1994 and entered into force in April 1998. See further www.encharter.org [Last accessed 10 September 2012].

57 R. Karova, *Energy Community for South East Europe: Rationale and Implementation to Date*, (2009) EUI-RSCAS Working Papers No. 12; B. Van Vooren and S. Blockmans, *Revitalizing the European 'Neighbourhood Economic Community': The Case for Legally Binding Sectoral Multilateralism* (2012) European Foreign Affairs Review 27(4), at 577-604.

58 See note 50.

59 See note 50, at 2.

competition, internal market, energy, environment and climate change must all subscribe to the overall agreement on the interests of the Union. Intra-institutional diversity may also flow from the fact that the Council General Secretariat holds opinions different from those within (certain DGs of) the Commission, and, notably, since the Lisbon Treaty the European External Action Service, which is largely organized along geographic lines (Eastern Partnership, Russia, Southern Mediterranean), may equally emphasize different aspects of external energy policy. These points may thus be captured, in a way that slightly lacks nuance, as disjunctions between the diplomats and the technocrats:

Pre-Lisbon: DG TREN v. DG RELEX + Council Secretariat DG E; and

Post-Lisbon: DG ENER v. EEAS + Council Secretariat DG E.

The emphasis on extending 'the benefits of the internal market' beyond EU borders creates regular clashes with those Member States and EU officials who are convinced that a more 'geopolitical' route is preferable for securing energy supplies. In a 2009 book based on extensive interviews, Youngs captured this issue as follows:

> *the principal division was described by officials as being between the Commission's Energy and Transport directorate, on the one hand, and Relex and the Council on the other hand. The latter berated the former's influence as an 'energy technocracy' whose market-based recipes were blind to geopolitical realities. The 'energy technocrats' complained that too much alliance-oriented foreign policy had already infected the coherence of EU strategies. […] In sum, officials acknowledged that the situation was not one of the 'markets and institutions' storyline having triumphed, but rather of sharply contrasting policy preferences persisting within different institutions and forums.*[60]

(3) Vertical: In the same way as with the progressive completion of the internal market, national energy champions' interests may, in external relations too, be uploaded to the Member State level, and Member States

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[60] R. Youngs, see note 53, at 40-41.

may seek to prioritize their national interests over the interest of the Union. Alternatively, Member States may seek to shape the Union interest so that it equates to their national interests, potentially disregarding considerations which are valid for the Union as a whole. Pre-Lisbon, this can be illustrated by the February 2009 Council meeting which took place a few weeks after the Russian-Ukrainian gas dispute had left many of the Eastern EU countries in the cold and dark:[61] "*Solidarity between Member States has to be strengthened and balanced with Member States' responsibility over their energy security, fully respecting Member States' choice of energy mix and sovereignty over energy sources.*"[62] A post-crisis evaluation report by the Commission showed mixed results. On the positive side, solidarity between the Member States was certainly present as, for example, Czech gas storage was made available to Slovakia and Austrian gas storage to Slovenia,[63] and new reverse flows from Greece to Bulgaria and from the Czech Republic to Slovakia became operational. More problematic was the fact that reliable and up-to-date information was available from some Member States, but certainly not from others, and the Commission found that a well-functioning internal market (notably the regime installed by the third package, not yet in place at that time) would have removed the decision-making obstacles created by insufficient information about current gas flows being shared.[64] Furthermore, the crisis also highlighted shortcomings in the gas pipeline network of the Union. For example, *"additional supplies from the Netherlands could not reach Bulgaria because the interconnections and same gas standards were not*

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61 J. Wouters, S. Sterckx and S. de Jong, see note 51.

62 Council Conclusions, Brussels, 19 February 2009, DOC 6692/09, at 2.

63 Commission Staff Working Document, *The January 2009 Gas Supply Disruption to the EU: An Assessment*, Brussels, 16 July 2009 COM(2009) 363 final, at 9.

64 *Ibid.,* at 5. *"At the EU level, a major difficulty in assessing how best to respond to the crisis was the limited access to important technical information with respect to the gas system and gas flows at a national and an EU level. There was not enough reliable information about gas flows, how much gas was in the system, and demand patterns. This situation reflected on the fact that qualitatively different systems exist across Member States, with unequal access to information by market players and others, including public authorities. As the crisis developed, the Gas Coordination Group helped to fill this information gap and enabled an exchange of detailed daily information and the analysis of the gas situation of the different EU Member States and Countries of Energy Community Treaty. However, the crisis came too early to benefit from the provisions of the third internal market package that had been proposed by the European Commission on [sic] September 2007 and only recently finally adopted, which includes an obligation to publish data on forecast and actual gas flows, amount of gas in storage and available pipeline and storage capacities."*

there. Lacking infrastructure also meant that available LNG supplies could not be supplied to where they were most needed, particularly from Spain and Greece."[65]Most notably for EU external relations, the national fall-back logic of the Member States failed to safeguard them from supply deficiencies. In the carefully chosen words of the Commission report: *"Political bilateral agreements (e.g. Bulgaria and Serbia with Russia) proved to be less effective than market arrangements between gas undertakings within the EU internal market framework in helping to keep supplies flowing."*[66] Hence, on the one hand there is the 'EU interest', the recognition that acting together will be for the benefit of the Union as a whole, and on the other hand there is the pursuit of national interests and the possible breaking of ranks by individual Member States which impedes the attainment of the common good that is there for all to see.

Such was the state of affairs in EU external energy policy prior to December 2009.

3.3 Lisbon Treaty conferral of competence: codification of preceding developments

All the internal and external developments described above took place without there being an explicitly conferred energy competence. In competition the Commission used the relevant legal bases (Articles 101 onwards TFEU), whereas most legislative instruments were adopted on the basis of the internal market competence (formerly Article 95 TEC, currently Article 114 TFEU), in combination with other legal bases where necessary (Environment (Article 191 TFEU), and so on). The Lisbon Treaty has now explicitly transferred a competence in this field to the Union (Article 194 TFEU), a competence which is shared between the Union and its Member States (Article 4 TFEU). Energy is specifically mentioned in Article 122 TFEU (measures in case of supply disruption), Article 170 TFEU (developing trans-European energy networks), and Article 192 TFEU (environmental measures which might affect Member States' energy mixes). However, these three articles had predecessors in the pre-Lisbon Treaty era, and the main novelty in the Lisbon Treaty is indeed Title XXI, with its comprehensive Article 194 TFEU. The *chapeau* of this article makes it immediately clear that the competence conferred upon the

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65 *Ibid.*, at 10-11.

66 *Ibid.,* at 9.

Union in December 2009 is not a sea-change in the substantive priorities of EU energy policy, but rather a codification of the policy process that preceded it. The TFEU competence is indeed a logical continuation of the three substantive dimensions and the complex means-ends relationships. The Energy 2020 programme explicitly recognizes this: "*A common EU energy policy has evolved around the common objective to ensure the uninterrupted physical availability of energy products and services on the market, at a price which is affordable for all consumers (private and industrial), while contributing to the EU's wider social and climate goals. The central goals for energy policy (security of supply, competitiveness, and sustainability) are now laid down in the Lisbon Treaty.*"[67]

Article 194 TFEU - Energy

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

(a) ensure the functioning of the energy market;

(b) ensure security of energy supply in the Union;

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

(d) promote the interconnection of energy networks.

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

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

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

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[67] See note 44, at 2.

Constructing the Union's policy on the basis of past policy choices is to be expected and is not necessarily a negative approach, but it may be problematic if no steps are undertaken to avoid past problems. The Energy 2020 strategy of November 2010 opens with an ominous warning: *"The price of failure is too high. Energy is the life blood of our society ... The energy challenge is one of the greatest tests which Europe has to face."*[68] The Energy 2020 Strategy gives an evaluation of past initiatives taken to surmount this challenge, and this evaluation is rather grim. On the lacklustre completion of the internal market it notes that over 40 infringement proceedings are underway on the second internal energy market package from 2003 alone.[69] On the external dimension, the strategy notes that *"despite serious gas supply crises that have acted as a wake-up call exposing Europe's vulnerability, there is still no common approach towards partner, supply or transit countries"*. To overcome this obstacle, the Commission makes a number of strong claims in the Energy 2020 strategy as regards both the subsidiarity of EU action (Article 5.3 TEU) and the need for loyalty between the EU and its Member States (Article 4.3 TEU), namely that the Union can more effectively defend European energy interests energy than individual member states can, and that Member States should set aside national interests and loyally pursue 'the EU interest' as commonly defined at (European) Council level. On *subsidiarity,* the Commission's wish to grasp the post-Lisbon momentum is unequivocal: *"The EU is the level at which energy policy should be developed. Decisions on energy policy taken by one Member State inevitably have an impact on other Member States. ... The time has come for energy policy to become truly European."*[70] On *loyalty*, the Commission is equally ambitious: *"The EU must now formalise the principle whereby Member States act in the benefit of the EU as a whole in bilateral energy relations with key partners and in global discussions"*,[71] and on the next page of the strategy we find: *"Mechanisms will be proposed by the Commission to align existing international agreements (notably in the gas sector) with the internal market rules and to strengthen cooperation between Member States for the conclusion of new ones."* [72] The Council endorsed the Energy 2020 Strategy in February 2011, though with the

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68 *Ibid.*, at 2.

69 *Ibid.*, at 3.

70 *Ibid.*, at 4.

71 *Ibid*., at 17.

72 *Ibid.*, at 18.

usual caveat: *"keeping in line with respective competences of Member States and the Union, the transparency, consistency, coherence and credibility of external action in energy matters should be improved"*.[73]

To reach that objective, the February 2011 Council requested the Commission to channel its council conclusions into 'one comprehensive policy document', which the Commission delivered through its Communication on 7 September 2011: 'On security of energy supply and international cooperation – "The EU Energy Policy: Engaging with Partners beyond Our Borders"'.[74] As previously noted, these proposals were followed by extensive Council Conclusions in November 2011 which were endorsed by the European Council in December 2011. On 4 October 2012, the Council agreed on the final compromise text for a legal binding framework governing EU-Member State relations in external energy policy, after a trialogue took place in spring 2012. We shall examine these policy documents in the following three distinct sections, asking the following questions:

- First, how are the re-vamped institutions post-Lisbon working to overcome the tensions identified above, and how they are functioning to implement EU external energy policy? Focus will lie on the new EU External Action Service, as well as on the strengthened role of the Parliament in external relations (**Section IV**)

- Second, how, if at all, has the new Article 194 TFEU, and the political momentum it created, led to shifts in the substantive policy choices on EU external energy policy? (**Section V**)

- Finally, has the explicit conferral of a shared competence had any impact on the EU-Member State relationship in EU external policy? How does the new legally binding regime function, and will it yield satisfactory results in the light of the obstacles unearthed in this report? (**Section VI**)

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[73] See note 45, at 6.

[74] See note 48.

4 The new institutional landscape after Lisbon: echternach procession?

4.1 The reshuffled institutional landscape of EU external energy policy

EU external energy policy has undergone a deep shift following the Lisbon Treaty, in terms of institutions and personalities responsible in this area: first, within the Commission, DG Transport and Energy (TREN), formerly led by Mr. Andris Piebalgs (now development policy), has been split into two, and now there is a DG (ENER) led by Commissioner Oettinger which is only responsible for energy. Second, DG RELEX has ceased to exist within the Commission, and with that its cell working on energy issues has disappeared.[75] DG RELEX was subsumed into the new European External Action Service in January 2011,[76] but no energy specific cell or unit has been erected within the EEAS' organogram, though a few staff members work (directly and indirectly) on energy issues as part of the horizontal or geographical MDs – for example in the 'global issues' division of the EEAS. Third, the former HR/SG Javier Solana has been succeeded by Catherine Ashton, which has visibly influenced energy priorities in CFSP. Fourth, when the EEAS was being formed from different EU institutions, DG E of the Council Secretariat, but not the Energy Policies Unit in DG C,[77] was transferred to the EEAS, and as a consequence the Council Secretariat maintains a small yet dedicated staff called the 'Energy Policies Unit, including International Aspects and Atomic Questions'. Fifth, while the High Representative chairs the Foreign Affairs Council, the Energy and General Affairs Council formats are still chaired by the rotating Presidency. Finally, through Articles 194 and 218 TFEU, the European Parliament now has a potentially significant role in EU external energy policy.

In sum, this section will examine who is in the driving seat at this moment (the Commission, or HR and the EEAS), the new role for the European Parliament, and the impact this has on the substantive priorities and

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75 R. Balfour, A. Bailes and M. Kenna, *The European External Action Service at work: How to improve EU foreign policy* (January 2012) EPC Issue Paper No 67, at 39.

76 B. Van Vooren, *A legal-institutional perspective on the European External Action Service* (2011) Common Market Law Review, at 475-502.

77 My thanks to Jan Frederik Braun for pointing this out to me.

policy interconnections between EU external energy policy and other EU initiatives. Given that this report provides a legal perspective on the subject matter, the focus will be on the international instruments which have been concluded by the EU. So far, EU external energy policy has been very much 'executive-driven', with the Commission firmly in the driving seat. In terms of instruments, this has meant that the EU has predominantly conducted its external energy relations not through binding international agreements,[78] but rather through instruments which are not legally binding.[79] The dozen 'Action Plans' concluded on a bilateral basis with partner countries in the context of the European Neighbourhood Policy all contain chapters on energy cooperation. More importantly, the EU has 'concluded' more than a dozen Memoranda of Understanding (MoUs) and Joint Declarations on energy cooperation with a number of partner countries from 2005 to 2012. The table[80] on pages 36-37 provides an overview of the non-binding documents 'concluded' between the EU and third countries. On the basis of this table, we can make a number of observations on the role of the European Parliament, and the role of the Commission and the EEAS, in EU energy policy post-Lisbon.

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78 The Energy Community and the Energy Charter are notable, multilateral, exceptions.

79 B. Van Vooren, *Soft Law in EU External Relations: The European neighbourhood policy,* (2009) 34 European Law Review 5, at 696-719. For a more elaborate discussion of these memoranda of understanding, see B. Van Vooren, note 2, at 203-205.

80 These documents are not published in the Official Journal, and these are the ones known by the present author. This also means that signatories must be made out through scanned versions of the MoUs signed by the parties. Hence, where the abbreviation "N.N." appears in the column headed "Signatories for 3rd Country", this implies that the signatory is not known to the present author.

4.2 Overview table – MoUs and joint declarations in the field of energy

Date	Country	Nature of Document[1]	Signatories for EU	Signatories for 3rd Country
1 December 2005	Ukraine	MoU on cooperation in the field of energy between the EU and Ukraine	President of the European Council; President of the Commission[2]	President of Ukraine[3]
7 November 2006	Azerbaijan	MoU on a Strategic Partnership between the EU and Azerbaijan in the field of Energy	President of the European Council[4]; President of the Commission[5]	President of Azerbaijan[6]
4 December 2006	Kazakhstan	MoU on cooperation in the field of Energy between the EU and Kazakhstan	Commissioner for RELEX and ENP[7] & Council Presidency[8]	N.N.
24 July 2007	Morocco	Joint Declaration on the priorities for cooperation between the Commission and Morocco in the energy sector[9]	Director General DG RELEX[10]	Director at Energy and Mining Ministry[11]
31 October 2007	Jordan	Joint Declaration on the priorities for cooperation between the Commission and Jordan in the energy sector	Commissioner for RELEX and ENP[12]	Minister for Energy and Mineral Resources[13]
26 May 2008	Turkmenistan	MoU and (sic) Cooperation in the field of Energy between the EU and Turkmenistan	Energy Commissioner[14] & Council Presidency	N.N.
2 December 2008	Egypt	MoU on Strategic Partnership on Energy between the EU and Egypt.	Commissioner for RELEX and ENP & Commissioner for Energy[15]	Minister for Foreign Affairs[16]

16 November 2009	Russia	MoU on Energy Dialogue	Energy Commissioner[17]	Minister of Energy of the Russian Federation[18]
18 January 2010	Iraq	MoU between the government of Iraq and the EU on Strategic Partnership in Energy	Energy Commissioner,[19] 'HR for Foreign Affairs and Security Policy/ VP of the Commission',[20] Spanish Presidency[21]	Minister of Oil[22]
13 January 2011	Azerbaijan	Joint Declaration on the Southern Gas Corridor	President of the European Commission[23]	President of Azerbaijan[24]
24 January 2011	Uzbekistan	MoU on Cooperation in the field of Energy between the EU and Uzbekistan	Energy Commissioner[25] & Hungarian Ambassador[26]	First Deputy Prime Minister and Minister for Finance[27]
10 February 2012	India	Joint Declaration for Enhanced Cooperation on Energy between the EU and Government of India	Not signed, adopted in margins of EU-India Summit	Not signed
3 May 2012	China	EU-China Joint Declaration on Energy Security	Energy Commissioner[28]	Administrator of the National Energy Administration[29]

1 Titles in full, but omitting words such as "republic" and "kingdom of" in the name of a country.
2 T. Blair & J.M. Barroso respectively.
3 V. Yuschenko
4 M. Vanhanen
5 J.M. Barroso
6 I. Aliyev
7 B. F. Waldner
8 Finnish Presidency.
9 In French
10 E. Landaburu
11 M. Aherdan
12 B. F. Waldner
13 K. N. Elshuraydeh
14 A. Piebalgs.
15 Ibid.
16 A. A. Gheit
17 A. Piebalgs
18 Shmatko
19 A. Piebalgs
20 C. Ashton, Title was written including the reference to her position as Vice-President of the Commission.
21 M. Sebastian, Minister of Industry, Tourism and Trade
22 H. I. S. Al-Shahristani
23 J.M. Barroso
24 I. Aliyev.
25 G. Oettinger
26 P. Györkös
27 R. Azimov
28 G. Oettinger.
29 L. Tinan

4.3 The role of the European Parliament: Articles 294 and 218 TFEU

Article 194.2 TFEU prescribes that the ordinary legislative procedure (Article 294 TFEU) shall apply to establish the measures necessary to achieve the objectives of EU energy policy in paragraph 1 of Article 194. In the external field, the consequence is that, in accordance with Article 218.6(a)(v) TFEU, international agreements within the scope of Article 194 require the consent of the European Parliament. In section VI below, this report examines the new legislative instrument setting up an exchange mechanism for information on intergovernmental agreements of the Member States, to be adopted as a Decision of the Council and the European Parliament. We will show in that section that the Parliament has had a tangible impact on the proposal from the Commission through its role in the ordinary legislative procedure.[81] In the following paragraphs, we focus on the role of the European Parliament through Article 218 TFEU.

Looking at the overview table above, an observation directly pertinent to the role of the European Parliament in EU external energy policy is that, because all of these documents are considered 'non-legal', the normal treaty making procedure of the old Article 300 TEC or Article 218 TFEU is completely excluded. For example, the EU-Russia MoU setting up the Energy Dialogue states in "section 13" (deliberately not called "article 13" to avoid legal language) that "*This Memorandum does not constitute an international agreement or other legally binding document and does not establish rights and obligations governed by international law*".[82] From the perspective of the European Parliament the message is then rather self-evident: if the documents listed in the above overview table are negotiated, concluded and implemented entirely in the 'executive' sphere of EU external relations, and since all the memoranda explicitly include a statement that they are not legally binding, the European Parliament will be excluded from giving its consent on these agreements – with a commensurate lack of Parliamentary influence on the

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[81] Proposal from the Commission, *Decision of the European Parliament and of the Council setting up an information exchange mechanism with regard to intergovernmental agreements between Member States and third countries in the field of energy,* 7 September 2011, COM(2011) 540, Ordinary Legislative Procedure: 2011/0238/COD.

[82] Section 13, EU-Russia MoU, setting up an early warning system, on file with author.

negotiated outcome of these documents.[83] However, in EU external energy policy, as in other external policy fields, there is a consistent tendency of the Union to initiate relations through non-legally binding soft law first, and then move to legally binding commitments. [84] This trend is certainly present in EU external energy policy, a dynamic which pre-dates the Lisbon Treaty by many years. This direction is certain to continue as the overview table above has shown, especially if the market-based methodology of the Union is to lead to the adoption of further bilateral (and multilateral) international treaties. A prominent example of this dynamic in the energy field has been the Energy Community for South East Europe. Prior to the conclusion of the multilateral legally binding framework, the work of the EU, Member States and SEE partner countries was based on the so-called 'Athens Memoranda' of 2002 and 2003. These were non-binding documents organizing the transposition to SEE countries of the EU *acquis* on electricity and gas. However, negotiations for a binding agreement started soon afterwards, in 2004. Signing took place in 2005, and the ECT entered into force in 2006. In a similar vein, the second strategic energy review of November 2008 made it an explicit objective to pursue this kind of soft-hard law approach in bilateral energy relations as well, implying that commitments contained in MoUs be converted into legally binding agreements or legally binding 'energy-interdependence clauses'. [85]An example of the use of the latter is in the ongoing negotiations with Russia on the new framework agreement; the EU intends that this will contain such a clause. An example of the former is the EU's work towards concluding a multilateral agreement on a Trans-Caspian Natural Gas Pipeline system. The recommendation to open negotiations was presented to the Council on 3 May 2011, and follows from the visit of Commission President Barroso and Commissioner Oettinger to Baku in January 2011. At that moment in time a Joint Declaration (a non-binding soft law document) on the Southern Gas Corridor had been signed by the Azeri President Aliyev and President Barroso,[86] with no other signatories. On 12 September 2011, the Council

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[83] Assessing the legitimacy of such non-legal instruments in the light of concerns about legality and effectiveness: B. Van Vooren, see note 2, at 203-205.

[84] This dynamic is writ large in the European Neighbourhood Policy, which includes energy policy, but also, for example, in the sphere of migration policy. B. Van Vooren, see note 2.

[85] See note 42, at 8.

[86] General Secretariat of the Council, *Note on factual information regarding international relations in the field of energy – Information from the Commission and the Presidency,* Brussels, 26 May 2012, DOC 10723/11.

adopted a decision authorising the Commission to negotiate an agreement with Azerbaijan and Turkmenistan 'on a legal framework for a Trans-Caspian (natural gas) Pipeline system'.[87]

If this dynamic continues, the consent of the European Parliament will be required for the above and any other energy agreements concluded by the Union. If we may then draw lessons from other areas of EU external relations post-Lisbon – for example the EU-South Korea Free Trade Agreement or the SWIFT Agreement with the USA[88] – this implies that the European Parliament will keep a close eye on these negotiations and assert its interests where necessary. For example, the human rights situation in Azerbaijan is not without its problems, and, in line with the 'mainstreaming approach' of the new strategy on human rights in EU external relations of 12 December 2011,[89] this ought to be reflected in these negotiations. In this respect, the role of the European Parliament could be crucial in ensuring coherence between EU energy interests and EU values (Articles 3.5 and 21 TEU), and in its 2007 report entitled 'Towards a common European foreign policy on energy', the Parliament has clearly indicated an ambition in that direction.[90] The ongoing negotiations with Azerbaijan and Turkmenistan provide the Parliament with a good opportunity for putting rhetoric into practice.

4.4 The Commission, the Member States, the High Representative and the EEAS

4.4.1 Signatories of the bilateral soft law instruments: dominance of the Commission and Member States

Examining the executive-driven nature of EU external energy policy, one of the central changes post-Lisbon is of course the presence of an EU diplomatic

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87 Council of the European Union, *The Council Gives go-ahead for negotiations on Trans-Caspian Pipeline System,* Brussels, 12 September 2011, DOC 14095/11.

88 J. Monar, *The Rejection of the EU-US SWIFT Interim Agreement by the European Parliament: A historic vote and its implications* (2010) 15 European Foreign Affairs Review, at 143.

89 Joint Communication from the European Commission and the High Representative, *Human Rights and Democracy at the Heart of EU External Action – Towards a More Effective Approach*, Brussels, 12 December 2011, COM(2011) 886 final.

90 See to that effect: Report of the European Parliament, Committee on Foreign Affairs, *Towards a common European foreign policy on energy,* Committee on Foreign Affairs, 11 September 2007, at 5.

service under the guidance of the High Representative for CFSP who also holds the post of Vice President of the Commission. The mandate of the HR/VP is not only to conduct the CFSP, but also to ensure consistency between all aspects of EU external relations (Article 18 TFEU). From the overview table above, we can make a number of observations on the post-Lisbon institutional balance, but also on the continuing presence of the Member States, in EU external energy relations.

First of all, five of these documents are dated after the Lisbon Treaty: the MoUs with Iraq (2010) and Uzbekistan (2011), and the Joint Declarations with Azerbaijan (2011), India and China (2012). This illustrates that this practice of agreeing soft legal instruments has certainly continued in the post-Lisbon era. Second, the signatories on the EU side provide much insight into the vertical division of competence between the EU and the Member States, and the horizontal division between the institutions. As regards the horizontal perspective, the Commission is always one of the signatories, whether this be through the head of the former DG RELEX, through the Energy Commissioner, or by the Commission President himself. Only in one instance, namely the MoU with Iraq, did the High Representative co-sign. This was six weeks after the entry into force of the Treaty of Lisbon, and thus the very early period of Mrs. Ashton taking up the newly created post of HR/VP. However, in subsequent documents the High Representative's signature was absent. Vertically, then, we see that out of the complete list of thirteen documents, six (three pre-Lisbon and three post-Lisbon) were co-signed by a representative of the rotating Presidency.

This overview of signatories on the EU side shows us that in bilateral energy relations the Lisbon Treaty has changed little: the Commission remains the central actor, the Member States, through the Presidency, appear alongside that institution as before, and the High Representative was included only once, but that seems to be an *accident de parcours.* In terms of the division of competence, we can thus infer the following: the Commission signs to show agreement to those aspects of the MoUs/Joint Declarations which concern the external dimension of the internal market; this pre-empts Member State action since the competence is shared with the Member States (Articles

2.2 and 4.2(i) TFEU *iuncto* Article 194 TFEU).[91] The Member States, then, sign in respect of those areas of external policy which have not yet been covered by the Union, as well as the foreign and security policy aspects of external energy policy (Article 24 TFEU). How do we explain the fact that the High Representative co-signed the MoU with Iraq, alongside the Spanish Presidency? Six weeks after the entry into force of the Lisbon Treaty, the institutions and the newly appointed leadership were still finding their bearings on the novel divisions of competence between them. In terms of content, the MoU with Iraq was certainly nothing different from other MoUs, as it basically proposed the development of Iraqi energy policy along the lines of a shared, mutual interest with the EU. Immediately post-Lisbon, it must therefore have been thought that energy security fell within the mandate of the new High Representative,[92] and was to be exercised jointly with the Energy Commissioner. The fact that the four subsequent documents, some of which clearly have a significant energy security aspect to them and are similar to the MoU with Iraq, were not signed by the High Representative, is then telling. In conclusion, then, the HR's signature under the 2010 Iraqi MoU was due to the 'transitional tug-of-war' which was ongoing in the wake of the entry into force of the Lisbon Treaty;[93] the dust has now firmly settled with the competence in the hands of the Commission. We will further flesh out that claim by looking at the extent to which energy has figured in the execution of the mandate of the HR/VP since Mrs. Ashton took up the post.

4.4.2 Energy security: within or outside the mandate of the High Representative?

Javier Solana, the predecessor of the current High Representative, was most active in the sphere of EU external energy policy. He viewed security of energy supply as an integral part of the Union's CFSP, but strongly pursued

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[91] The external powers in the field of energy are based on the implied powers doctrine. See Chapter 5 "Existence of Competence" in B. Van Vooren and R. Wessel, *EU External Relations Law: Text, Cases & Materials* (2013, forthcoming) Cambridge University Press.

[92] The fact that Iraq is an unstable region is in itself insufficient to explain why that MoU in particular would require the signature of the HR, when this was not the case with Azerbaijan, China, and others where stability or strategic considerations are equally pertinent.

[93] S. Blockmans and L. Erkelens, *Setting up the European External Action Service:* An institutional act of balance, (2012) Centre for the Law of EU External Relations, CLEER Working Papers 2012/1.

overall coherence with the more market-oriented elements of EU external energy policy. Speaking in 2008, Solana said:

> *There is no single solution. We will have to work on multiple fronts: savings and efficiency, renewables and biofuels; carbon capture, interconnections and storage. [T]here is not just an internal solution. We also need a credible European external energy policy. ... I sometimes wonder if we are keeping up with the speed and scope of the changes in the international energy landscape. Big deals are being made every day. In the Middle East, the Caucasus, the Balkans and Asia. From decisions on pipelines, to exploration deals to strategic partnerships among producers. Our future options seem to be narrowing while others move in a determined manner.* [94]

For that reason, when EU energy policy was being drawn up during the first half of 2006, Solana ensured that his department drafted, jointly with the Commission, a paper for the attention of the European Council to support a coherent and over-arching approach to its external dimension.[95] Furthermore, Solana made regular appearances and speeches at prominent events where he emphasized the importance of energy in his work: *"Hardly a day goes by that I am not confronted in my role as High Representative with the impact that energy has: from Sudan to Venezuela, from Iran to the Caucasus and beyond."* [96] However, whereas in May 2006 the departments of the then HR and the RELEX Commissioner wrote a joint paper at the request of the European Council *"to harness the EU's collective resources"* towards a coherent, strategic and focused external energy policy, there is a clear regression in this area. Indeed, the September 2011 Communication on security of energy supply and international cooperation is a publication of the Commission alone.[97] Such an exclusion of the European External Action Service is not merely coincidental, as in other external policy areas the EEAS and the Commission do draft strategic documents jointly, and this

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94 See note 34.

95 *Ibid*. Solana mentioned the joint drafting process in his speech of November 2006, see note 96 below.

96 J. Solana, *Address to the External Energy Policy Conference*, Brussels, 20 November 2006, DOC S324/06.

97 See note 47.

is so even if the drafting had already started before the EEAS commenced its work in January 2011. Two notable examples are the joint Communication on human rights[98] and the joint Communication revamping the Neighbourhood Policy.[99] However, this institutional reorientation does not necessarily imply a lessening of the attention given to the foreign policy dimension of energy, but just means that the Commission is firmly in charge. The proposed EU multilateral agreement with Azerbaijan and Turkmenistan on a Trans-Caspian Natural Gas Pipeline system can illustrate that point.

The joint declaration of January 2011 was signed in Baku by, on the EU side, Commission President Barroso alone. In substance, it is very much in line with the 'rule-based approach' of EU external energy policy because it sets up a trilateral, legally binding framework. However, the proposed agreement created a strong backlash, with Russian officials and the Russian media stating that this pipeline through the Caspian Sea would harm the environment. Additionally, Russia argued that the negotiations could not be started until a territorial dispute over the Caspian Sea was resolved by the littoral states.[100] These arguments should be seen as tools in the broader geostrategic game of Russia and the EU, with the latter seeking to diversify its supplies, and the former seeking to obstruct this. Indeed, both the EU and Russia had been courting Turkmenistan over the provision of supplies for their competing pipeline projects into Europe. This example thus indicates that there is a clear aspect of traditional diplomacy and foreign security to EU external energy relations, even when the EU is pursuing the objective of establishing a legal framework through which to conduct relations. What is more, one ought not to forget the 'not-so-frozen' conflict over Nagorno-Karabakh, a source of instability threatening all pipeline initiatives in the region; the EU, mistakenly, has no real involvement in seeking to resolve this matter.[101] From a purely EU institutional perspective, the absence of the High Representative in this instance leads to the conclusion that, in the post-Lisbon institutional landscape, the influence of the High Representative (and with that the influence of the EEAS) and the importance of energy within

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98 See note 89.

99 Joint Communication from the Commission and the High Representative, *A new response to a changing neighbourhood,* Brussels, 25 May 2011, COM(2011) 303.

100 EU Business, *Turkmenistan rejects Russia's EU pipeline criticism*, 19 October 2011.

101 The EU limits itself to the rhetorical support of the work of the Minsk Group.

the scope of CFSP, have diminished. Looking more generally at the activities of High Representative Ashton, we see this conclusion confirmed through the conspicuous absence of energy issues in her visits and missions to third countries and in her regular diplomatic démarches and statements.

Mrs. Ashton took up the post of High Representative at the beginning of 2010, and the need for the HR to play a role in EU external energy policy was recognized in the 4 February 2011 European Council as follows: "*The High Representative is invited to take fully account of the energy security dimension in her work.[sic]*"[102] To examine her role in EU external energy policy, I have conducted a discourse analysis of the statements made by her on behalf of the EU, or on behalf of her office, from January 2010 until 10 September 2012. This analysis focused on explicit references to EU external energy policy, and mining through this discourse we find a near total absence of energy issues:

4.4.3 Table: Energy policy in démarches by the High Representative

Nature of Statement	Number of Statements between 1 January 2010 and 10 September 2012.	Energy related
"Statement on Behalf of EU"	184	0
"Statement on Behalf of HR" [30]	753	1
... made as HR/Vice President of the Commission	13 out of 753	0
... made jointly with ENP/Enlargement Commissioner	33 out of 753	0
... made jointly with Development Commissioner	7 out of 753	0
... made with non-EU dignitaries (foreign ministers etc.)[31]	5 out of 753	0
... made jointly with Commission/ Council Presidents	4 out of 753	0
... made with other Commissioners (non-energy)[32]	3 out of 753	0
... made jointly with Energy Commissioner & Member States	1 out of 753	1

30 The word 'Statements' is perceived quite broadly by the EEAS, and several dozen 'remarks' or similar comments made by the HR on different occasions are included here.

31 On 5 occasions she also made statements jointly with non-EU colleagues: one joint declaration with the Council of Europe Secretary General, two with the US Secretary of State, one with the Australian foreign minister and 2 with the foreign minister of Russia.

32 Three with Commissioner Reding, one with Commissioner Malström, and one with Commissioners Reding and Piebalgs jointly.

102 See note 46, at 4.

In one instance the High Representative was present at an event concerning EU energy policy. This was at the EU-US Energy Council of 28 November 2011, with Secretary of State Clinton attending for the USA, and the HR being joined by Commissioner for Energy Oettinger, along with a representative from the Polish Presidency.[103] This confirms the continued presence of the Member States in EU energy policy, and it shows that the High Representative still has a long way to go in order to 'fully take into account energy security into her work', as requested by the European Council of 4 February 2011.

As an observer to these developments it would be unfair to stop at these findings, as the institutions – and the HR/EEAS in particular – had to find a new *modus vivendi* in this thoroughly reshuffled institutional landscape. The best horseman is always on his feet: first of all, for much of the period discussed, the High Representative and the EEAS were working in an environment that was legally, politically and even logistically transitional. Aside from an 'institutional tug-of-war', from the perspective of effective policy-making it could be viewed as positive that DG ENER of the Commission filled the gap that was left by the departure of DG RELEX from the Commission, and a struggling novel EU actor working to find its place in the EU's foreign policy. Secondly, the EU's CFSP was faced with events across the Southern Mediterranean rim. As shown earlier in this report, this simply figured higher on the EU's political agenda, pushing down the energy dossier to the more technical/technocratic level. Thirdly, following the Lisbon Treaty, DG Transport and Energy was split into two Commission DGs, leaving the new Energy Commissioner with an empty agenda which could be filled with nothing but energy-related work. This was in stark contrast to the over-full agenda of the High Representative who had to fulfil roles as High Representative, Vice President of the Commission, and Chairperson of the Foreign Affairs Council, while, at the same time, setting up and managing a new diplomatic service.

Whether the "new normal" for the institutional dimension of EU external energy policy therefore means that the Commission will hold on to the foreign security aspects of energy for the future as well is uncertain. The 7 September 2011 Communication should certainly not be read purely negatively. On

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[103] Joint Press Statement, The EU-US Energy Council, Brussels, 28 November 2011, DOC 17814/11.

the one hand, it gives three hints of developments which may encompass greater inter-institutional cooperation and coordination. On the other hand, the Communication is not particularly imbued with enthusiasm, and is too muffled and hesitant to attain the coherent and effective EU external energy policy the Union is pursuing. I shall discuss these three points in turn in the following sub-section.

4.4.4 Light at the end of the tunnel: prospects for institutional synergy

At a conference on EU external energy policy organized by the EPP Group in November 2011, Daniel Guyader, Head of Division for Global Issues at the EEAS, reported that "*Energy is an important aspect in EU relations with many third countries. The High Representative is associated with the Commission's work and the recent Communication on the external dimension of energy policy.*"[104] While this statement reflects the position of the High Representative as required by Article 18.4 TEU ('associated'), there is little tangible evidence in the September 2011 Communication to support it. In that document, there are only two references to the High Representative; one at the very end of the document ('Conclusions'), and one halfway through, under the heading 'Market integration with neighbouring states'. The first sentence under the latter heading then reads: *"The Commission and the High Representative of the Union for Foreign Affairs and Security Policy are committed to stepping up energy cooperation to improve market integration and energy security with European Neighbourhood Policy partners."*[105] In a footnote to that sentence there is a reference to the Communication of May 2011 'A new response to a changing neighbourhood', which sought to revitalize the European Neighbourhood Policy (ENP) in the wake of the Arab Spring. Due to the ENP being an umbrella policy, this May 2011 Communication was issued jointly by the High Representative and the Commission, but this cannot be viewed to mean that there were concrete plans for Commission-EEAS joint work in the field of external energy policy. A closer look at this joint Communication shows that it contains one paragraph on energy, with, most notably, the novel idea of extending the Energy Community Treaty to

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[104] See, for brief transcripts of the speeches at that conference, European Parliament EPP Group, *Building European Energy Diplomacy: External Dimension of Energy Security for Europe*, EPP group public hearing, 10 November 2011, at 17.

[105] See note 47, at 6.

Southern neighbours.[106] However, that extension is an entirely Commission-driven process, and thus we must conclude that the first reference to the High Representative in the September 2011 Communication on EU external energy policy is rather wanting in substance.

Second, an interesting proposal in the September 2011 Communication can be found at the very end of that document, under the heading 'Improving coordination among Member States'. Here the Commission makes the following proposal:

> *A more coherent approach by the EU and Member States is already bringing benefits in multilateral energy organisations. However, this could be reinforced by improved coordination between external strategies of Member States. For this purpose, the Commission will establish a* ***Strategic Group for International Energy Cooperation****, composed of representatives of Member States and* ***relevant EU services****, supported by regular joint reviews of EU cooperation with third countries on a country, or region, basis.* (emphasis added)[107]

I shall return to EU-Member State coordination further in this article, but it is certainly a laudable proposal that a new format be created to ensure regular meetings and exchanges on EU external energy policy. However, the Communication does not explain which are the '*relevant services*' to be included in the Strategic Group; evidently the EU diplomatic service should be the foremost candidate. The purpose of this Strategic Group will be to coordinate energy initiatives of the EU and the Member States in multilateral fora, although it is uncertain whether the mandate of this group might be broader and encompass EU and Member State energy initiatives more generally.[108] The latter would be the more desirable option, but in any case the Commission rather explicitly grafts the mission of this group onto Article 4.3 TEU. The sentences which follow the paragraph quoted above read as follows: *"Within key international fora, the EU and its Member States must as a rule speak with one voice. In such cases, the principle of sincere cooperation, including*

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[106] Joint Communication of the Commission and the High Representative, *A New Response to a Changing Neighbourhood,* Brussels 25 May 2011, COM (2011) 303 at 10.

[107] See note 47, at 17.

[108] *Ibid*.

the duty to ensure unity in the external representation of the Union shall fully apply."[109] It is certainly legitimate for the Commission to graft the purpose for a strategic coordination group for international energy relations onto this legal foundation, though with one caveat: the same duty of cooperation applies equally *between the institutions* (Article 13.2 TEU) and the Communication makes no mention of that. While the EEAS is not actually one of the seven EU institutions, Article 3 of the Council Decision establishing the EEAS imposes a strong and reciprocal duty of cooperation between the Commission and the EEAS.[110] Thus, the legal obligation invoked by the Commission, which indubitably justifies the setting up of the 'Strategic Group' of representatives of the EU and the Member States, equally implies that the EEAS should have a strong role in this new format – and the Commission ought to apply the duty of cooperation in all aspects of its institutional relationships. This is all the more true in the light of the fact that it has not been made clear whether or how this proposal builds on the EU Network of Energy Security Correspondents (NESCO). This network was launched on 10 May 2007 by former Commissioner for RELEX Ferrero-Waldner and former Energy Commissioner Piebalgs. It was established following the European Council of December 2006 which endorsed *"the setting up of a network of energy security correspondents as an important tool for collecting and processing existing geopolitical and energy related information and to provide an early warning tool to support the Union's overall strategy with the aim of ensuring the security of energy supply"*.[111] Pre-Lisbon, the network was composed of representatives of the Ministries of Foreign Affairs and Energy from the EU Member States, the European Commission and the European Council. *"Their continued monitoring and exchange of information was facilitated through a dedicated web portal with controlled access guaranteeing secure communication. The Commission coordinated input from 130 Delegations, the DG External Relations (RELEX) Crisis Room as well as Commission's advisory bodies to complement the input from members of the network."*[112] Given that DG RELEX has been absorbed by the EEAS, and the Commission Delegations have become EU Delegations of the EEAS, a connection

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109 *Ibid*.

110 B. Van Vooren, see note 76.

111 Description available at: http://eeas.europa.eu/energy/network_en.htm [Last accessed 12 September 2012]

112 *Ibid*.

between the newly-proposed Strategic Group and a revamped NESCO, with an integral role for the diplomatic service, is fairly self-evident. What is more, later in this report we see that the new Council Decision of 4 October 2012 sets up a coordination structure between the Commission and the Member States as regards the relationship to Union law and EU security of supply of the Member States' intergovernmental agreements. It is imperative that synergies be established between these various coordinating entities, or that they be merged where possible. The first meeting of the Strategic Group took place on 24 April 2012 in Brussels, at the level of Director Generals.[113] The substance of the meeting was devoted to a 'stocktaking' of actions undertaken *by the Commission* as a follow-up to the 2011 Communication, a presentation of the EU database on energy projects in third countries, and 'an overview' of EU-China cooperation. The 'strategic' aspect of the group is likely to have to develop further over time.

A final element of interest in the September 2011 Communication can be found in its concluding paragraphs. Here the document proposes *"a number of strategic actions and objectives, in line with European Union interests"*. A few final sentences are worth quoting, for they give us one final glimpse of potential inter-institutional coordination, as well as the potential impact of this on coherence between energy and other external policy areas:

> *These [proposed strategic actions] must be fully coordinated with all Member States, and also be consistent* ***and wherever possible mutually reinforcing with other EU policies such as external relations, trade, development, enlargement, competition, research, innovation, environment and climate action.*** *Energy partnerships should seek complementarity and linkages that are mutually beneficial for energy policy and the broader relationship between the Union and relevant partner countries. Such comprehensive approach would ensure that efforts to improve security and sustainability of the EU energy supply are consistent with the development of political and economic cooperation that is based on, and wherever possible enhances, democratic values and respect of human rights****. These priorities should likewise be reflected in the work of the High Representative and the EEAS,***

[113] General Secretariat of the Council, see note 86, at 5.

> ***giving EU Delegations in strategic partner countries an active role in their implementation.*** *Implementing these proposals will not only help to achieve EU energy policy objectives. It can also contribute to achieving greater security, stability and prosperity across the globe. The Commission invites the European Parliament and the Council to endorse the proposed approach.* ***It also looks forward to continuing the dialogue with all stakeholders to make the ambition of an EU external energy policy a reality.*** (emphasis added)

Some passages in this extract have been highlighted because it is important to 'read between the lines'. First, this final paragraph is the only instance in the Communication where the European External Action Service is explicitly mentioned, and is the second mention of the High Representative. Since we know that the Commission is in the driving seat for EU external energy policy, the use of the words *"these priorities should be reflected in…"*, shows that the role for the HR and the EEAS is 'on the receiving end' of the external energy policy priorities set out by the Commission in the September 2011 Communication. This is also clear from the role given to EU Delegations in strategic countries – whose role is to 'implement' EU actions. This passive approach to the involvement of the EEAS and its network of 140 Delegations around the globe is rather unfortunate, and EU external energy policy could learn lessons from the EU's new proposals in the sphere of human rights. In this area, the European Commission and the High Representative adopted a Joint Communication on 12 December 2011 entitled 'Human Rights and Democracy at the Heart of EU External Action – Towards a More Effective Approach'. This document aims to broaden, deepen and streamline human rights throughout all EU external action in order to make a real difference.[114] Though drafting on this strategy was initially slow, given the initial growing pains of the diplomatic service, the EEAS with, among others, the Commission's DG JUST coordinated work on it. Importantly, *"the methodology is based on a thorough, inductive and bottom-up approach: all 140 EU Delegations ... have been tasked to analyse – in cooperation with the Member States' embassies – the human rights situation in their respective*

[114] See note 89.

countries..."[115] The point here is rather self-evident: though not entirely identical to the horizontal nature of human rights, EU external energy policy could also benefit from such a thoroughly integrated approach to policy-making, so that the EU Delegations are actively involved in the policy work of drawing up strategies in Brussels, rather than merely being tasked with being (part of) their implementation.

The first highlighted sentence in the above quotation brings us to the next section of this report. The 2011 Communication rightly states that EU energy policy must be mutually reinforcing with other EU policies. Here too the formulation is rather interesting. The passage mentions trade, development, enlargement and competition policy, but makes no mention of the Common Foreign and Security Policy. Rather, it says that EU external energy policy should be consistent with 'external relations', as a category separate from trade, development, etc. In the light of the pre-Lisbon debates on the relationship between CFSP (energy diplomacy) and energy (externalization of the internal market), this omission is indeed no coincidence. In sum, the Communication remains vague on whether or not such an interconnection exists, and if so, how it could be implemented. It is this to which we now turn in the next section.

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[115] S. Blockmans, *The EEAS one year on: first signs of strengths and weaknesses* (2012) Centre for the Law of EU External Relations, CLEER Working Papers 2012/2, at 25.

5 Substantive dimension of EU external energy policy: new synergies

5.1 The connection between pre- and post-Lisbon institutional and substantive challenges

The previous sections have indicated that the intra-institutional divide also represents a substantive divide between the rule-based approach of EU energy policy and EU energy diplomacy. At least, such was the case in the pre-Lisbon era, with former SG/HR Solana working hard to cross that divide. The fact that this divide has become stronger from an institutional perspective is shown by the absence of the High Representative from the Joint Declaration with Azerbaijan on the Southern Corridor, as well as from the MoUs and Joint Declarations on energy security with Uzbekistan, China, and India. Specifically in relation to the trilateral agreement with Azerbaijan and Turkmenistan, we have seen that security aspects are surely present: there are conflicting interests of EU and Russia in this area, as well as the frozen conflict between Armenia and Azerbaijan which, should it flare up again, would endanger this project. The question this section will thus briefly highlight is whether the pre-Lisbon problem of EU external energy policy, the absence of agreement on a strategic approach to complement the externalization of the internal market, has been tackled in the post-Lisbon setting.

We have already seen that the EEAS/HR is absent from the September 2011 Communication. It does not really therefore matter whether the absence of energy relations in the work of the High Representative is due to a personal lack of interest in these matters or to a proactive Commission seeking to ring-fence its powers in this area. The fact of the matter is that this institutional omission reflects the unjustifiable separation which existed pre-Lisbon between foreign and security policy on the one hand and EU energy external policy, as an external dimension of the internal market, on the other. What signs are there that the post-Lisbon policy processes seek to meet this challenge? When examining the September 2011 Communication and the November 2011 Council Conclusions that endorsed them, we can see an important effort to 'strategize' more in this policy area and to connect energy diplomacy to the rule-based approach previously outlined in section III of this report. In this sense, these policy documents clearly indicate a readiness on the part of the Union to integrate strategic and diplomatic approaches with

rule- and market-based ones. While substantively more strategic thinking is being done, the previous institutional examination shows that the strategic/diplomatic aspects will not be carried out by the EEAS in Brussels under the authority of the HR/VP, but by the officials at DG ENER working with the EEAS directly through the EU Delegations. Legally, this kind of direct connection is permitted by the Council Decision establishing the EEAS, in Article 4.3, which states that *"In areas where the Commission exercises the powers conferred upon it by the Treaties, the Commission may, in accordance with Article 221(2) TFEU, also issue instructions to delegations, which shall be executed under the overall responsibility of the Head of Delegation"*. The result is thus a separation between the EEAS and the Commission 'at headquarters' in Brussels, which is not desirable, but not necessarily a separation in the field at the level of day-to-day diplomacy and actual policy substance, which is arguably a rather significant silver lining to the preceding findings in the institutional landscape.

The next parts of this section will not dwell further on these institutional questions, but will look more closely at the kind of strategic thinking done by the EU in strengthening EU energy policy itself.

5.2 EU Rule-based energy policy and energy diplomacy: new balance between competing priorities

In the avalanche of policy documents described at the outset of this report, we can observe a rather broad and perhaps even 'generic' externalization of the three pillars of EU external policy. This meant that the EU simply tried to replicate security-sustainability-competitiveness with international partners, without clear choices on how different objectives should be prioritized, without clear choices on which instruments would be used to pursue those objectives, and with the externalization of the internal market very much a one-size-fits-all solution. It is then notable and laudable that the documents of autumn 2011 reflect *a genuine attempt on the part of the Commission services to think in more strategic terms for EU initiatives on energy cooperation with third countries or organisations*. From now on, EU external energy cooperation will explicitly be adapted for the type of relationship to which it applies: the 1) market integration relationship (neighbours and developing countries, categories 1 and 4 in the table below); 2) the consumer/supplier relationship (category 2 in the table below); or 3) the consumer/consumer relationship (category 3 in the table below).

This approach was accepted in the Council Conclusions of 24 November 2011, and is reflected in the following table which appears in the Annex to those Conclusions:[116]

	With our neighbors / market integration partners	**With our key energy suppliers and transit countries**	**With key energy players worldwide**	**With developing countries**
Scope	All issues covered by EU energy policy	Priority to: - Security of supply/demand - investment promotion, stability and security - trade and investments cooperation - promotion of sustainable development policies and common energy standards	Priority to: - Security of global energy supply chain - common actions towards enhancing investment promotion, stability and security - promotion of sustainable development policies and common energy standards - R&D cooperation	Priority to: - energy market reforms - promotion of sustainable development policies and common energy standards
Instruments	Energy Community treaty	Strategic energy dialogues	Strategic energy dialogues	Ad hoc energy cooperation
	Instruments under the ENP; crisis response and prevention mechanisms;		Instruments under EU development policy Where appropriate crisis and response instruments	
	Partnership and cooperation agreements covering inter alia energy Energy Charter Treaty Trade Agreements Union for the Mediterranean			

In abstract terms, political scientists define a strategy as something which *"defines actual policy objectives, decides on priorities to achieve those goals,*

[116] See note 48.

as well as describing the means that can be used, and under what conditions, to fulfil that specific purpose."[117] Concretely, this should entail no 'blind reliance' on the rule-based approach to externalizing the internal market, but recourse to alternative – whether diplomatic or other – instruments where necessary. In the opinion of this author, the Council Conclusions of 24 November 2011 can therefore be termed an actual strategy, a commendable feat by the European Union.

Starting with the objectives, these have been well-known since 2006. As previously stated in this report, they are the three substantive dimensions which have now been codified in Article 194 TFEU. It is never a problem for the Union to have objectives in EU external relations – one commentator has observed that *"if there was an international award for 'enthusiasm', the EU would stand good chances for winning it"*.[118] Indeed, the problem is usually not so much that the Union has good intentions, but rather the prioritization between these intentions, the recognition of trade-offs, and the effective deployment of the instruments at hand for their implementation. It is exactly that which the above table wishes to achieve.

In the first column, on relations with the neighbours and market integration partners, we find the broadest coverage of the objectives: "all issues covered by EU energy policy", which are to be implemented through the Energy Community Treaty. It is the furthest one can go in EU external energy relations, as it effectively 'externalizes the internal' by rendering the countries in the neighbourhood the same as countries in the EU, through the application of the same labour standards, standards for competition as regards transit and energy deliveries, and so on. The Council Conclusions then make a number of explicit choices on how the functioning of its organisational structures should be improved to ensure better implementation of the EU *acquis*,[119] which is indeed necessary.

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[117] A. Toje, *The 2003 European Union Security Strategy: A Critical Appraisal*, (2005) European Foreign Affairs Review 10, 117 – 133, at 121.

[118] J. Larik, *Shaping the international order as a Union objective and the dynamic internationalisation of constitutional law,* (2011) Centre for the Law of EU External Relations, CLEER Working Papers 2011/5, at 7.

[119] See note 48, at 4.

What is perhaps problematic in strategic terms is the small disclaimer to the three categories mentioned above, namely the statement that *"It is duly acknowledged that a third country may belong to more than one of the above four categories or that its status may change across time"*.[120] This implies that even though the Council Conclusions express choices, the Council is not always willing to follow the consequences of these choices to the fullest extent, which rather negates the idea of prioritization. An example concerns Turkey: Turkey is an important transit country for gas supplies to the Union, thus falling under the second category; however, it is also an observer to the Energy Community Treaty, with negotiations for membership ongoing. The consequence is then that the 'prioritization' in the second row of the table no longer really matters. As soon as a country falls within the first category, 'all issues covered by EU energy policy' apply. Related to that, we must question whether the second, third and fourth columns really set strategic priorities. In particular, the second and third columns effectively say that the following are the priorities in EU relations with key energy suppliers, transit countries, and key energy players worldwide: demand/supply security; investment promotion, trade and investment cooperation; and sustainable development policies. In effect this means that the EU will pursue the three dimensions of EU energy policy, and it is not fully clear how that is different from 'all issues covered by EU energy policy' in the first column.

The case of Russia is the clearest example of the effort to think strategically in the short and long term, and to connect these windows of opportunity to strategic and market-based policy approaches. This country clearly falls under category 2, as a 'key energy supplier', where the immediate priorities of the Union are stated to be security of supply and demand, stability and security as regards investment promotion and cooperation, and the promotion of sustainable development policies. The last objective, the environmental one, is pursued by, among other methods, stopping the problem of gas flaring in Russia. This is a problem through which up to 25% of the gas is lost in transit, with a deeply detrimental impact on climate change, as methane is a greenhouse gas with a much greater impact than CO_2. However, the more self-serving reason is equally evident: if less gas gets lost in transit, more arrives in the Union, thereby benefiting supply security. Thus, there is a clear strategic choice to focus on supply security, and this is also expressed

[120] See note 48, at 9.

by pointing to the need for investment promotion: the EU wants Russia/Gazprom to invest in the development of new sources of hydrocarbons, to invest in modernization of the transit infrastructure to the Union, and to allow EU energy champions to join in with such investments without the fear of being pushed out for purely political reasons. As regards instruments, the EU then proposes that this objective will be fulfilled through strategic energy dialogues, as well as through the new partnership and cooperation agreement which is still being negotiated (and which would introduce the rule of law into the EU-Russia energy relationship).[121] Thus, the Union is clearly pursuing its own self-interest in relation to Russia, though it is imperative that the strategic energy dialogue be conducted by the Union as a whole, and not by heads of state on behalf of individual Member States. In section VI we shall see that this is currently still rather problematic.

Focusing on the long-term relationship with Russia, the EU has (quite wrongly[122]) not given up hope that one day that country might see the error of its ways and turn to the rule- and market-based approach. In the Council Conclusions, one sees this quite clearly in the portion on the Energy Charter Treaty, which says that the EU shall:

> *promot[e] the benefit of joining the ECT as full member, in EU energy dialogues with those third countries that have not yet signed or ratified the Treaty and whose accession to the ECT would have added-value for the Energy Charter process, in particular key energy players, so that the Treaty might become a global instrument, recognised as the basis for international energy regulation in its main fields of competence.*

Quite evidently, this passage refers to the Russian Federation. This does not have to be problematic, because there is nothing wrong with the Union not wishing to give up its long-term goal of a multilateral order based on the rule of law – in line with Article 21 TEU. In that sense, the EU does indeed have a strategy for its external energy relations, and is doing exactly as it is mandated

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121 See note 42, at 9.

122 In the same vein see: Aaron Matta, *Understanding and Assessing the EU-Russia Legal Approximation Process: Case Study of Competition Law* (2012) European University Institute, Doctoral Thesis, Chapter 7.

by Article 3.5 TFEU, which says *"In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens"*. Thus, while in the long term the multilateral legal system exemplified by the Energy Charter may be desirable, it is necessary for the Union to think strategically in the short and medium term. It is exactly that which it has now attempted to do in the policy exercise of autumn 2011. The proof of the pudding is in the eating, and this perhaps benevolent view of the new strategic vision must of course be tempered by the preceding findings about the institutions, and the fact that Member States do not always loyally pursue the 'EU common interest' as agreed in the Council. Indeed, all actors must get together as one, and agree on all the different aspects of the strategy if it is to be implemented. Furthermore, the above table is in itself not sufficient to capture all the subtleties of EU energy policy in relation to each country or geographic region. Therefore, it is desirable that a road map be drawn up whereby short-, medium- and long-term objectives, including targets and a specific timeframe for their implementation, are formulated more specifically for each region.[123] Indeed, it is recommended that the EEAS, which is organized in a geographic fashion, and DG ENER of the Commission, come together to draft a Joint Communication which does exactly that.

[123] European Parliament Resolution, *Engaging in energy policy cooperation with partners beyond our borders: A strategic approach to secure, sustainable and competitive energy supply*, 12 June 2012, DOC 2012/2029(INI).

6 The EU-Member State relationship: loyalty towards the "Union" interest

6.1 The post-Lisbon perspective to obligations governing the EU-Member State relationship

In the Energy 2020 Strategy, which was published in 2010, the Commission said that it would propose mechanisms to ensure that the Member States act for the benefit of EU supply security in their bilateral relations, and that the agreements which they conclude are in line with the internal market rules. In response to the request for more formalized solidarity mechanisms made in the 2020 Energy Strategy, the European Council of 4 February 2011 made the following statement:

> *The Member States are invited to inform from 1 January 2012 the Commission on all their new and existing bilateral energy agreements with third countries; the Commission will make this information available to all other Member states in an appropriate form, having regard to the need for protection of commercially sensitive information.*[124]

The Energy Council of 28 February 2011 reflected the European Council statement in its conclusions by saying that:

> *While pursuing on-going dialogues, partnerships and other initiatives with key partners and regions and keeping in line with respective competences of Member States and the Union, the transparency, consistency, coherence and credibility of external action in energy matters should be improved through … (iii) Improved and timely exchange of information between the Commission and Member States including Member States information to Commission on their new and existing bilateral energy agreements with third countries.*[125]

Previous experience from other policy areas shows that such an open-ended invitation without a formalized legal structure does not suffice to ensure

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[124] See note 46, at 4.

[125] See note 45, at 6.

that the common EU interest prevails over national policy priorities.[126] The background to incorporating this 'invitation' in the European Council Conclusions supports the idea that this lesson has been learned: the Hungarian Presidency had sought a far stronger commitment from leaders to inform each other about energy agreements, but this met with resistance from Italy and the United Kingdom, resulting in the open-ended 'invitation' to do so.[127] With this in mind, on 7 September 2011, the European Commission published, alongside its Communication, its proposal for a 'Decision of the European Parliament and of the Council setting up an information exchange mechanism with regard to intergovernmental agreements between Member States and third countries in the field of energy'[128] (hereafter 'the Energy Decision'). This proposal is intended to transform the European Council invitation into a mechanism with detailed procedures for the exchange of information and the coordination at an EU level of intergovernmental agreements which *"are likely to have an impact on the operation or the functioning of the internal market for energy or on the security of energy supply in the Union"*.[129] Between March and May 2012, three informal trialogues with Parliament took place, with a consolidated text which met the approval of the Council and Parliament being agreed on 6 June 2012. A positive vote in Parliament took place on 13 September 2012, and the Council approved the Decision on 4 October 2012.[130]

Instruments such as the Energy Decision are a relative novelty in EU external relations law. Two other such mechanisms are currently in place, although

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126 Regulation of the European Parliament and of the Council (EC) 847/2004 On the negotiation and implementation of air service agreements between Member States and third countries, *[2004] OJ L195/3*. For a thorough discussion of this regulation, see B. Van Vooren, note 2, at Chapter 3. (Referring also to: (Council Decision 80/50/EEC of 20 December 1979 setting up a consultation procedure on relations between Member States and third countries in the field of air transport and on action relating to such matters within international organizations, *OJ L 010, 24/01/1980, 0024-0025.)*

127 European Voice, *Safety-first approach to European Energy Policy*, 23-29 June 2011.

128 Commission, *Proposal for a Decision of the European Parliament and of the Council setting up an information exchange mechanism with regard to intergovernmental agreements between Member States and third countries in the field of energy,* Brussels, 7 September 2011, COM (2011) 540 final.

129 *Ibid*., at 1.

130 Council of the European Union, *The Council adopts new rules on the exchange of information on energy agreements with third countries*, 4 October 2012, 14399/12.

they are not Decisions but Regulations: Regulation 847/2004 in the field of external aviation,[131] and Regulation 664/2009 on the external dimension of matrimonial matters.[132] There is also a proposal pending, in the field of investment, for a Regulation on transitional arrangements for bilateral investment treaties between Member States and third countries.[133] These are instruments which organize the vertical EU-Member State relationship, and are formal expressions of the duty of cooperation embedded in Article 4.3 TEU. They include binding obligations to provide information, and, as is the case for Member State civil aviation agreements, may include *ex ante* or *ex post* authorisation to conclude binding instruments in policy areas where the EU and Member States share competences.[134] Often the lines between information, consultation and authorisation can be rather thin, making these instruments politically contentious and their language the result of complex negotiations. This was no different in the energy field.

In the following subsection I first briefly explain the nature of Member State international agreements in the sphere of energy, since it is these that are targeted by the Commission in the proposed Energy Decision. This will allow for a better understanding and an assessment of whether the Commission will be able to command Member State loyalty in the pursuit of an effective and coherent EU external energy policy. Thereafter, we evaluate the final text of the information mechanism in light of 'the Union interest' in energy policy, from both a legal and a policy perspective.

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131 See note 126.

132 Council Regulation (EC) No 664/2009 of 7 July 2009 Establishing a procedure for the negotiation and conclusion of agreements between Member States and third countries concerning jurisdiction, recognition and enforcement of judgments and decisions in matrimonial matters, matters of parental responsibility and matters relating to maintenance obligations, and the law applicable to matters relating to maintenance obligations, *OJ L200/46.*

133 Commission, *Proposal for a Regulation of the European Parliament and of the Council establishing transitional arrangements for bilateral investment agreements between Member States and third countries*, Brussels, 7 July 2010, COM 2010 (344) final.

134 The EU is exclusively competent for some matters through the *ERTA* doctrine, yet the Member States have retained significant powers in the same field, thus requiring close cooperation so as to attain EU treaty objectives. In the case of investment, the Regulation concerns a transitional regime now that investment policy is included within the scope of Article 207 TFEU, an exclusive EU competence.

6.2 What kinds of agreements are targeted by the energy decision?

In the field of energy, intergovernmental agreements between Member States and third countries can have as their object both gas and oil, though the Commission estimates that there are more agreements on gas.[135] This because gas trade is more infrastructure-dependent than oil trade, although oil is sometimes also transported through pipelines (rather than in oil tankers, which make the oil market more liquid and global). In both cases, the international agreements can have as their subject the construction of new infrastructure, such as a new gas pipeline to be constructed between the parties, or they can relate to the actual supply and delivery of the relevant hydrocarbon. Often there is then an intimate relationship with the energy companies based in the Member State, with the intergovernmental agreement providing (long-term) political and regulatory backing to the commercial relationship of the energy companies (national champions) involved. All these agreements have the potential of being at odds with EU internal market laws.

Gas deliveries are commonly agreed as take-or-pay contracts[136] between energy giants and/or the governments of the countries in which those giants are based. The contracts generally have a duration of 20 to 25 years to counterbalance the substantial investment required to implement them, and they provide a guaranteed income to the producer country/company. Additionally, these agreements have persistently contained clauses which prohibit European companies from reselling the gas outside their home country: 'destination clauses'. These clauses protect gas deliveries from having to compete with themselves, and guarantee the effectiveness of bilateral price negotiations between the third country and the various EU Member States. Such a carving-up of the market is obviously a concern from the perspective of EU law: on the one hand, territorial restrictions are clearly prohibited by Article 101 TFEU, and on the other hand the decades-long terms of the agreements, with preferential national pricing, are equally incompatible with an EU-wide liberalised market. Taking the example of Russia, this country has fiercely defended such take-or-pay contracts with their destination clauses. From

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135 See note 47, at 2.

136 These are contracts whereby the contracted supplies have to be paid for ('pay') even if they have not been used ('take') because demand in the consumer country has been lower than agreed in the agreement.

2000 onwards the Commission has threatened legal action against European companies,[137] and while it was unable to have any impact on the length of the Member States' agreements with third countries, between 2000 and 2004 destination clauses were being dismantled and removed from bilateral agreements with Russia.[138]

Infrastructure agreements can also be problematic, and this is the example which the Commissioner regularly mentions in press conferences.[139] When negotiating these, Member States are regularly under pressure to accept clauses which violate the EU energy *acquis*, notably clauses that reserve the right of a particular company to contract the full capacity or part of the capacity of the pipeline which is the subject of the intergovernmental agreement. For example, in the case of the South Stream project several EU Member States have concluded bilateral agreements with Russia which, if they come into force upon completion of the pipeline, will contravene EU law.[140] This is because agreements on pipelines should allow non-discriminatory access to booking capacity for transit, non-discriminatory tariffs and bi-directional flows, in line with the regulations on gas security.

The key point to take home is therefore that these bilateral agreements are not always legally in line with the internal market rules, and also that, in particular, they may be hampering the policy objectives of Article 194 TFEU on EU supply security: secretive, individual deals between Member States and third countries make the EU very much more susceptible to geostrategic divide-and-rule approaches by third countries. The case of the Nord Stream is a recent well-known example. Economically, questions were asked about whether the project, which runs through the Baltic Sea, is the most cost-effective, safe and environmentally-friendly route for gas deliveries from

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137 P. Aalto, *The EU-Russian Energy Dialogue* (2008) Ashgate, at 68.

138 See the list of cases provided by the Commission in MEMO/03/159, *Application of competition rules to the gas sector*, Brussels 29 July 2003. Also: H. Nyssens, C. Cultrera & D. Schnichels, *The territorial restrictions case in the gas sector: a state of play,* DG COMP unit E-3 available from: http://ec.europa.eu/competition/publications/cpn/2004_1_48.pdf [Last accessed 25 September 2012].

139 G. Oettinger, *Speech at the South Stream event*, 25 May 2011, SPEECH/11/382.

140 *Ibid.*

Russia to Germany.[141] However, the project went ahead, for the route avoids passing through Belarus and Poland in the North, and Ukraine in the South. From an EU perspective, Poland was certainly displeased at what its foreign minister in 2010 termed the 'Molotov-Ribbentrop pipeline'.[142]

Hence, a single voice in the EU external energy policy is not possible in the current state of affairs. In the Energy 2020 Strategy the Commission stated that it would propose instruments to avoid these negative effects, with legally binding instruments forcing Member States to act for the benefit of the EU as a whole, as well aligning intergovernmental agreements with internal market rules.

6.3 Evaluation of the final compromise text of the decision

6.3.1 The legal and political objective of the instrument: a few queries

Article 4.3 TEU requires that the *"Union and the Member State shall, in full mutual respect, assist each other in carrying out the tasks which flow from the Treaties"*. As a formal instrument implementing that obligation of primary law, this instrument must be unequivocal on what are considered to be the 'tasks which flow from the Treaties', and what obligations the duty of cooperation in pursuit of those objectives concretely entails. In other words, what is the 'EU interest' the Decision hopes to achieve, and how will it do this?

There are two distinct challenges of the EU-Member State relationship which could be addressed by the proposed Decision. Namely, the EU interest can be defined in policy terms or in legal terms, and these both pertain to the three central obstacles to EU energy policy identified above: substantive, institutional and vertical challenges. First, there is the legal interest, which implies ensuring that the bilateral agreements of Member States do not violate the principles which are essential to the proper functioning of the

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[141] Euractiv, Nord Stream a Waste of Money says Poland, 11 January 2010. Available from: http://www.euractiv.com/energy/nord-stream-waste-money-poland/article-188727 (last accessed 30 September 2012).

[142] *Ibid*.

internal market.[143] Second, there is the political challenge that Member States' agreements substantively take into account the 'Union interest' to ensure the security of supply for all 27 Member States as one, and work with the institutions towards that objective.[144] In short, there are two objectives this instrument could pursue; one is legal, the other political. The kind of questions which then arise in the light of the key obstacles to EU energy policy identified above, are the following:

- In political and policy terms, through what mechanism will the instrument help to ensure that the interests of the Member States are aligned with, or at least support, the interest of the Union as a whole? Is it purely about information-pooling, or is there ad hoc, or even permanent and proactive, coordination and planning? Will subsidiarity assessments be carried out using the mechanism set up in the Decision, and could these possibly lead to Commission proposals for EU agreements would be preferred over Member State agreements? Would that be the objective of this instrument, or is it excluded? Alongside that vertical dimension, is the instrument expected to have a positive impact on the synergy between the market-based, security of supply and environmental sustainability pillars of EU energy policy, and, if so, how? Institutionally, given that the mechanism is 'run' by the Commission, how does it relate to the functions of the EEAS and the Council General secretariat in EU energy policy? Is the Commission merely an administrator, with the EEAS in particular being involved in coordination on equal terms with the Member States and the Commission itself?

- In legal terms, how does the instrument safeguard the legal interest of the Union in ensuring Member State compliance with EU energy legislation as well as primary law obligations (internal market and competition laws)? Which agreements are covered? Is it only intergovernmental agreements or is it also commercial agreements, and why one or the other? How is commercially sensitive information dealt with? Are the obligations imposed on the Member States binding, or just optional? What kind of obligations of action or inaction does the instrument require? Where the Commission provides assistance in negotiations to ensure Member State

[143] See note 128, at 18.

[144] See note 45, at 17.

compliance, what form will this assistance take? What kind of legal or political enforcement is foreseen, and, notably, who is the final arbiter of compliance? How does this affect legal enforcement before the Court of Justice? Will Member State agreements be replaced by EU agreements, or will 'EU standard clauses' be inserted into Member State agreements, and, if so, by whom? Will we see mixed EU-Member State energy agreements emerge from this instrument?

In what follows we examine the legal and policy questions in an intertwined fashion, by going step-by-step through the provisions of the Decision. A brief overview of the structure of the instrument is appropriate for a good understanding of the discussion that follows:

- A lengthy preamble with a number of important qualifications and clarifications.
- Article1 defining the subject matter and scope of the mechanism.
- Article 2 containing a definition of 'intergovernmental agreements'.
- Article 3 on exchange of information between the Commission and the Member States; and Article 3a on confidentiality in this regard.
- Article 4 concerning 'assistance from the Commission' and follows from the previous article.
- Article 5, which was entitled 'Ex-ante compatibility control' in the original Commission version, but which has been renamed 'Compatibility Assessment' in the final compromise text.
- Article 6 on 'Coordination with the Member States'.
- Article 7 on confidentiality and Article 8 planning for a review of the mechanism four years after its entry into force.

6.3.2 Choice of legal instrument, scope and definition

Prior to discussing the obligations actually contained in the proposed instrument, we must reflect briefly on the choice of legal instrument. Indeed, the Commission rightly states that voluntary measures have so far not proved to be sufficient to ensure that Member State bilateral agreements are legal, so that a mandatory exchange of information is therefore the only option.[145] It says that a Decision rather than a Regulation will suffice to meet

[145] See note 128, at 3.

that end: "*although [both] appear possible, a Decision is deemed more appropriate as the legal instrument will not have direct effect on individuals but is exclusively addressed to Member States*".[146] That reasoning is rather ill-explained – if it is explained at all – in the proposal, and its substance is questionable. Given the important political, economic, and sometimes legal interconnection between the commercial interests of Member States' energy giants and those of companies in third countries, and the conclusion of intergovernmental agreements with third countries by Member States, it has not been clearly explained why the direct effect would be avoided. It is questionable to say that the Decision, by only targeting Member States, would have no legal effect on individuals' legal or commercial positions. The seventh paragraph of the preamble to the Decision states that: *"This Decision does not create obligations as regards agreements between commercial entities... Furthermore, as commercial agreements could contain regulatory provisions, commercial operators negotiating commercial agreements with operators from third countries should have the possibility to seek guidance from the Commission in order to avoid potential conflicts with Union Law."*[147] Commercial actors can thus be legally affected by the remit of this Decision in at least two ways. First, if the Commission does indeed decide that a proposed intergovernmental agreement cannot (or should not – see below) be ratified because it violates EU law, and if this agreement directly relates to agreements between commercial actors, what would be the effect on the legal validity of the non-governmental agreement of the Commission's decision? Could commercial operators argue that their freedom to conduct a business and their right to property is affected (Articles 16 and 17 Charter of Fundamental Rights of the EU[148])? Second, if in consultations with the Commission a company seeks guidance on its commercial agreement in order to avoid infringing EU law, what is the legal consequence and effect of such 'guidance' for future litigation? The nature of these agreements means that companies would request guidance which has a bearing on EU competition law and the free movement of goods, and the question then arises of whether this guidance on (in)compatibility with EU law could have the nature of an individually binding Decision on the commercial actor. This may have

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146 See note 128, footnote 8.

147 General Secretariat of the Council, Proposal for a Decision – Approval of the final compromise text, DOC 10456/12, Brussels, 30 May 2012, at 6.

148 *Ibid*., para 7 of the preamble.

a number of legal consequences, and it may imply a standing for 'directly concerned' private entities under Article 267 TFEU. Surely the Commission would phrase its advice carefully and explicitly state that its advice would not prejudice legal proceedings, but at the very least its guidance could have an interpretative effect in future litigation (preliminary references or review of legality procedures). In sum, the absence of relevance for individuals is certainly false, and fails to explain the legal nature of the proposed instrument. A Regulation would have better served the goal of legal certainty in this regard.

6.3.3 The definition of intergovernmental agreements captured by the mechanism

In this sub-section I argue that the way in which the Decision defines the international agreements which fall within its scope leaves two 'escape routes' by which the Member States can avoid the information exchange mechanism: namely, by utilizing non-binding agreements, and by arguing that the agreement does not impact the internal market and/or EU security of supply.

Legally Binding Agreements Only

Article 2.1 of the Decision defines an international agreement as *"any legally binding agreement between one or more Member States and one or more third countries having an impact on the operation or the functioning of the internal market for energy or on the security of energy supply in the Union"*. One may question whether the definition of intergovernmental agreements, which limits them to those with legally binding force, is not too constraining. Previously in this paper we have indicated that it is commonplace to use documents which are not legally binding (memoranda of understanding) to give political backing to future energy relations. Transposing that reality to the national level, the Decision then explicitly states that it will apply solely to intergovernmental agreements made by Member States which have *legally binding force*. The question is thus whether this limitation will create a temptation for Member States to venture further into the soft-law sphere to avoid this EU-level information exchange mechanism. Indeed, as the EU itself has done in its MoUs, a Member State could conclude a very meticulously drafted international agreement, but simply add a final provision saying that "this document does not constitute a legally binding document", and thereby avoid the information obligation. What is more, an

informal gentlemen's agreement between Member State and a third country leadership may sometimes suffice as political backing for commercial entities to continue or set up a business relationship. A recent example – though obviously public and known to the Commission – is the political agreement between Italy, Albania and Greece on the Trans Adriatic Pipeline (TAP).[149] This 'political agreement' paves the way for a formal inter-governmental agreement which will set out the legal framework for the pipeline, and which in turn will be implemented by the participating commercial actors (E.ON, Statoil and Axpo).[150] Under the information exchange mechanism, the political agreement on TAP would not have had to be notified, the related commercial agreements between the aforementioned companies are *a priori* excluded, and only the legally binding agreement would be captured by the regime. Hence, to ensure full effectiveness of the regime, it would have been advisable to drop the reference to legally binding force since that would be more representative of the intricacies of international energy negotiations. Of course, that comes with the caveat that such a wider definition discards the 'veil' that this proposed Decision is merely about legal conformity with the internal market. Indeed, it would render the objective broader and more political in nature: to provide comprehensive information about *all* bilateral deals of the Member States to all participants in EU institutional structures (including other Member States!), to enable decision-making on external energy policy in the common interest of the EU as a whole.[151] With that, the emphasis of the mechanism would lie less on the functioning of the internal market, and more on the security of energy supply.

'Optionally' Organizing the EU-MS duty of cooperation

The duty to inform the Commission arises for Member State agreements which have an impact on the functioning or operation of the internal energy market or on the security of energy supply in the Union. Through the trialogue, an important limitation has been introduced which was not present in the initial Commission Proposal: whether a certain agreement matches the definition in Article 2 of the Energy Decision is initially for the Member State to decide.

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149 Press Release, *Commissioner Oettinger welcomes the signature of the political agreement on TAP*, 28 September 2012, IP/712/1041.

150 See further:
http://www.trans-adriatic-pipeline.com/ [Last accessed 29 September 2012].

151 See note 128, para 14 of the preamble to the proposed decision.

> *The initial assessment as to whether an intergovernmental agreement, or another text to which an intergovernmental agreement refers to [sic] explicitly, has an impact on the internal market for energy or the security of energy supply in the Union should be the responsibility of Member States; in case of doubt, a Member State should consult the Commission. In principle, agreements that are no longer in force or are no longer applied, do not have an impact on the internal market for energy or on the security of energy supply in the Union and are thus not covered by this information exchange mechanism.*[152]

This is mirrored in paragraph 9 of the preamble, which states that more transparency on future agreements will be beneficial for compliance and EU supply security, and that *"therefore, Member States should have* ***the option*** *to inform the commission ..."* (emphasis added)[153] about new negotiations. This kind of limitation has the potential to undermine the whole regime, as it renders the mechanism 'non-automatic' because it gives the Member States initial control over the information that feeds into it. The question is then to what extent this allows for (continued) secrecy on the part of the Member States in certain international negotiations. Arguably it allows very little secrecy, because the definition of which intergovernmental agreements are covered allows little leeway: it is certainly difficult to envisage Member State agreements with third countries which would not, one way or another, 'impact' the internal energy market or EU supply security. However, this depends entirely on the definition of the notion 'impact', and no definition or clarification can be found in the preamble or the substantive provisions of the Energy Decision. For example, as regards impact on the internal market, the most obvious area for this is EU competition law. Article 101.1 TFEU states that *"the following shall be prohibited as incompatible with the internal market: all agreements... which may affect trade between Member States... and which have as their object or effect the prevision restriction or distortion of competition within the internal market..."*. The meaning of the scope and interpretation of this phrase has generated a large body of literature,[154] but,

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[152] See note 147, para 4 of the preamble.

[153] See note 147, para 9 of the preamble.

[154] P. Craig and G. de Búrca, *EU law: text, cases and materials* (2011) Oxford University Press, Chapter 26, entitled 'Article 101'.

even so, the word 'impact' in the Energy Decision is certainly broader: the decision does not say what kind of impact (positive or negative) the agreement should have, and since the impact can relate to any form of EU internal market law, all eventualities (not just competition law but also all pertinent internal market secondary legislation) fall within the scope of the information mechanism. We must add to that the fact that, even if the agreement does not impact the internal market but impacts EU security of supply, then it is subject to the discipline of the Decision. Security of supply is equally broad, and can encompass demand side and supply side security. Arguably, any intergovernmental agreement pertaining to planned new infrastructure from a third country into an EU member state, or a long term agreement on terms for delivery of hydrocarbons into a Member State, would impact 'EU' security of supply.

Thus, if we accept that the notion of 'impact' is rather broad, the safeguard function of this initial assessment is merely a political palliative to ease the pain of Member States 'giving up powers' to the supranational institutions. However, by inserting this preliminary assessment, the Energy Decision creates new uncertainties and opens a clear avenue for litigation before the Court of Justice. Paragraph 2 of the preamble of the Decision paraphrases the text from Article 4.3 TEU, thereby reflecting the fact that the instrument is essentially an expression of the EU-Member State duty of loyal cooperation. Suppose that a Member State decides that certain negotiations will not affect EU security of supply or the internal market, and it goes ahead without consulting and/or notifying the Commission. When word of the agreement gets out (at the moment of ratification or earlier), the Commission asks for information, which the Member State either refuses to give, or, more likely, provides but in a limited fashion. Subsequently, the Member State goes ahead and ratifies the agreement. The Commission has previously been most proactive and successful in having Member States convicted for violations of the duty of cooperation, and situations such as the one described here would be exactly captured by that case law.[155] Thus, this instrument, which seeks to organize the duty of cooperation, might still give rise to litigation if the 'initial assessment' by a Member State is at odds with later assessments by the Commission. Thus, the legal certainty and effectiveness of the

[155] J. Larik and A. D. Casteleiro, *The Duty to Remain Silent: Limitless Loyalty in EU External Relations,* (2011) 36 European Law Review 4, at 524-541.

regime has partly been sacrificed on the altar of continuing Member State sensitivities over the national interest in the face of the common EU interest in transparency, information-sharing and cooperation.

6.3.4 The information exchange mechanism in Article 3

Article 3.1 requires that currently existing intergovernmental agreements of the Member States with third countries are communicated to the Commission within three months of the entry into force of the Decision. The proposed Decision is, in that sense, a broadened version of Article 13 (6) of the Gas Security Regulation.[156] That article requires that intergovernmental agreements which have 'an impact on the development of gas infrastructure and gas supplies' be communicated to the Commission. This Decision is thus broader, and agreements submitted under the Gas Security Regulation are considered to have been submitted for the purposes of this provision. This first paragraph says nothing about the kind of action the Commission will undertake following this communication, but from Article 3.2 we can assume that there will be some kind of check following the initial information to the Commission since this article reads: *"Where following its first assessment, the Commission has doubts as to the compatibility with Union law of agreements submitted to it under paragraph 1, in particular with Union competition law and internal energy market legislation, the Commission shall inform the Member States concerned accordingly within 9 months following the submission of those agreements"*. The scope of this assessment is not defined further in the Decision, and neither are its legal consequences. The quoted passage states that the compatibility check "in particular" will look at competition and internal market rules, which means that beyond a legality assessment, there may also be a political assessment notably focusing on "EU security of supply". The consequences of the Commission informing the Member State of its assessment are then left equally open. In legal terms, would this information take the form of a 'reasoned opinion' under Article 258 TFEU, thereby opening the door to infringement proceedings? Probably not, but at the very least, we must query the role of the information forwarded by the Commission to the Member State in any such proceedings (see also the next section of this report). In political terms, the decision does not clarify

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

whether the information that an agreement is incompatible with security of supply would lead to discussions under Article 7 of the Decision. Specifically, Article 7 (d) states that the Commission shall facilitate coordination among Member States with a view to supporting the development of multilateral intergovernmental agreements involving several Member States or the Union as a whole. In other words, if current intergovernmental agreements are found to violate EU energy policy objectives in legal and/or political terms, will this mechanism be used to trigger their replacement by EU (or mixed EU-Member State) energy agreements with the relevant third countries?

Article 3.3 applies the same the duty of information in relation to negotiations which the Member States wish to open, and to ongoing negotiations. The original proposal is interesting in that it was stricter: it stated that a Member State "shall" notify the Commission "when it intends"[157] to enter into negotiations. The final version has been watered down in a fashion which has the potential to negatively affect the 'comprehensiveness' of the information gathered by the Commission. Namely, it reads that a Member State "may"[158] inform the Commission "before or during" the negotiations, rather than at the moment of its 'intention'. The original version then also stated that such a notification would include "the relevant documentation, and indication of the provisions to be addressed", but this level of specificity has been dropped in favour of a more general duty of information "on the objectives of the negotiations".[159] Thus, the information obligation has been transformed into a possibility, the substance of the notification is limited to what one hopes to achieve but not what one intends to negotiate, and the information no longer needs to arrive before negotiations are opened. When negotiations are ongoing, the Commission shall be kept "regularly informed of the progress of negotiations". The depth of the information that is provided to fulfil that obligation depends of course on the goodwill of the Member State. Interestingly, from the perspective of creating a pool of information and in pursuit of the common interest, a Member State has the right to indicate that the information will remain confidential and shall not be passed on to other Member States.[160] During the negotiations, there is a role

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157 See note 128, at 10.

158 See note 147, at 13.

159 See note 147, at 13.

160 See note 147, (Article 3, para 3 final sentence)

for the Commission, and this role is focused purely on legal compatibility with EU energy policy, but not political compatibility as it was in relation to agreements already in existence. Namely, Article 3.4 states that when the Member State "gives notice of negotiations" the Commission *"may provide the negotiating Member State with advice on how to avoid incompatibility [of the agreement] with Union law*".[161]

In all cases, this information will be shared with other Member States in a secure electronic form. However, there are limitations to the notion of full, reciprocal information-sharing which is integral to the mechanism. As mentioned, there is the possibility for exceptions where the Member States can instruct the Commission to communicate to other Member States not the entire intergovernmental agreement, but only a summary of the information submitted (Article 3, paras 6 and 7 and Article 4).[162] This is possible when Member States indicate that any part of the information could harm the activities of the parties involved. The Commission gets access to the information in full, but the Decision does not foresee for a role for that institution in assessing whether the arguments of the Member States are valid or not.

Finally, note that paragraphs 1 and 5 of this article explicitly exclude the applicability of these obligations 'in respect of agreements between commercial entities'.

6.3.5 The "optional" use of standard clauses, Commission assistance and their legal consequences.

In the explanatory memorandum, the Commission states that, for reasons of commercial interest or national considerations on security of supply, Member States are under increased pressure to accept concessions in their international agreements with third countries which are incompatible with Union energy law. The section on intergovernmental agreements has illustrated how that may be the case, and the Commission quotes the specific example of pre-assigning usage of pipeline infrastructure. In order to avoid such non-conformity, Article 5 of the decision states that if a Member States gives notice of negotiations pursuant to Article 3.3 on the (re-)negotiation of an

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[161] See note 148, at 13.

[162] See note 148, at 15 (final paragraph of Article 3).

international agreement or the amendment of an existing one, that Member State may "request the assistance" of the Commission in the negotiations with that third country, but the article does not further state the nature of such assistance. The next indent of that Article 5 then continues by saying that the Commission may participate as an observer in the negotiations at the request of the Member State or at the request of the Commission with the Member State's approval. If the Commission "participates in the negotiations as an observer", it "may provide advice" on how to avoid incompatibility with Union law.[163]

Here, thus, the possibility of assistance is focused on legal compliance and not on broader compatibility with EU external energy policy objectives. From a legal perspective, it is important to examine the consequences for the Member States of asking for and/or receiving such assistance and/or advice on legal compatibility. In the explanatory memorandum we can see how the Commission envisages its own role in the negotiations: continuous contact, exchange of information and the possibility of a compatibility check are expected to aid compliance where the current (threat of) infringement procedures does not seem to suffice.[164] Furthermore, *"the experience gained through these exchange mechanisms should enable the joint development of voluntary standard clauses that Member States can use in future intergovernmental agreements. The use of such standard clauses would help preventing conflicts of intergovernmental agreements with Union law."*[165] Beyond that, the nature and impact of the assistance that may be provided is somewhat unclear. For example, what exactly does the Commission hope to achieve through observer status? Is it expected that its presence would (im) press the third country into ensuring that the Member State-third country agreement complies with EU law? Or instead, could this provide a basis for the Commission to be invited (perhaps informally) to become an active participant in the negotiations, as part of a negotiating team? The connection with the development of voluntary clauses seems to hint at the fact that we must view this decision not entirely as establishing a 'fixed mechanism', but rather as an 'organic process' which is expected to create an increasingly close relationship between the EU and the Member States. From that perspective it

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163 See note 147, at 16.

164 See note 47, at 4.

165 *Ibid*, at 4.

is perhaps positive that the notions of advice and assistance are not defined, as in that fashion they allow for a certain level of negotiation-specific flexibility. However, from a legal perspective this open-ended nature may lead to certain problems. In footnote 9 of its explanatory memorandum, for example, the Commission states that if a Member State fulfils the notification obligation of Article 3, this would not prevent the Commission from starting infringement procedures if necessary, e.g. when an agreement still infringes internal market rules.[166] Indeed, throughout the proposal there is no clarity on the legal consequences of compatibility or of compliance by the Member States with the information obligations imposed by this Decision. This is underlined by a Commission statement which it communicated at the moment of adoption of the Decision in the Council:[167]

> *The Commission considers that the adoption of the Decision of the European Parliament and of the Council setting up an information exchange mechanism with regard to intergovernmental agreements between Member States and third countries in the field of energy represents a first step towards more transparency, solidarity and consistency with internal market rules. The Commission will continue to encourage – as outlined in the original proposal – a more ambitious approach that would reflect and be more consistent with the EU's challenges and far-reaching objectives in the area of energy policy.*
>
> *In particular as provisions proposed as mandatory by the Commission have been made voluntary by the legislator, notably as regards an ex ante compatibility assessment mechanism to ensure that new intergovernmental agreements which have an impact on the operation or the functioning of the internal market are in compliance with Union law, the Commission will closely monitor the effectiveness of the adopted legislation, reserving its Treaty rights, and make use of its review clause as appropriate.*

With this statement the Commission clearly expresses its disappointment at the extent to which the mandatory language has been watered down,

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166 *Ibid*, footnote 9.

167 See note 147, at 1-2.

emphasizing that the Decision is but a starting point. As to the consequences of this watering down, it warns that it intends to use the review clause which allows it to assess the effectiveness of the Decision in 2016 (Article 8). More importantly, it warns the Member States that it "reserves its Treaty rights". In other words, the shadow of the infringement procedure looms in the background. The present author agrees with the Commission that the open-ended nature of the Decision has the potential of negating its purpose. Namely, compliance with the obligations under this information exchange mechanism does not provide conclusive legal certainty to a Member State that its agreement will be compatible and will therefore remain in force. This 'shadow of litigation' is not without its policy consequences, as it creates a 'chain of legal uncertainty' which is at odds with the objectives of the Decision. Specifically, the Commission's intention with this Decision was to ensure the creation of a long-term stable investment climate for the benefit of EU energy policy objectives, through creating legal certainty that intergovernmental agreements comply with EU law. Indeed, the commercial agreements which are often negotiated in parallel or following intergovernmental agreements would need a guarantee that the legal framework on which they depend will not fall away if a violation is found.[168]

One of the crucial mechanisms which the Energy Decision wished to use to effect this is the insertion of standard clauses into the Member State agreements.[169] The use of such standard clauses is not new. In 2004 the EU adopted a Regulation on relations between the EU and the Member States on the negotiation and conclusion of Member State civil aviation agreements. Just as in the field of energy, the objective was to ensure compliance with Union law. In the Aviation Regulation, standard clauses were developed during the negotiations in the Co-Decision procedure, and were actually *integrated* into the notification procedure. Member States are to communicate whether or not these standard clauses have been used.[170] If they have been used, then the Aviation Regulation builds in a presumption of compliance, and the Member States are authorised to conclude the agreement, thus providing commercial airlines operating under the relevant international agreement with the benefit

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168 See note 45, at 2.

169 See note 45, at 11.

170 Regulation 847/2004, see note 126, Article 1 (1).

of legal certainty.[171] If these clauses have not been used, then the Comitology procedure would commence and would examine whether the Member State aviation agreement "does not harm the object and purpose of the Community common transport policy".[172] It is then odd that, in order to ensure legal certainty, this system has not been emulated in the context of the proposed Decision on information exchange in the field of energy. Indeed, the standard clauses are integrated not into the information exchange mechanism itself, but into Article 7 on "Coordination among Member States". In paragraph 3 of that article we find that: *"on the basis of best practice and in consultation with the Member States, developing optional model clauses, which, if applied, would significantly improve compliance of future intergovernmental agreements with Union law"*.

The fact that these model clauses are merely optional and are to be developed at a later stage evidently does not create the legal certainty sought after in this Decision. Moreover, from the perspective of Article 4.4 TEU, it is rather striking that the objective is to "significantly improve compliance of future" agreements, through standard clauses – "if they are applied". Article 4.3 TEU states that the Member States *"shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties"*. It is thus quite remarkable that improved compliance with Union law is projected as an optional endeavour for the future...

6.3.6 An "EU" energy policy, and coordination "among" the Member States?

Article 7 has already been mentioned, but deserves a separate discussion as well. Its heading reads "Coordination among Member States", whereas the original read "with" Member States. This is not a minor change, since it negates the idea of the Commission as a central actor coordinating energy policy. It thus denies the suggestion that the Member States could be the subjects of a Commission policy direction, or that they as individual actors remain firmly in control. Article 7 of the Energy Decision is the only provision with a clear policy objective (as opposed to the objective of ensuring legal conformity with Union law). It is worth quoting the provision in full, as the emphasized parts illustrate the differences between the original Commission proposal and the final compromise text as adopted on 4 October 2012:

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[171] *Ibid*., Article 4 (2).

[172] *Ibid.*, Article 4 (3).

*Article 6 - Coordination **among** Member States*
*The Commission shall facilitate **and encourage** the coordination among Member States with a view to:*

*a) review developments in relation to intergovernmental agreements **and strive for consistency and coherence in the Union's external energy relations with producer, transit, and consumer countries**;*

*b) identify common problems in relation to intergovernmental agreements and to consider appropriate action to address these problems, **and, where appropriate, propose solutions**;*

*c) on the basis of best practice **and in consultation with the Member States, develop optional, model clauses that if applied would significantly improve** compliance of future intergovernmental agreements with Union energy legislation;*

*d) **support where appropriate the development of multilateral intergovernmental agreements involving several Member States or the Union as a whole**.* (emphasis added)

The formalization and legal spelling out of a consultation procedure in this Decision is arguably an important development for EU external energy relations. In particular, paragraphs (a), (b) and (d) contain language which clearly and irreversibly allows the Commission to undertake action to pursue EU external energy relations in a legal and political sense. Notably, paragraphs (b) and (d) should be read as opening the door to allowing the Commission to submit requests to open negotiations for future EU agreements such as the agreement being negotiated with Azerbaijan and Turkmenistan. Furthermore, paragraph (b) allows for 'the identification of problems and proposal of solutions'. More generally, this could be connected to paragraph (a) of the article which emphasizes that the Commission shall encourage Member States to strive for consistency in 'the Union's' external energy relations. This could, for example, avoid scenarios such as the Polish reference to the pre-World War II 'political betrayal' in relation to the German-Russian deal on the Nord Stream Pipeline in 2006.

A final point pertains to the European External Action Service in relation to the Energy Decision. Paragraph 15 of the preamble reads that

> *A permanent exchange of information on intergovernmental agreements at Union level should enable best practices to be developed. On the basis of those best practices, the Commission, where appropriate in cooperation with the European External Action Service (EEAS) as regards the Union's external policies, should develop optional model clauses to be used in intergovernmental agreements between Member States and third countries.*[173]

In the light of section II of this report, it should come as no surprise that the EEAS was not mentioned in the original proposal of the Commission. While it is certainly commendable that the EEAS be involved in the formulation of EU external energy policy, the specific connection to the model clauses is rather unfortunate and beside the point. The model clauses would focus specifically on compliance with Union law (non-discrimination in pricing and access to infrastructure etc.), and would have little to do with EU security of supply or the 'foreign policy mandate' of the EEAS.[174] Thus, the cooperation of the EEAS is not particularly necessary in relation to paragraph (c) of Article 7 (standard clauses), but rather in relation to paragraphs (a), (b) and (d). To take the example of the EU agreement with Azerbaijan and Turkmenistan, the regional expertise could clearly be beneficial given the impact on the balance of power in EU relations with Russia, regional instability through relations with Armenia, the Nagorno-Karabakh conflict, pipeline security and human rights concerns in the countries with which the EU negotiates, to name but a few. It would thus be desirable that the Commission and the EEAS work closely in the implementation of Article 7 of the Energy Decision, to ensure a truly consistent EU energy policy as paragraph (a) of that provision demands.

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[173] See note 147, para 15 of the preamble.

[174] Council Decision of 26 July 2010 establishing the organisation and functioning of the European External Action Service *OJ L 201/30,* 3.08.2010 (Article 18 and 27 TEU).

7 Conclusions

The following conclusions can be drawn from the preceding analysis. First, in policy terms the direction of EU energy policy has not seen a great shift in direction with the entry into force of the Lisbon Treaty. Instead, Article 194 TFEU, which has conferred a shared competence on the Union, codifies the policy formation process prior to the entry into force of the Lisbon Treaty. Second, while initially the new competence was used to build momentum for a true EU external energy policy, the euro crisis and developments in the Southern Mediterranean pushed the EU's political agenda off track, and momentum was lost. However, during the second half of 2011, the policy process overseen by the Polish Presidency led to a number of important decisions about EU external energy policy post-Lisbon. In analysing the post-Lisbon era, this report has focused on three distinct elements: first, the institutional dimension; second, the substantive policy dimension; and third, the EU-Member State dimension.

In the institutional dimension, this paper argued that the new post-Lisbon structures are found to be excluded from the policy-making process of EU external energy relations. Symptomatic of this was the fact that the Commission proposal starting the decision-making process in the autumn of 2011 was not even drawn up jointly with the EEAS. Utilizing the inter-institutional duty of cooperation, this paper has argued that the EEAS should be far more explicitly involved than it is now. Specifically, the examination of the soft legal documents signed as part of EU external energy policy have shown that the Commission remains firmly in the driving seat, and that the Member States' role through the rotating Presidency remains as it was prior to the Lisbon Treaty. As regards the role of the European Parliament, it has been shown that the Lisbon Treaty could have a significant impact. A number of legally binding agreements are planned or are under negotiation, and under Article 194 TFEU these require the consent of Parliament. Taking a cue from common commercial policy or the external dimension of the areas of freedom, security and justice, Parliament is sure to use its new powers to good effect. Subsequently, the Commission's proposal for a 'Strategic Group for International Energy Cooperation' was welcomed, and this group should certainly include the EEAS fully in its work.

In substantive terms, the paper found that strategic thinking has indeed changed in comparison to the pre-Lisbon era, and that direct cooperation between DG

TREN and the EU Delegations makes room for a substantive connection between what has been termed geostrategic energy diplomacy and the rule-based market approach. Thus, though cooperation between the EEAS and the Commission may be lacking, in substantive terms EU external energy policy has seen several improvements. While not perfect, the Council conclusions do more than has been done before to set out an explicit strategy in EU external energy relations, including defining the nature of different partners, the EU's objectives in relation to those different partners, and the instruments through which to realize those objectives. This should be welcomed. Be that as it may, the report called for the EEAS and the Commission to draft a joint communication which maps the short-, medium- and long-term objectives of EU external energy policy specifically for each region, country and strategic partner, and includes targets and a specific timeframe for the implementation of those targets.

In the final section of this report, the relationship between the EU and the Member States was examined. The newly adopted instrument has been welcomed, but thorough scrutiny reveals a number of deficiencies which may detract from its proper functioning. The Commission was certainly right to state that it could only be a starting point, since several of its obligations were made contingent on Member State agreement on a case-by-case basis. Furthermore, the obligations of compliance and means of enforcement are not always made clear. Finally, the relationship to the new post-Lisbon institutional set-up requires further clarification, specifically as to how the institutions could use the pertinent information to devise new policy proposals.

In conclusion, the findings comparing the pre- and post-Lisbon era remain mixed. The report found most progress as regards strategic thinking on policy objectives and instruments in EU external energy relations. The vertical EU-Member State relationship was slightly more problematic, but the new legally binding Decision is a highly welcome instrument and is sure to develop into a well-functioning structure in the coming years. Most problematic was the horizontal inter-institutional relationship, where it is clear that institutional schisms have been deepened post-Lisbon, which may cause lost potential and a loss of resources for the Union.

8 Sammanfattning på svenska

Det europeiska samarbetet inom energiområdet utgör själva kärnan i den europeiska integrationen och sträcker sig tillbaka till 1951. Dock var det först i och med Lissabonfördraget som man specifikt tilldelade EU befogenhet inom energiområdet. Nu, år 2012, befinner sig EU i en process där man fortfarande formulerar och genomför en gemensam extern energipolitik värd namnet. Rapporten fokuserar på tre huvudsakliga hinder till att uppnå en synlig, effektiv och sammanhållen europeisk extern energipolitik. Först granskar vi dessa hinder såsom de yttrade sig före december 2009 och därefter Lissabonfördragets inverkan.

Vi analyserar först huruvida EU:s institutioner och de enskilda generaldirektoraten har kunnat enas om riktningen för EU:s externa energipolitik. Nu efter Lissabonfördraget har trätt i kraft måste vi granska vilken inverkan inrättandet av europeiska utrikestjänsten (EEAS), de utökade befogenheterna som tilldelats Europaparlamentet och det roterande ordförandeskapets fortsatta roll har haft. För det andra, i sak var man helt oenig om huruvida EU:s externa energipolitik skulle främst handla om att internationalisera den inre marknaden på grundval av juridiskt bindande instrument eller om det skulle handla om att i stället fokusera på energidiplomati och som resultat därav träffade avtal med tredje land för att säkra EU:s energiförsörjning. Rapporten ställer frågan huruvida den nya befogenheten har lyckats med att förena dessa två olika tillvägagångssätt.

Slutligen, som tredje punkt granskar vi medlemsländernas relation till EU:s gemensamma intresse inom energipolitiken, det vi kallar den ”vertikala dimensionen”. På den här punkten påvisar rapporten att den inre marknaden har under en längre tid lidit av det faktum att medlemsstaterna har brustit vad gäller efterlevnaden av EU-rätten, detta p.g.a. att medlemsstaternas nationella intressen har spelat en roll. I den externa dimensionen handlar detta i praktiken om ett fortsatt spänt läge mellan den enskilda nationella energipolitikens prioriteringar och det som ligger i hela EU:s intresse. I den här rapporten granskar vi noga de instrument som antogs den 4 oktober 2012 och som bygger upp en så kallad vertikal informationsutbytesmekanism som man hoppas skall förbättra efterlevnaden av EU-rätten och förstärka samordningen mellan medlemsstaterna och EU.

Rapporten drar följande slutsatser:

Europeiska utrikestjänsten ligger utanför den politiska beslutsprocessen i den institutionella dimensionen vad gäller EU:s externa energirelationer. Mer specifikt, granskningen av den mjuka lagstiftningen som är en del av EU:s externa energipolitik har visat att kommissionen fortfarande står bakom rodret och att medlemsstaternas roll i det roterande ordförandeskapet består. Rapporten noterar att när man inrättade utrikestjänsten hade energipolitiken en starkare roll inom den höga representantens mandat men att denna ställning försvagades snabbt när det interinstitutionella dammet hade lagt sig. Därefter välkomnades kommissionens förslag för en ”strategisk grupp för internationellt energisamarbete” och rapporten hävdar att utrikestjänsten bör ingå till fullo i den här gruppens arbete.

Vad beträffar Europaparlamentets roll så kommer Lissabonfördraget ha en stor påverkan inom en nära framtid. Ett antal juridiskt bindande avtal planeras eller håller på att förhandlas fram och enligt artikel 194 och artikel 216 i fördraget om Europeiska unionens funktionssätt kräver dessa Europaparlamentets godkännande. Med inflytande från den gemensamma kommersiella politiken eller den externa dimensionen inom områdena frihet, säkerhet och rättvisa, kommer parlamentet med all säkerhet att använda sina nya befogenheter för att påverka.

I sak välkomnar rapporten det nya strategiska tänkandet vad gäller EU:s externa relationer på energiområdet. Det är tydligt att man prioriterar mer i EU:s externa relationer på energiområdet. Med andra ord, även om rapporten menar att samarbetet mellan den europeiska utrikestjänsten och kommissionen kanske brister, ser man flera förbättringar i sak vad gäller EU:s externa energipolitik. Även om de inte är perfekta, leder rådets slutsatser till en tydlig strategi för EU:s externa relationer inom energiområdet. I slutsatserna definieras även olika samarbetspartners, EU:s målsättningar i förhållande till dessa och instrument med vilka man ska uppnå dessa målsättningar. Man bör välkomna detta, men då krävs det också åtgärder för att konkretisera de relevanta slutsatserna. Därmed uppmanar rapporten europeiska utrikestjänsten och kommissionen att utarbeta ett gemensamt meddelande där man kartlägger de kort-, mellan- och långsiktiga målsättningarna för EU:s externa energipolitik specifikt för varje region, land och strategisk partner, och som innefattar mål och specifik tidsram för genomförandet av dessa mål.

I den sista delen av den här rapporten granskar vi relationen mellan EU och dess medlemsstater. Det nyligen antagna instrumentet är välkommet, men en djupare analys avslöjar ett antal brister som kan försvåra dess effekt. Flera skyldigheter hänger på medlemsstaternas vilja från fall till fall. Ett olyckligt exempel på detta: enligt rådets beslut är det upp till medlemsstaterna att göra en första bedömning av om avtalen faktiskt påverkar den inre marknaden and säkrar EU:s energiförsörjning, och huruvida dessa skall meddelas kommissionen. Dessutom har man inte alltid klargjort efterlevnadsskyldigheten och hur den skall utkrävas. Detta innebär i sin tur att hjälp och råd från kommissionen i internationella förhandlingar inte nödvändigtvis leder till ett rättssäkert förfarande eller utesluter att man påbörjar ett överträdelseförfarande gentemot en medlemsstat.

Sammanfattningsvis kan man säga att jämförelsen mellan tiden före och efter Lissabonfördraget leder till blandade resultat. De främsta framstegen vad gäller strategiskt tänkande har gjorts inom policymålsättningar och policyinstrument gällande EU:s externa relationer inom energiområdet. Medlemsstaternas vertikala relationer var något mer problematiska, men det nya juridiskt bindande beslutet är ett mycket välkommet instrument och kommer säkerligen att utvecklas till en väl fungerande struktur under de närmaste åren. Mest problematiskt var den horisontella interinstitutionella relationen, där det är tydligt att institutionella schismer har fördjupats efter Lissabon vilket i sin tur kan leda till för EU förlorade möjligheter och resurser. Därför rekommenderar rapporten följande:

- På det institutionella planet: man bör lösa problemet med att energiförsörjningsfrågor lyser med sin frånvaro på höga representantens nivå. Inom utrikestjänsten är det viktigt att de särskilda geografiska enheterna blir mer delaktiga i det tematiskt organiserade generaldirektoratet för energifrågor inom kommissionen.

- I sak: ett konkret policyförslag för att hantera den nuvarande institutionella schismen är att utarbeta ett gemensamt meddelande som tydligt kartlägger och beskriver de kort-, mellan- och långsiktiga målsättningarna specifikt per region, land och strategisk partner, och där även mål och den specifika tidsramen för genomförandet ingår. På så sätt kan både kommissionen och utrikestjänsten genomföra de strategiska besluten som rådet tidigare

beslutat om och samtidigt skapa en kultur av mellanstatligt EU samarbete inom den externa energipolitiken.

- Vertikalt: det nya beslutet som innebär inrättandet av en informationsutbytesmekanism för mellanstatliga avtal ger en god grund för medlemsstaterna att samordna sig på. Men eftersom beslutet är formulerat på ett löst och ospecifikt sätt utan tvång, är risken att bristen på lojalt och fullgott samarbete med den nya strukturen kommer att utgöra ett hinder för att uppnå målsättningarna. Kommissionen skulle kunna tvinga fram ett sådant samarbete genom överträdelseförfarandet men det är högst önskvärt att det inte behöver gå så långt.

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Swedish Institute for European Policy Studies

Fleminggatan 20
SE-112 26 Stockholm
Ph: +46-(0)8-586 447 00
Fax: +46-(0)8-586 447 06
E-mail: info@sieps.se
www.sieps.se