

The 2009 Russian-Ukrainian Gas Dispute: Lessons for European Energy Crisis Management after Lisbon

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Abstract. The dispute between Russia and Ukraine of January 2009 brought about the largest interruption in the supply of natural gas in the history of the European Union (EU). Given the significance of Russian gas to the EU, the 2009 crisis triggered a challenge that had to be resolved swiftly and adequately in cooperation with all parties concerned. Against the backdrop of the Union's foreign policy *leitmotiv* of 'effective multilateralism', this article aims to critically assess the EU's interventions and draw lessons for future energy crisis management. Furthermore, it analyses the implications of the entry into force of the Lisbon Treaty for EU external action in the field of energy crisis management.

I Introduction

The changing security environment following the end of the Cold War has led to a widening of the concept of security,¹ which caused progressively more issues to be approached from a security point of view. In connection with this, security has also become more prominently visible within the external relations of the European Union ('the Union' or 'the EU'), prompting the latter to transform itself into a security actor on a variety of terrains, including anti-terrorism and civilian and

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¹ Traditionally, being confined to the military domain, the changing security environment following the end of the Cold War and the ensuing debate on the concept of security have led it to now also comprise environmental, society (identity), political, and economic issues. See, *inter alia*, B. Buzan, 'Rethinking Security after the Cold War', *Cooperation and Conflict* 32, no. 5 (1997): 5–28; and B. Buzan, O. Waever & J. de Wilde, *Security: A New Framework for Analysis* (Boulder/London: Lynne Rienner Publishers, 1998); and H.G. Brauch et al. (eds), *Globalization and Environmental Challenges: Reconceptualizing Security in the 21st Century* (Berlin, Heidelberg: Springer, 2008).

military operations, but also increasingly on ‘non-traditional’ security areas such as energy.²

Energy gained increased prominence within the security domain, not least because of a series of interruptions in the supply of energy to the Union or specific EU Member States. Security concerns with regard to energy commonly focus on what is known as ‘security of supply’, or the ‘adequacy of [energy] supply at a reasonable price’.³ Precisely, this adequacy of supply was threatened in January 2009. What happened was a halt in natural gas deliveries from Russia to Ukraine, followed by reported shortages and a cut in supplies to other European countries a few days later. In a two-week span, in what was one of the coldest winters in decades, the EU experienced one of the largest interruptions in its energy supply to date. In January 2006, a similar crisis between the two countries had resulted in falling pressures and non-delivery of gas reports by European companies. A ‘new years gas tussle’ thus seemed to become the rule, rather than the exception, prompting concerns on whether existing energy security arrangements and instruments are adequate.⁴

Given the significance of Russian gas for the EU,⁵ the 2009 crisis triggered a challenge that had to be resolved swiftly and adequately in cooperation with all parties concerned. As such, it provided a solid test of whether the Union was able to act according to its *leitmotiv* of ‘effective multilateralism’ (section II below) and guarantee a stable supply of energy. The present article aims to assess whether the EU’s interventions were successful to that effect and what impact the Treaty of Lisbon has on the Union’s future ability to resolve such crises.

To this end, we first briefly introduce the concept of ‘effective multilateralism’, which plays a central role in our analysis of the EU’s interventions during the dispute (section II). We then turn to a digression of EU-Russia energy relations, giving careful attention to the most important frameworks that guide these relations,

² In recent years, there has been a veritable rise in the number of publications dedicated explicitly to energy and its security implications. See, *inter alia*, S. Haghighi, *Energy Security: The External Legal Relations of the European Union with the Major Oil and Gas Supplying Countries* (Oxford: Hart Publishing, 2007); J.H. Kalicki & D.L. Goldwin, *Energy and Security: Toward a New Foreign Policy Strategy* (Washington, DC: Woodrow Wilson Centre Press, 2005); and R. Youngs, *Energy Security: Europe’s New Foreign Policy Challenge* (Abingdon: Routledge, 2009).

³ Haghighi, n. 2 above, 14.

⁴ See, *inter alia*, Haghighi, n. 2 above, 357; J. Perovic & R. Ortung, ‘Russia’s Energy Policy: Should Europe Worry?’, *Russian Analytical Digest* 18 (2007): 2; J. Stern, ‘The Russian-Ukrainian Gas Crisis of January 2006’, *Oxford Institute for Energy Studies* (2006): 14; J. Grätz, ‘Energy Relations with Russia and Gas Market Liberalization’, *Internationale Politik und Gesellschaft* 3 (2009): 67–68; J. Perovic, ‘Russian Energy Power Abroad’, *Russian Analytical Digest* 33 (2008): 2.

⁵ In 2008, gas imports from Russia to the EU-27 constituted 23% of total imports; 37% was generated from indigenous production and 18% was imported from Norway. The other large supplier of natural gas to the Union is Algeria with 9% of the total share. See Eurogas, ‘Statistics 2008’, <www.eurogas.org/uploaded/Eurogas%20Annual%20Report%202008-2009_%20statistics.pdf>, 3 Mar. 2010, 30.

and where appropriate highlighting the role played by Ukraine (section III). The next section provides an overview of the way in which the Union handled the January 2009 crisis (section IV). We then critically evaluate the EU's interventions, with a particular focus on whether its efforts have been effective in reinstating the gas supply (section V). A final section discusses the implications of the entry into force of the Lisbon Treaty for EU external action in the field of energy crisis management (section VI). At the end, we make some brief concluding remarks (section VII).

II The EU and Effective Multilateralism⁶

In 2003, in a bid to strategically steer its foreign and security policy, the Union released the European Security Strategy ('ESS'),⁷ in which it put forward its own *leitmotiv* to guide its external relations, that is, 'effective multilateralism'. According to Ruggie, multilateralism refers to the 'coordinating [of] relations among three or more States in accordance with certain principles that order relations among these States'.⁸ Adding the notion of 'effectiveness' presupposes multilateralism to first and foremost produce 'noticeable effects' that, when applied to the EU, refer to the extent to which the Union is able to attain its predetermined policy goals.⁹ This is made more likely if decisions taken at EU level succeed in improving the Union's problem solving capacity in the international arena.¹⁰ At the same time, the ability to act effectively requires the EU also to organize itself efficiently in a consistent, coherent, and sustainable manner in cooperation with key actors involved. Taking these two aspects of effectiveness together, one could say effective multilateralism has become the key

⁶ The research method applied here is based on an ongoing collaborative research project that investigates the role of the EU as a regional security actor with global aspirations in a context of challenged and changing multilateralism. See <www.eugrasp.eu>, 13 Apr. 2010.

⁷ Council of the European Union, *A Secure Europe in a Better World, European Security Strategy*, (Brussels, 12 Dec. 2003).

⁸ J. Ruggie, *Multilateralism Matters: The Theory and Praxis of an Institutional Form* (New York: Columbia University Press, 1993), 8. Here, Ruggie insists that multilateralism represents a 'generic institutional form' and is thereby not confined to the study of international institutions. See 10–11.

⁹ J. Neyer, 'Explaining the Unexpected: Efficiency and Effectiveness in European Decision-Making', *Journal of European Public Policy* 11 (2004): 22; J. Wouters, S. de Jong & Ph. De Man, 'The EU's Commitment to Effective Multilateralism in the Field of Security: Theory and Practice', *Yearbook of European Law* (Oxford: Oxford University Press, forthcoming, 2010).

¹⁰ Cf. Scharpf's description of output legitimacy, according to which governments (and the EU alike) derive their legitimacy from their capacity to solve problems requiring collective solutions because they could not be solved through individual action or market exchanges alone. See F. Scharpf, *Governing in Europe: Effective and Democratic?* (Oxford: Oxford University Press, 1999), 11.

benchmark criterion for performance in the Union's external relations. The EU's commitment to multilateralism has meanwhile been confirmed in the Lisbon Treaty (section VI.3 below).

With 'effective multilateralism' as a starting point and key benchmark, this article aims to assess the role that EU multilateral security governance played in handling the January 2009 crisis. Doing so, we will look into the various *levels of cooperation* on which EU action was taken. Departing from Ruggie's definition, we distinguish and analyse four levels of cooperation: (i) the *regional level* encompassing the EU-internal sphere and comprising initiatives/projects that originated from within the Union itself, as well as Member State-led initiatives, operating either individually or in a concerted EU effort; (ii) the *bilateral level* referring to the EU's engagement vis-à-vis individual third States, including specific dialogues with supply and transit countries; (iii) the *interregional level* comprising the interaction between the EU and other regional organizations relevant to the crisis; and (iv) the *global level* referring to EU action in multilateral organizations/institutions, independent of the level of their institutional character.¹¹

An analysis is made of how the EU acted on those levels of cooperation with a view to assessing whether its actions have been effective in resolving the crisis. Next to secondary documents (i.e., think tank and public policy research centre reports, media sources, and relevant academic literature), the analysis is largely based on primary documents such as EU Statements, Council Working Group Reports, Commission documents, and press releases that were released shortly before, during, and shortly after the crisis. Questions that are addressed are whether or not the levels of cooperation are concretely used, whether actions are mutually connected, and whether the overall policy is effective or not.

Since the focus of this article is on a single case, that is, the Russian-Ukrainian gas row, the empirical analysis makes use of a 'within-case method' and proceeds by means of process tracing.¹² Although we opt for a detailed and chronological narrative tracking a chain of events (before, during, and in the wake of the crisis), the explanation will be analytically and geographically selective, focusing on whether the EU's actions have been effective in resolving the crisis within the Union's immediate neighbourhood (where the impact of the crisis was most felt).¹³ In doing so, the underlying assumption of the analysis is that, if the EU wants to be

¹¹ Cf. Ruggie, n. 8 above.

¹² See A.L. George & A. Bennett, *Case Studies and Theory Development in the Social Sciences*, (Cambridge, MA: MIT Press, 2005), 224; A. Bennett, 'Process Tracing: A Bayesian Perspective', in *The Oxford Handbook of Political Methodology*, eds J.M. Box-Steffensmeier, H.E. Brady & D. Collier (Oxford: Oxford University Press, 2008), 704.

¹³ George & Bennet, n. 12 above, 10–11.

an effective security actor, it will have to act on the relevant levels of cooperation, in an interconnected as well as in an effective way.

III EU-Russia Energy Relations

Relations between the EU and Russia are currently described as tense, based on conflicts and mistrust; energy being an area where this is prominently felt.¹⁴ Nevertheless, given the strong mutual interdependence between the two, it is no surprise that several frameworks have been established over time that either include or deal specifically with energy.

1. *The Partnership and Cooperation Agreement*

Arguably, the most important framework to guide relations between the EU and Russia is the Partnership and Cooperation Agreement (PCA), which came into force in 1997 for a period of ten years.¹⁵ Under Article 106 of the PCA, the agreement is automatically prolonged, unless either party to the agreement gives notice of termination. Both parties have agreed to leave it in place until a new agreement is signed, to avoid having no agreement at all.¹⁶ Given the vital importance of energy, the PCA contains specific energy provisions, including the ‘improvement of the quality and security of energy supply’.¹⁷ The agreement aims both at security of energy supply but also at assisting Russia in overcoming its shortages in the energy sector. This includes modernization of the latter’s energy infrastructure, promotion of energy saving and energy efficiency, and improvements in the management and regulation of the energy sector in line with market economy principles.¹⁸

¹⁴ R. Leal-Arcas, ‘The EU and Russia as Energy Trading Partners: Friends or Foes?’, *European Foreign Affairs Review* 14, no. 3 (2009): 348; J. Sherr, ‘The Russia-EU Energy Relationship: Getting It Right’, *The International Spectator* 45, no. 2 (2010): 57–59. Contrary to the EU’s ‘market’ perspective, Russia takes a firm ‘statist’ view with respect to its gas market characterized by strong vertical integration and control over its pipeline system. See J. M. Godzimirski, ‘The Northern Dimension of the Russian Gas Strategy’, *Russian Analytical Digest* 58 (2009): 3; and K. Hóber, ‘Law and Policy in the Russian Oil and Gas Sector’, *Journal of Energy & Natural Resources Law* 27, no. 3 (2009): 426.

¹⁵ Agreement on Partnership and Cooperation Establishing a Partnership between the European Communities and Their Member States, of the One Part, and the Russian Federation, of the Other Part, OJ L 327/3 of 28 Nov. 1997.

¹⁶ See K. Barysch, ‘Report from the 4th Friedrich-Ebert Stiftung and Foundation for Unity for Russia Roundtable (2006)’, <http://www.cer.org.uk/pdf/partnership_with_russia_barysch_dec06.pdf>, 10 Mar. 2010, 2.

¹⁷ Article 65 EU-Russia PCA, n. 15 above.

¹⁸ *Ibid.* See also Haghghi, n. 2 above, 343–344.

In the past, market reform has played a major role in fuelling recent conflicts between Russia, Ukraine, and Belarus.¹⁹ The transition to a market-based pricing system and supply obligations between sovereign States was particularly painful for the latter two countries as it was implemented after long delays, and after 2004 when oil and gas prices rose dramatically – prompting acute issues of liquidity.²⁰ In Ukraine, this problem was exacerbated by the 2004 ‘Orange Revolution’, which alternated its relations with Russia and added to a more negative environment for changes in gas prices.²¹ Recently, in an attempt to bring new life to the reform of Russia’s energy sector and market, the EU and Russia agreed on their ‘Partnership for Modernization’.²² The Partnership aims to bring about reform of the Russian economy and society, whereby expanding investment opportunities and the promotion of a sustainable and energy-efficient low-carbon economy are some of its key priorities.²³

The ongoing negotiations on a new PCA have proven cumbersome as both the EU and Russia diverge quite strongly on what a new agreement should look like.²⁴ Whereas the EU seems to favour a new agreement containing precise wordings on energy and security in particular, Russian President Medvedev rather supports a document that is ‘short, without too many details’.²⁵ Issues on trade (notably, negotiations on Russia’s accession to the WTO) and human rights notwithstanding, the ability for both parties to reconcile on a future PCA seems to hinge to a large extent on the ‘legal nature’ of future energy agreements.

¹⁹ In January 2007, a dispute erupted between Russia and Belarus, which led to a cut in Russian supplies, causing angry reactions from the EU. See Euractiv, ‘Europe Caught in Middle of Russian-Belarus Oil Dispute, 9 Jan. 2007’, <www.euractiv.com/en/energy/europe-caught-middle-russia-belarus-oil-dispute/article-160725>, 17 Mar. 2010; and Youngs, n. 2 above, 86. A similar dispute occurred earlier this year. See Euractiv, ‘Russian Oil Flowing to EU Despite Belarus Dispute, 5 Jan. 2010’, <www.euractiv.com/en/energy/russian-oil-flowing-eu-despite-belarus-dispute/article-188545>, 17 Mar. 2010.

²⁰ A. Knoplyanik, ‘Gas Transit in Eurasia: Transit Issues between Russia and the European Union and the Role of the Energy Charter’, *Journal of Energy & Natural Resources Law* 27, no. 3 (2009): 455–45; H. Pleines, ‘The Natural Gas Conflict between Russia and Ukraine’, *Russian Analytical Digest* 41, (2008): 10; and Youngs, n. 2 above, 82 and 86.

²¹ Knoplyanik, n. 20 above, 456.

²² See ‘Joint Statement on the Partnership for Modernization, EU-Russia Summit, 31 May–1 June 2010, Rostov-on-Don, 1 Jun. 2010’, <www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/er/114747.pdf>, 14 Jul. 2010.

²³ *Ibid.*, 2.

²⁴ Some scholars argue that the current PCA simply no longer corresponds to the existing character of EU-Russia relations. See, *inter alia*, Y. Borko, *Partnership and Cooperation Agreement between the EU and Russia: Do We Need a New Treaty?* (Moscow: Probel, 2004); N. Arbatova, T. Bordachev & A.S. Makarychev, in *The Elephant and the Bear Try Again: Options for a New Agreement between the EU and Russia*, ed. M. Emerson (Brussels: Centre For European Policy Studies, 2006).

²⁵ ‘Medvedev Makes Nice with the EU’, *International Herald Tribune*, 27 Jun. 2008, <www.ihf.com/articles/2008/06/27/europe/union.php>, 10 Mar. 2010.

2. EU-Russia Energy Dialogue

Deemed such an important field, energy warranted a framework of its own, rather than to constitute only a small part of the PCA. At the 2000 EU-Russia Summit, both parties agreed to institute the so-called ‘EU-Russia Energy Dialogue’, based on Article 65 of the PCA.²⁶ The Dialogue constitutes a platform where the EU and Russia aim to further integrate their energy markets and highlight common interests for political institutions on both sides, thus keeping each other informed about recent events and developments in the energy sector.²⁷

The Dialogue involves both political and industrial actors and focuses on many different themes including²⁸ the promotion of ‘clean coal’ technologies in Russia, technology transfer, the monitoring of changes with respect to security of gas and oil markets, energy efficiency, environmental questions, and efforts aimed at improving Russia’s investment climate.²⁹ Ensuring the functioning of the EU’s internal market has been one of the cardinal topics within the Dialogue, with discussions focusing, *inter alia*, on the compatibility of short-term contracts and destination clauses with existing EU legislation, the establishment of interconnections, energy sector reform, and unbundling.³⁰ A development in recent years that could see an improvement in future crisis management capabilities is the establishment of a so-called ‘Early Warning Mechanism’ (EWM; sections IV.1 and V below).³¹

²⁶ See EU/Russia Summit Joint Declaration, EU Press Release, Doc. IP/00/1239 (Paris, 30 Oct. 2000).

²⁷ Haghghi, n. 2 above, 345.

²⁸ A comprehensive overview of the EU-Russia Energy Dialogue falls outside the purview of this article. For a more detailed analysis, see P. Aalto (ed.), *The EU-Russia Energy Dialogue: Securing Europe’s Future Energy Supplies?* (Aldershot: Ashgate, 2007).

²⁹ Haghghi, n. 2 above, 347–348. See also European Commission, *The Energy Dialogue between the European Union and the Russian Federation between 2000 and 2004*, COM (2004) 777 final (Brussels, 13 Dec. 2004), 3–4; and T. Romanova, ‘The Russian Perspective on the Energy Dialogue’, *Journal of Contemporary European Studies* 16, no. 2 (2008): 220–221. October 2005 saw the first Permanent Partnership Council on energy (PPC) that had as its aim the development of an attractive, stable, and predictable investment climate in Russia and foresaw an active role for foreign investors. Russia’s ‘double pricing’ of gas was a particular point of tension. See Youngs, n. 2 above, 81.

³⁰ See COM(2004) 777 final, n. 29 above, 7 and 11; Romanova, n. 29 above, 220; and Youngs, n. 2 above, 85.

³¹ The EWM is a political tool used to identify potential supply and demand problems and risks well in advance and allow for preparedness of Russia and the EU to minimize the impact of future potential disruptions. An agreement was signed on 16 Nov. 2009. See *The EU and Russia Reinforce the Early Warning Mechanism to Improve Prevention and Management in Case of an Energy Crisis*, EU Press Release, Doc. IP/09/1718 (Brussels, 16 Nov. 2009); Euractiv, ‘Russia and EU Agree on Supply Alert Mechanism, 16 Nov. 2009’, <www.euractiv.com/en/energy/russia-eu-agree-gas-supply-alert-mechanism/article-187360?Ref=RSS>, 15 Mar. 2010.

Whereas the EU's primary aim is to create a stable legal regime based on the principles of a liberalized energy market with a corresponding stronger influence of private energy companies in securing supply, Russia's view is based on the need to safeguard equality between partners by all means, giving the Russian State the role of overseeing this equality.³² Building on this observation, it is crucial for the EU to have full coherence in its relations with Russia. A coherent external energy policy hinges partly on the extent to which institutions and general rules are followed as opposed to individual barter deals. The former is preferred by the Commission and some Member States, whereas some of the larger Member States tend to prefer the latter, as is well illustrated by the Nord Stream project – a gas pipeline linking Russia and Germany via the Baltic Sea.³³ The pipeline is seen by some as a move by Russia to bypass 'traditional' transit countries such as Ukraine, Belarus, and Poland,³⁴ whereas others oppose it for environmental reasons.³⁵

Pursuing individual barter deals, however, inadvertently creates possibilities for elites in supply countries to pursue their own 'reciprocity rules', that is, not limiting demands to capital, arguing more substantial trade-offs are necessary in order to get things done. The monopolistic and quasi-statist character of such energy markets thus remains unchanged.³⁶

Russia's concerns in recent years over the protection of producer countries' interests under the Energy Charter Treaty (ECT; a multilateral investment protection

³² Romanova, n. 29 above, 225. See also Youngs, n. 2 above, 83.

³³ Construction of the pipeline began on 9 Apr. 2010. Its main proponents are Gazprom, German BASF/Wintershall Holding AG, German E-ON Ruhrgas AG, and Dutch NV Nederlandse Gasunie. Recently, French GDF Suez joined the project. Interestingly, the newly appointed Commissioner for Energy Günther Oettinger confirmed during his hearing at the European Parliament that the bilateral agreement in the case of Nord Stream lacked solidarity. See Council of the European Union, Summary of the Meeting of the Committee on Industry, Research and Energy (ITRE), Council Doc. 5460/10 (Brussels, 14 Jan. 2010), 3.

³⁴ See, *inter alia*, A. Cohen, 'The North European Gas Pipeline Threatens Europe's Energy Security', *Backgrounders (Heritage Foundation)* 1980 (2006); G. Feller, 'Nord Stream Pipeline Project Stokes Controversy', *Pipeline & Gas Journal* 234, no. 3 (2007): 92–92; T. De Wachter, 'The Russian Export of Gas/Oil and the Baltic: A Political Dependency?', *Global* 15, no. 1 (2007): 9; Godzimirski, n. 14 above, 3; and Höber, n. 14 above, 430.

³⁵ Feller, n. 34 above; and Z. Baran, 'EU Energy Security: Time to End Russian Leverage', *The Washington Quarterly* 30, no. 4 (2007): 135.

³⁶ See Grätz, n. 4 above, 69; Höber, n. 14 above, 423; and Youngs, n. 2 above, 82–84, 86–87, 91, and 96. See also O. Geden et al., 'Perspectives for the European Union's External Energy Policy. Discourse, Ideas, and Interests in Germany, the UK, Poland and France', Working Paper FG1 (Berlin: SWP, 2006); Romanova, n. 29 above, 227; and A. Checchi, A. Behrens & C. Egenhofer, 'Long-Term Energy Security Risks for Europe: A Sector Specific Approach', Working Document 309 (Brussels: CEPS, 2009); interviews with officials from the Permanent Representations of the Czech Republic and Latvia to the EU on 19 Apr. and 23 Apr. 2010; and interview with official from the Polish Delegation of the European People's Party in the European Parliament on 26 Apr. 2010.

treaty)³⁷ and its ultimate refusal to ratify the Treaty³⁸ (see also section V, below, on the application of the ECT to Russia), as well as disputes over the extent of reciprocal access to the European market in exchange for European investments in energy exploration in Russia, have complicated relations in the Dialogue.³⁹

Overall, these underlying divergent views between the EU and Russia are an important factor in determining contemporary energy relations between both parties.

IV The January 2009 Gas Crisis

We divide our analysis into three periods: (1) relevant events in the context of EU-Russia energy relations that took place in the months prior to the crisis; (2) the EU's interventions during the crisis; (3) and the Union's actions that were undertaken in the wake of the supply interruption.⁴⁰ EU action in each of these periods is analysed according to its effectiveness, both in terms of whether its decisions succeeded in solving the problem under consideration and if it was able to organize itself efficiently in a consistent, coherent, and sustainable manner at all levels of cooperation.

1. *An Impending Crisis*

The EU's attempts at modernizing the energy sectors of third countries such as Russia are not limited to supplier countries alone. The Union performs similar actions towards vital transit countries such as Ukraine (see also section IV.3 below). For example, in an attempt to upgrade and increase the efficiency of Ukraine's domestic market and energy infrastructure, the EU started the first negotiations on the country's admission to the Energy Community (ENCOM) in November 2008.⁴¹ ENCOM,

³⁷ The ECT is a legally binding multilateral agreement that has as its aim to strengthen the rule of law on energy issues, by creating a level playing field of rules to be observed by all participating governments, and so mitigate risks associated with energy-related investment and trade.

³⁸ The Treaty was, however, applied provisionally, until, on 20 Aug. 2009, Russia officially stated it intended to terminate provisional application. Russia's refusal stemmed mainly from opposition to opening up the Russian network to lower cost gas from Central Asian countries, a lack of access on the EU market, and the fact that the ECT's transit protocol would not apply between European countries (the EU being defined as a single economic space). See Haghghi, n. 2 above, 348; T. Bordachev, 'Europe's Russia Problem: Immediate Concerns and Long-Term Prerequisites', in *Prospects and Risks beyond EU Enlargement. Eastern Europe: Challenges of a Pan-European Policy*, ed. I. Kempe (Opladen: Lese & Buddrich, 2003), 88; and Youngs, n. 2 above, 80–81.

³⁹ See Romanova, n. 29 above, 223–224; and Youngs, n. 2 above, 92.

⁴⁰ This part is not exhaustive in the sense that it is limited to those EU actions that impacted most directly on preventing similar crises from occurring in the future.

⁴¹ Energy Community Ministerial Council, 'Meeting Conclusions, Point 13 (Tirana, 11 Dec. 2008)', <www.energy-community.org/pls/portal/docs/296197.PDF>, 13 Apr. 2010.

of which the EU is a member,⁴² is a regional Treaty building an integrated market in Southeast Europe adjacent to the Union and represents a form of EU ‘external governance’, by extending the Union’s *acquis* in relation to internal market, security of supply legislation for electricity and gas, environment, and renewables.⁴³

Although some indications existed about possible difficulties in late December 2008, there was no solid basis to believe that supplies to and through Ukraine would be in fact *completely* cut.⁴⁴ At this stage of the crisis, the Commission did not intervene much, nor seemed it necessary to do so based on the available information. However, anticipating possible difficulties, the Commission had on 19 December already alerted the Gas Coordination Group (GCG)⁴⁵ – which facilitates coordination of security of supply measures by the Union in the event of a major supply disruption – and set up a meeting for 9 January.⁴⁶

2. *The Cut-Off and the Search for a Solution*

In 30 December, Gazprom insisted that late-payment fines and penalties on behalf of Naftogaz were still outstanding. It claimed talks had failed and therefore cut supplies to Ukraine on 1 January 2009.⁴⁷

In an attempt to gather more information about ongoing events, the EU’s Network of Energy Security Correspondents (NESCO)⁴⁸ – designed as an instrument for collecting and processing existing geopolitical- and energy-related data as a means for early warning – was used in an impromptu way to exchange information on the evolution of the situation in EU Member States as well as other third countries concerned.⁴⁹ Three days later, a ‘fact finding mission’ was sent to

⁴² The Treaty establishing Energy Community was signed in October 2005 in Athens, Greece. It entered into force on 1 Jul. 2006. See The Energy Community Treaty, OJ L 198/18 of 20 Jul. 2006.

⁴³ The Energy Community provides a stable investment environment based on the rule of law and ties the Contracting Parties together with the EU. Through its actions, the Energy Community aims to contribute to security of supply in wider Europe. See <www.energy-community.org/portal/page/portal/ENC_HOME/ENERGY_COMMUNITY/Facts_and_Figures>, 18 May 2010. See also A. Belyi, ‘EU External Energy Policies: A Paradox of Integration’, in *Europe’s Global Role*, ed. J. Orbie (Aldershot: Ashgate, 2009), 210–211; R. Youngs, ‘Europe’s External Energy Policy: Between Geopolitics and the Market’, Working Document 278 (Brussels: CEPS, 2007), 3.

⁴⁴ Commission Staff Working Document, the January 2009 Gas Supply Disruption to the EU: An Assessment, SEC (2009) 977 (Brussels, 2009), 5.

⁴⁵ The GCG is composed of representatives of Member States, of representative bodies in the industry concerned, and of relevant consumers, under the chairmanship of the Commission.

⁴⁶ Commission Staff Working Document, n. 44 above, 5.

⁴⁷ ‘Russia-Ukraine Gas Row Heats Up’, *BBC News*, 31 Dec. 2008, <<http://news.bbc.co.uk/2/hi/business/7805770.stm>>, 13 Apr. 2010; S. Pirani, ‘The Russo-Ukrainian Gas Dispute, 2009’, RAD 53 (2009): 3.

⁴⁸ NESCO consists of the representatives of the Ministries of foreign affairs and energy from the EU Member States, the European Commission, and the Council Secretariat.

⁴⁹ Commission Staff Working Document, n. 44 above, 5.

Moscow and Kiev. The following day, Commission President Barroso warned that both countries' reputation as reliable partners was at stake and insisted that a stable and long-term solution had to be found.⁵⁰ In spite of the overall quick response by the EU and other organizations to condemn the events, this initial 'bilateral diplomacy' proved ineffective in terms of preventing the crisis from escalating further.

On 7 January 2009, Gazprom shut down the system completely, arguing Ukraine should replace the 'technical' gas it had taken (i.e., the amount of gas required to run the compressor stations, which transit countries usually provide).⁵¹ Around this time, French President Sarkozy and German Chancellor Merkel joined angry calls for Russia to resume supplies as gas shortages and heating rationing threatened to spread from Eastern to central Europe and beyond.⁵²

On 8 January 2009, the Council of the European Union ('the Council') issued a Declaration, which stated:

Given the importance attached to solidarity within the EU, this is a problem for the EU as such. It is unacceptable for the EU to see its citizens and enterprises suffering from gas shortages due to the non respect by both partner countries of their contractual obligations [and it] calls on both parties to accept independent monitoring of the actual flows of gas through the pipelines.⁵³

The International Energy Agency (IEA) took a similar stance by stating that the closure of the pipes is:

completely unacceptable, given that European customers are not a party in this dispute, have long-term contracts with fair prices, and have made prompt payments. The interruption is creating hardship during the coldest weather Europe has faced within a number of years.⁵⁴

Following this, both the EU Presidency and the Commission intensified their efforts to facilitate a solution, which resulted in a monitoring agreement between Ukraine, Russia, and the EU in 9 January. The agreement provided for independent

⁵⁰ Statement from the President Barroso and Commissioner Piebalgs on the Agreement for Gas Monitoring, EU Press Release, Doc. IP/09/33 (Brussels, 11 Jan. 2009).

⁵¹ Pirani, n. 47 above, 3. On the alleged stealing of gas, see 'Gazprom Calls on Naftogaz Ukrainy to Resume Negotiations', *Ukrainefacts*, 4 Jan. 2009.

⁵² 'Europe Shivers as Russia Ignores Calls to Restore Gas', *Telegraph.co.uk*, 9 Jan. 2009, <www.telegraph.co.uk/news/worldnews/europe/russia/4206720/Europe-shivers-as-Russia-ignores-calls-to-restore-gas.html>, 13 Apr. 2010. See also 'Europe Homes Freeze amid Gas Row', *BBC News*, 9 Jan. 2009, <<http://news.bbc.co.uk/2/hi/europe/7819429.stm>>, 13 Apr. 2010 and 'Europeans Struggle to Keep Warm', *BBC News*, 8 Jan. 2009, <<http://news.bbc.co.uk/2/hi/europe/7817780.stm>>, 13 Apr. 2010.

⁵³ EU Declaration on the Russia/Ukraine Problem and Energy Security, Council Doc. 5104/09 (Presse 4) (Brussels, 8 Jan. 2009), Points 1 and 3.

⁵⁴ IEA, 'IEA Urges Resumption of Gas Supplies to Europe, 7 Jan. 2009', <www.iea.org/journalists/arch_pop.asp?MED_ARCH_ID=534>, 13 Apr. 2010.

monitors from all the involved parties to oversee gas transit on Russian and Ukrainian territories.⁵⁵

During the same time interval, the GCG raised production in several Member States,⁵⁶ increased withdrawal from storage to maximum capacity in the most heavily affected areas⁵⁷, stepped up imports from diversification of sources and routes both inside and outside the EU,⁵⁸ and limited consumption for industry in Bulgaria, Slovakia and temporarily for large consumers in Hungary.⁵⁹ The overall effectiveness of these mitigation measures notwithstanding additional Norwegian supplies could not reach Eastern Europe due to a lack of interconnections, as well as differing standards of gas.⁶⁰ It is partly in this context that the GCG emphasized the need for quick implementation of mid- to long-term measures, in particular improving the interconnectivity between Member States and ENCOM countries.⁶¹

⁵⁵ S. Pirani, J. Stern & K. Yafimava, 'The Russo-Ukrainian Gas Dispute of January 2009: A Comprehensive Assessment', *Oxford Institute for Energy Studies* (2009): 46; Commission Staff Working Document, n. 44 above, 4. See also 'Ukraine Making Gas Crisis Worse', *BBC News*, 10 Jan. 2009, <<http://news.bbc.co.uk/2/hi/europe/7821880.stm>>, 13 Apr. 2010; 'Energy Fuels New "Great Game" in Europe', *BBC News*, 9 Jun. 2009, <<http://news.bbc.co.uk/2/hi/europe/8090104.stm>>, 13 Apr. 2010; Monitoring Team Starts Work in Kiev and Gas Coordination Group Urges Naftogaz and Gazprom to Resume Gas Deliveries Immediately, EU Press Release, Doc. IP/09/24 (Brussels, 9 Jan. 2009). The terms of reference of the agreement can be found here: <<http://old.gazprom.ru/eng/news/2009/01/33576.shtml>>, 13 Apr. 2010; also see 'Accord Signed in Russia Gas Row', *BBC News*, 11 Jan. 2009, <<http://news.bbc.co.uk/2/hi/europe/7822093.stm>>, 13 Apr. 2010. Note that during this time the European Parliament also organized a debate where representatives of Gazprom and Naftogaz were invited to discuss solutions to the crisis. See European Parliament Press Service, Doc. No. 20090108IPR45595.

⁵⁶ Production was raised in the Netherlands, United Kingdom, Romania, and Poland, as well as in non-Member States Norway, Algeria, and Libya to compensate the loss of Russian gas, to the maximum capacity of production and transport means. Europe is said to have lost up to 30% of its gas imports at this time.

⁵⁷ Storage sharing at this point in time was already implemented in two cases: Austria and Slovenia and Hungary and Serbia. Czech Republic left its stored volume in Slovakia for its domestic needs as it was very heavily impacted.

⁵⁸ Imports from alternative suppliers increased, namely Norway and Libya, along with increased Russian imports via Belarus and Turkey. By 10 January, Ukraine announced the delivery of gas from their own reserves to Moldova and Bulgaria. Greece was said to be confident that its Liquefied Natural Gas (LNG) terminal would enable it to cope with the crisis. Fuel switching took place, particularly towards fuel oil for heating and coal for power production in Austria, Slovakia, Greece, Poland, Bulgaria, and Romania. In addition, extra commercial deliveries were delivered from neighbouring countries in the case of Austria, Hungary, and the Czech Republic.

⁵⁹ See 'Gas Cut: How Europe Is Coping', *BBC News*, 8 Jan. 2009, <<http://news.bbc.co.uk/2/hi/europe/7815113.stm>>, 13 Apr. 2010.

⁶⁰ *European Regulators Group for Electricity and Gas (ERGEG) Advice on Russia-Ukraine Gas Dispute* (Brussels, 10 Feb. 2009), 2, <www.energyregulators.eu/portal/page/portal/EER_HOME/EER_PUBLICATIONS/CEER_ERGEG_PAPERS/Gas/2009/LM_Piebalgs_090210.pdf>, 4 May 2010.

⁶¹ Measures Discussed at Gas Coordination Group, EU Press Release, Doc. MEMO/09/4 (Brussels, 9 Jan. 2009).

Moreover, problems existed in terms of quality of available information. Limitations on consistent information and exchange of data between gas companies were all obstacles in making most of available market potential. In particular, the market was hampered by inadequate information on cross-border gas flows and a lack of transparent information on the flow of gas into the EU (see also section V below).⁶²

On 12 January 2009, the Council evaluated the situation of gas supplies in relevant Member States and expressed its appreciation for domestic and solidarity measures already undertaken. Specifically, it noted:

despite the limited possibilities in the short run [these measures] have helped to mitigate the impact on European citizens and national economies. Member States are encouraged to sustain and deepen solidarity measures until supplies are restored.⁶³

However, the EU's hopes that the monitoring mission would allow gas flows to resume were quickly dashed by Russian claims that Ukraine had blocked gas deliveries to Europe.⁶⁴ What followed was a swift move by European industry in an attempt to end the dispute. After Naftogaz declared to Gazprom that a significant amount of technical gas would be needed to restart the system before transit to Europe could be restarted, in 15 January a group of companies set about creating a means to provide the finance for such gas. A consortium was created consisting of Eurogas⁶⁵ members ENI, Gdf/Suez, E.ON/Ruhrigas, RWE, Wingas, OMV and non-member Gazprom.⁶⁶ The consortium would provide the finance for gas to restart the transit network until the two sides had reached a long-term settlement, after which a mechanism provided for repayment of funds to the companies involved.⁶⁷

In 17 January, Russia hosted a high-level summit in Moscow, with the participation of representatives from the EU, Russia, and Ukraine.⁶⁸ This resulted in an

⁶² Commission Staff Working Document, n. 44 above, 10.

⁶³ Council Conclusions, Extraordinary Council Meeting Transport, Telecommunications and Energy, Council Doc. 5165/1/09 REV 1 (Brussels, 12 Jan. 2009), 2.

⁶⁴ Pirani, n. 47 above, 3.

⁶⁵ Eurogas promotes, *inter alia*, the interests of its membership, companies, national federations, and associations involved in the European gas trade.

⁶⁶ 'Putin Weighs in as Europe Gas Crisis Continues', *MSNBC World News*, 15 Jan. 2009, <www.msnbc.msn.com/id/28678240/>, 21 Apr. 2010. See also I. Traynor, 'Anger at German Award for Russia's Vladimir Putin amid Gas Crisis', *Guardian*, 16 Jan. 2009, <www.guardian.co.uk/world/2009/jan/16/anger-at-german-award-for-putin>, 21 Apr. 2010. Traynor remarks that this agreement was bound to encourage criticism that Moscow and Gazprom succeeded in dividing the EU through dealing with its biggest west European clients, Germany and Italy, and thus bypass the countries of central and southern Europe, which are the main victims of the crisis.

⁶⁷ See Pirani et al., n. 55 above, 48.

⁶⁸ 'EU to Attend Gas Summit in Moscow', *BBC News*, 15 Jan. 2009, <<http://news.bbc.co.uk/2/hi/europe/7830517.stm>>, 13 Apr. 2010.

agreement between Russian Prime Minister Putin and Ukrainian Prime Minister Timoshenko on 19 January.⁶⁹ Gas flows to Europe were reinstated the following day.⁷⁰

3. *A Resulting Rethink of European Energy Security*

Following the resolution of the crisis, Commission President Barroso issued a Statement in which he called for the rapid development of infrastructure, diversification of energy sources and supply routes, and a revision of the 2004 Gas Directive.⁷¹ In a similar ‘call’, the Energy Charter’s Secretary General issued a reflection in which he emphasized that the interruption of gas supplies occurred in spite of transit provisions within the Charter that had in fact been designed to prevent such incidents, while calling for further development of the Treaty so as to better cope with severe supply disruptions. The statement invoked the principle of ‘uninterrupted transit’, which could be seen as a reminder to Ukraine of its obligations under the ECT.⁷² Furthermore, the Secretary General called for the finalization of the ECT’s Transit Protocol, which would limit the risks associated with energy transit (see also section V below).⁷³

EU efforts aimed at diversification of energy sources and supply routes have since intensified.⁷⁴ In March 2009, the EU signed a deal with Ukraine paving the way for USD 3.4 billion of investment in its gas infrastructure. As a follow-up, in

⁶⁹ ‘Gas to Flow after Moscow Deal’, *BBC News*, 18 Jan. 2009, <<http://news.bbc.co.uk/2/hi/europe/7834796.stm>>, 13 Apr. 2010.

⁷⁰ See Commission Staff Working Document, n. 44 above, 4; Pirani et al., n. 55, 25–26; Pirani, n. 47 above, 3; and I. Gazizullin, ‘A Ukrainian Perspective of the 2009 Gas Dispute’, in *ISS Opinion* (European Union Institute for Security Studies, 2009). See also ‘Russia Opens Gas Taps to Europe’, *BBC News*, 20 Jan. 2009, <<http://news.bbc.co.uk/2/hi/europe/7839053.stm>>, 13 Apr. 2010.

⁷¹ Statement of President Barroso on the resolution of the Ukraine-Russia Gas Dispute, Press Point, Doc. SPEECH/09/12 (Brussels, 20 Jan. 2009), <<http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/09/12&format=HTML&aged=0&language=EN&guiLanguage=en>>, 13 Apr. 2010. See also Council Directive 2004/67/EC of 26 Apr. 2004 concerning measures to safeguard security of gas supply, OJ L 127/92 of 29 Apr. 2004.

⁷² Article 7(5) ECT obliges ECT members to ‘... secure established flows of Energy Materials and Products to, from or between the Areas of other Contracting Parties’. A core element of this principle is to prevent non-transit related issues (i.e., commercial issues) from having a negative impact on transit volumes.

⁷³ ECT, ‘A Word from the Secretary General on the Energy Crisis of Early 2009, 6 Feb. 2009’, <www.encharter.org/index.php?id=21&id_article=171&L=0>, 13 Apr. 2010.

⁷⁴ In March 2009, former External Relations Commissioner Benita Ferrero-Waldner said that the EU was seeking bilateral agreements on gas shipments with former Soviet countries, including Armenia, Azerbaijan, Moldova, Ukraine, and Belarus. See ‘EU Seeks Gas Accords with Ex-Soviet States, Commissioner Says’, *Bloomberg*, 9 Mar. 2009, <www.bloomberg.com/apps/news?pid=newsarchive&sid=aoON0rcc_3ZY>, 13 Apr. 2010.

August 2009 the EU and international lending institutions agreed with Ukraine a loan worth USD 1.7 billion in return for reforms of its gas sector.⁷⁵

The year 2009 saw also many developments with regard to the Nabucco project – a planned gas pipeline connecting the Caspian region, the Middle East, and Egypt via Turkey, Bulgaria, Romania, and Hungary with Austria and further on with the Central and Western European gas markets, bypassing both Russia and Ukraine. The project enjoys EU support, stemming from its desire to diversify both in terms of suppliers and transit routes. In July 2009, the Nabucco Intergovernmental Agreement was signed by the four EU transit countries and Turkey, paving the way for its further development and construction.⁷⁶ Notwithstanding the fact that the Agreement is a milestone in Nabucco's development, it cannot be said that many of its problems have disappeared. It remains unclear how much gas Turkey will be able to take from the pipeline as this matter was left out of the Agreement.⁷⁷ Therefore, if Nabucco wishes to truly contribute to the Union's energy security in the long-term and not remain an empty pipe, much more than political will is needed by its proponents, with the negotiation of supply contracts ranking on top of the list.

The above overview showed numerous interventions across different levels of cooperation, with varying degrees of success. In the next section, we assess which forms and levels of cooperation were in fact used and whether their use proved effective in resolving the crisis.

V Critical Appraisal

By the complexity of the crisis, it is clear that neither companies nor governments can have access to all relevant information. As shown, a lack of a well-functioning exchange of up-to-date, reliable and consistent information between gas companies, as well as inadequate information on cross-border flows served to undermine full effectiveness of solidarity measures.

This view is supported by Gas Infrastructure Europe (GIE)⁷⁸ – a representative organization to the EU institutions gathering operators of gas infrastructures across Europe – in its April 2009 assessment, in which it claimed

⁷⁵ 'EU Reaches Deal with Ukraine', *BBC News*, 1 Aug. 2009, <<http://news.bbc.co.uk/2/hi/europe/8179461.stm>>, 13 Apr. 2010.

⁷⁶ 'Europe Gas Pipeline Deal Agreed', *BBC News*, 13 Jul. 2009, <<http://news.bbc.co.uk/2/hi/business/8147053.stm>>, 13 Apr. 2010. See also Remarks by Commission President José Manuel Barroso upon the Signature of the Nabucco Intergovernmental Agreement, EU Press Release, SPEECH/09/339 (Ankara, 13 Jul. 2009).

⁷⁷ 'Europe Gas Pipeline Deal Agreed', n. 76 above; see also B. Vermeulen, 'Pijpleiding Nabucco blijft leeg ondanks politieke wil', *NRC Handelsblad*, 13 Jul. 2009, <www.nrc.nl/economie/article2299086.ece/Pijpleiding_Nabucco_blijft_leeg_ondanks_politieke_wil>, 13 Apr. 2010.

⁷⁸ GIE represents sixty-five member companies from twenty-seven countries who work on transmission pipelines, storage facilities, and/or LNG terminals.

that constraints flowing from the confidentiality of data limited information exchanges and prevented relevant solutions from being found.⁷⁹ It noted not so much a lack in quantity of information but claimed its fragmented character proved an overall assessment of the situation that was hard to make.⁸⁰ The efforts by NESCO to distribute information do not seem to have been able to overcome these issues.

According to the European Regulators Group for Electricity and Gas (ERGEG) – the Commission’s formal advisory group of energy regulators⁸¹ – the exchange of information through the GCG constitutes an important first step to improve coordination, though it cannot count as sufficient.⁸² Indeed, access to reliable information is crucial for the EU to be able to act appropriately on its *regional* dimension (section II above). To that effect, a harmonized minimum level of information – while respecting existing confidentiality agreements – should be made available to the market, especially in crisis situations.⁸³ Moreover, in order to improve the Union’s coherence and consistency in external relations, it is important that a single actor acts publicly on the basis of this information.

Although the Gas Directive obliges Member States to have gas emergency plans in place, an insufficient degree of coordination of these plans seems to have contributed to limiting the Union’s resolve. The emergency plans, triggers, and the extent of these mechanisms differ from country to country.⁸⁴ Some Member States declared emergencies as a result of their national situation and launched their plans; some adopted and implemented concrete plans and measures on the first day of the crisis; whereas others had no detailed plans in place.⁸⁵ As such, the level of preparedness across Member States varied significantly.⁸⁶

This was confirmed by ERGEG, who claimed there was neither adequate coordination of the various plans within gas regions nor sufficient transparency of arrangements in Member States (such as maintaining certain levels of gas in storage), which could have consequences in terms of gas flows to or from neighbouring

⁷⁹ Gas Infrastructure Europe, GIE Views Regarding the Prevention and Management of Gas Crises, Doc. Ref: 09GIE130 (30 Apr. 2009), 2, <www.gie.eu.com/adminmod/show.asp?wat=GIE%20views%20on%20SoSversion%2030%20avril_final.pdf>.

⁸⁰ *Ibid.*, 4.

⁸¹ ERGEG was established by the European Commission, in November 2003, in order to assist in creating a single-EU market for electricity and gas. See Commission Decision 2003/796/EC of 11 Nov. 2003 on establishing the European Regulators Group for Electricity and Gas, OJ L 296/34 of 14 Nov. 2003.

⁸² ERGEG, n. 60 above, 1–2.

⁸³ *Ibid.*, 4.

⁸⁴ Commission Staff Working Document, n. 44 above, 7.

⁸⁵ *Ibid.*

⁸⁶ *Ibid.*

countries.⁸⁷ To prevent this from happening, regional (or Europe-wide, see section VII below) coordination of individual emergency plans with neighbouring countries should take place with the aim of eliminating any contradictions to ensure there is full consistency, avoiding individual actions that could have the effect of reducing gas in neighbouring countries.⁸⁸

Next to inadequate coordination of emergency plans, EU mitigation efforts were further hampered by a lack of interconnectedness of Europe's pipeline system. GIE noted that not all transmission operators could adequately adapt gas flow patterns in their networks (e.g., by reversing the flow of gas) and so deal with an alternated gas flow situation resulting from the dispute.⁸⁹ Overall, the absence of an EU-wide equality in level of preparedness, worsened by a lack of interconnectors, made it more difficult for the Union to adequately deal with the crisis through the Gas Directive.⁹⁰

The new Regulation that will replace the existing Gas Directive⁹¹ seems a step in improving coordination. According to the original proposal, the Commission should coordinate actions both internally and with regard to third States, working with both producer and transit countries on arrangements to handle crisis situations and to ensure a stable gas flow to the Union.⁹²

Specifically, the Commission envisages a role for itself whereby, in consultation with third countries involved, it would be entitled to deploy a task force to

⁸⁷ Examples of situations where actions in one Member State inadvertently placed another under strain include measures on gas flows during emergency situations taken in Italy, which nearly prevented alternate flows of gas from reaching Slovenia. See Commission Staff Working Document, n. 44 above, 10; interview with official from the Permanent Representation of Slovenia to the EU on 23 Apr. 2010. ERGEG's advice presented a five-point plan with suggestions to improve coordination in national emergency planning and regional coordination of network access, interconnections between markets, infrastructure planning procedures, including emergency scenarios, and the careful monitoring of security of supply in order to increase transparency through monitoring and early warning, notably in crisis and pre-crisis situations. See ERGEG, n. 60 above, 1–2.

⁸⁸ ERGEG, n. 60 above, 2.

⁸⁹ GIE, n. 79 above, 6.

⁹⁰ According to the Commission, the existing Directive is insufficient given the growing import dependence and increased supply and transit risks in third countries, as well as increasing gas flows and the development of the internal gas market in the Union. Moreover, it claims the extra capacity to ensure security of supply is not necessarily provided for by market forces. See Proposal for a Regulation of the European Parliament and of the Council concerning measures to safeguard security of gas supply and repealing Directive 2004/67/EC, COM(2009) 363 final (Brussels, 16 Jul. 2009), 3.

⁹¹ *Ibid.* On 25 Jun. 2010, EU Member State representatives reached a political agreement on a compromise text for the Gas Regulation. See Euractiv, 'EU Agrees Rules to Secure Gas Supply, 28 Jun. 2010', <www.euractiv.com/en/energy/eu-agrees-rules-secure-gas-supply-news-495651>, 28 Jun. 2010.

⁹² Council of the European Union, Note from General Secretariat of the Council to Delegations on the Proposal for a Regulation of the European Parliament and of the Council concerning measures to safeguard security of gas supply and repealing Directive 2004/67/EC 11892/09 ENER 253 CODEC 963, Council Doc. 8304/4/10 REV 4, Recital Point 30, Commission Proposal Text, 20. In its amendments to the Proposal, the European Parliament stresses that this coordinating role should, in particular, be fulfilled in the case of emergency situations. *Ibid.*, EP Amendment 25, 20.

monitor gas flows outside of the Union and assume a role as mediator and facilitator where a crisis arises due to difficulties in a third country.⁹³ Member States posit a slightly more nuanced view, where such a monitoring force may be deployed outside the EU, where necessary, and report on gas flows *into* the Union.⁹⁴ Interestingly, whereas neither the Commission nor the Council makes mention of any role of the High Representative of Foreign Affairs and Security Policy/Vice-President of the Commission (HR/VP), the Parliament repeatedly stresses that this mediation and facilitation role should be enacted through both the energy Commissioner and the HR/VP (see in particular section VI.3 below).⁹⁵

In addition, the draft Regulation would place an obligation on Member States to designate a competent authority to assess risks and establish both preventive and emergency plans, which should be updated regularly and published, and be subject to peer review and testing.⁹⁶ The European Parliament goes a step further, in suggesting that these assessments should include the geopolitical risk to the Union posed by situations in third countries.⁹⁷ Conversely, the Council makes no mention of such risks.⁹⁸ Whether or not geopolitical risks are included, it is safe to say that provisions as suggested by all institutional actors involved would clearly impact positively on the Union's coherence in external action.

What immediately came into play on a *bilateral* level (section II above) is the ineffectiveness of statements made by the EU, as well as other organizations.⁹⁹ Recourse to such interventions, with the Union organizing its emergency planning in the meantime, would have been less necessary if the bilateral EWM had been reinforced earlier. Due to transit countries not being associated with the Mechanism, it was difficult to anticipate the crisis thoroughly. In order for a correct assessment to be made and for the EU to be able to organize its emergency response in advance, it is recommended for (key) transit countries to be associated with the Mechanism in the future. Coupled with the agreement to overhaul Ukraine's energy infrastructure and the country's likely joining of the Energy Community, this should aid the Union's oversight of one of its key transit partners.

Overall, looking at the Commission's handling of the dispute, its initial reaction was swift, as the monitoring agreement was quickly established; in spite of the fact that there proved little to monitor in the end. However, its bilateral diplomacy proved ineffective in preventing the crisis from escalating as neither Russia nor Ukraine acted on the EU's statements. In fact, it was not until industry got actively involved that the dispute was finally settled.

⁹³ *Ibid.*, Recital Point 30, Commission Proposal Text, 20.

⁹⁴ *Ibid.*, Recital Point 30, Current Council Text, 20.

⁹⁵ *Ibid.*, EP Amendment 25, 20–21 and Amendment 86, para. 4a (new), 70–71.

⁹⁶ *Ibid.*, Art. 3(2) and Recital Point 27, Commission Proposal Text, 25–26 and 19.

⁹⁷ *Ibid.*, EP Amendment 33, 27–28.

⁹⁸ *Ibid.*, Art. 3(2), Current Council Text, 27–28.

⁹⁹ Interview with official from the Permanent Representation of the Czech Republic to the EU on 19 Apr. 2010.

In the end, the agreement brokered between European companies was never needed as a final solution was reached before the crisis got to such a stage. However, it seems fair to assume that the mere negotiating of this deal proved helpful in removing Ukraine's objection to pay for the necessary technical gas. The consortium was set up by gas companies and backed up by national leaders – Prime Minister Berlusconi of Italy and German Chancellor Angela Merkel, together with Russian Prime Minister Putin are said to have been particularly influential, with the Commission allegedly not having played a role.¹⁰⁰ In terms of consistency and coherence in external relations however, this public 'interfering' by leaders from Member States and European companies did not aid the EU's attempts to speak with one voice to all relevant parties concerned.

No actions took place on the *interregional* level (section II above), yet this can be easily explained by the lack of regional integration between countries in the area. It is remarkable however that EU actions were largely absent on the *global* level (section II above), for it appears that there was something to gain here. With respect to the IEA, neither Ukraine nor Russia is a member of the organization. Consequently, neither could be held accountable for a failure to adhere to particular treaty provisions. With the Energy Charter, this is somewhat different. In spite of the ECT's primary role being to ensure investment protection and provide for a clear and reliable investment climate, public statements denouncing Ukraine's breach of the Charter's transit provisions on non-interruption and non-reduction of transit flows nevertheless could have exerted pressure on one of the parties to the dispute (in the form of public scrutiny) to push for resolution of the conflict. Doing so could have sent a signal that the EU took a violation of an international agreement by one of its contracting parties very seriously, thus providing the Treaty with a potential early role in resolving the conflict.¹⁰¹ In the long term, the finalization of the ECT's Transit Protocol should be stepped up in order to strengthen the Charter's regulatory framework. Doing so could be a significant first step forward into strengthening the ECT's power to mitigate any future crises.

Overall, differences in types and levels of interventions set aside, the analysis demonstrated that EU interventions seem to have been undermined by deficits in

¹⁰⁰ Pirani et al., n. 55 above, 48; MSNBC, n. 66 above; Traynor, n. 66 above.

¹⁰¹ Cf., P. Stevens, 'Cross-Border Oil and Gas Pipelines: Problems and Prospects', Joint UNDP/World Bank *Energy Sector Management Assistance Programme* (Washington, DC: UNDP/World Bank, 2003), 21 and 44. Here, Stevens argues that the consequences of violating an international agreement are much more serious than those resulting from not adhering to a bilateral agreement. Note that during the crisis, the EU could have referred to Art. 45 of the Treaty, which states that even without ratification, the Treaty is provisionally applicable, provided that it does not contradict existing domestic legislation. This in turn implies that referral to the Article in relation to Russia would have been possible. In fact, this has recently been confirmed by a special international commercial tribunal, set up for the Yukos case, that on 30 Nov. 2009 ruled that the ECT is binding on Russia. See Euractiv, 'Court Rules against Russia in Yukos Case, 1 Dec. 2009', <www.euractiv.com/en/energy/court-rules-russia-yukos-case/article-187869>, 7 Apr. 2010. However, given Russia's withdrawal from the provisional application of the ECT, see n. 38 above, any referral to Art. 45 ECT in the future seems unlikely to have any impact as Russia will no longer be bound by it.

coherence between Member State actions and those at EU level rather than by (in)action at any specific level of cooperation. Building on this observation, the advantages for the Union to act more coherently seem to lie in a combination of prevention, coupled with the ability to pose a credible and unified response to crisis situations. If coherence in external action could be ensured, for example through verification at EU level of Member States' bilateral deals with third country suppliers (e.g., Nord Stream, section III.2 above), the chances for such deals to serve the interests of the Union as a whole, rather than individual Member States, would be significantly enhanced.

In the long term, such verification would allow the benefits of both supply contracts and infrastructural deals to accrue more equally within the Union. This could potentially limit the occurrence of differing technical standards and clauses that constrain information sharing between gas companies, and so improve the level of interconnectedness of the internal market. In turn, this would then have the effect of improving the possibility for a well-informed, coordinated, and *solidaire* response to a supply interruption.

For the Union to be able to execute its emergency response accordingly in the future, institutional developments may act as catalysts or turning points towards achieving this aim. In the next section, we assess whether such implications can be derived from the recent coming into force of the Treaty of Lisbon.

VI Impact of the Treaty of Lisbon

Increased coherence in EU external relations is one of the central aims underpinning the Treaty of Lisbon. The Treaty generated much debate on whether it in fact allows the Union to act more coherently and effectively in its external policies, including energy. In this section, we assess whether three novelties of the Lisbon Treaty, that is, the energy competence, the solidarity mechanism, and the new actors in the Union's external relations, have the potential to act as a catalyst for a common energy policy in the (near) future.

1. *Scope of the Energy Competence*

Under the Lisbon Treaty, energy remains a shared competence,¹⁰² but for the first time it is given its own Title,¹⁰³ consisting of the three-limbed new Article 194

¹⁰² Article 4(2)(i) TFEU. However, one has to note here that the Union's exclusive competence to 'establish the competition rules necessary for the functioning of the internal market' based on Art. 3(1)(b) TFEU also stretches into the internal energy market. See also S. Fischer, 'Energie- und Klimapolitik im Vertrag von Lissabon: Legitimationsverweiterung für wachsende Herausforderungen', *Integration* 1 (2009): 54. It may be added that this also extends to some of the external aspects of the energy policy, see Art. 3(2) TFEU.

¹⁰³ Title XXI, Energy, of Part Three, Union Policies and Internal Actions, TFEU.

Treaty on the Functioning of the European Union (TFEU). Situating the ‘Union policy on energy’ explicitly ‘in the context of the establishment and functioning of the internal market’ and ‘with regard for the need to preserve and improve the environment’, the policy’s objectives are clearly outlined: (i) to ensure the functioning of the energy market; (ii) to ensure security of energy supply in the Union, (iii) to promote energy efficiency, energy saving, and the development of new and renewable forms of energy; and (iv) to promote the interconnection of energy networks.¹⁰⁴

In the past, as energy was an objective under the Treaties, yet no specific legal basis existed to take appropriate measures to that effect, Articles 95¹⁰⁵ and 308¹⁰⁶ of the Treaty Establishing the European Community (TEC) were often used. The frequent recourse to these articles became part of a broader discussion on ‘the future of Europe’ that started back in the early 2000s.¹⁰⁷ The 2001 Laeken Declaration approached the use of Articles 95 and 308 TEC in two ways, when it spoke of how to strike a balance between allowing the EU to be able to react to fresh challenges and developments and explore new policy areas on the one hand, while preventing ‘competence creep’ on part of the Union, on the other.¹⁰⁸ To accommodate both issues and work towards a solution, the Convention on the Future of Europe recommended in 2002 that energy should be granted a new specific legal basis should the Union wish to pursue policy in this field.¹⁰⁹

Some argue that the Lisbon Treaty’s creation of an energy Title may strengthen the Union’s self-perception as an energy actor and gradually turn European energy politics into a more *natural* undertaking, as Member States that are traditionally ‘wary’ of increased ‘Europeanization’ in this field could become more convinced of the possible added value of European energy policy.¹¹⁰ However, such a chain of events is by no means certain. It presupposes both increased concerted external action in the energy field and that the benefits of such actions outweigh actions taken at Member State level. At this stage, it remains speculative whether the application of the provisions of the Lisbon Treaty will effectively lead to this (ideal-type) situation.

¹⁰⁴ Article 194(1) TFEU.

¹⁰⁵ Article 95 TEC allowed for measures that had as their object the establishment and functioning of the internal market.

¹⁰⁶ Article 308 TEC provided for an additional legislative competence if action was proven necessary to attain one of the objectives of the Community, in the course of the operation of the common market, and the Treaty did not provide the necessary powers.

¹⁰⁷ ‘Laeken Declaration on the Future of the European Union, 15 Dec. 2001’, <<http://european-convention.eu.int/pdf/lknen.pdf>>, 15 Jul. 2010, s. III.

¹⁰⁸ *Ibid.*, 4.

¹⁰⁹ Convention on the Future of Europe, Final Report of Working Group V ‘Complementary Competences’, Doc. CONV 375/1/02 REV 1 (Brussels, 4 Nov. 2002), 15.

¹¹⁰ Fischer, n. 102 above, 58; interview with official from the Permanent Representation of the Czech Republic to the EU on 19 Apr. 2010.

Article 194 TFEU raises the question whether all EU measures in the energy field need to be henceforth based on this specific Treaty provision, or whether they may be adopted on the basis of other Treaty provisions (notably internal market provisions), as has been common practice in the past.¹¹¹ As Article 194(2), first paragraph TFEU stipulates that measures necessary to achieve the aforementioned objectives have to be established ‘without prejudice to the application of other provisions of the Treaties’, a cautious approach seems due. It is clear, for instance, that if EU measures were considered for the development of trans-European networks for energy infrastructures, Article 172 TFEU would be the appropriate legal basis. Moreover, the use of the plural ‘Treaties’ seems to indicate that in certain cases also Common Foreign and Security Policy (CFSP) measures – which find their basis in the Treaty on European Union (TEU) and not the TFEU – touching on energy remain possible.

2. *Solidarity*

An important novelty is the solidarity mechanism laid down in Article 122(1) TFEU¹¹² and touching in particular on energy:

Without prejudice to any other procedures provided for in the Treaties, the Council, on a proposal from the Commission, may decide, in a spirit of solidarity between Member States, upon the measures appropriate to the economic situation, in particular if severe difficulties arise in the supply of certain products, notably in the area of energy.

As was highlighted above, throughout the crisis, the Council made repeated references to solidarity (section IV.2 above). This could be seen as a ‘test’ of Member States’ dedication to and concrete implementation of the Lisbon Treaty’s solidarity provision, pending the latter’s entry into force. However, as the account of the crisis showed, for various reasons the measures did not deliver their full intended effects. This could also stem from the equivocal nature of the concept of ‘solidarity’ itself. It is not a quantifiable notion, and once activated, its financial implications are unclear and cannot be derived from the Treaty. Solidarity is thus subject to Member States’ interpretation on how much weight is given to it in times of crisis.¹¹³ It may be added that ‘a spirit of solidarity between Member States’ is also expressly set out in Article 194(1) TFEU to guide the EU’s energy policy as such.

¹¹¹ B. Delvaux, M. Hunt & K. Talus (eds), *EU Energy Law and Policy Issues* (Rixensart: Euroconfidentiel, 2008), 28.

¹¹² Article 122(1) TFEU is the former Art. 100(1) TEC.

¹¹³ Interviews with officials from the Permanent Representations to the EU of Bulgaria and Czech Republic on 19 Apr. 2010, Latvia on 22 Apr. 2010, and Slovenia on 23 Apr. 2010; interview with official from the European Commission Directorate-General for Energy on 11 Mar. 2010.

The explicit mention of energy in connection with supply interruptions creates a legal basis that could enable the Union to intervene more actively in the future.¹¹⁴ In this light, the solidarity clause will undoubtedly play a role with respect to measures taken to ensure the security of supply at a time of crisis.¹¹⁵ It is however necessary here to point to some limitations. According to Article 194(2), second paragraph TFEU, measures necessary to achieve the objectives of Article 194(1) TFEU

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) TFEU.¹¹⁶

Although the extent to which Article 194(2), second paragraph TFEU impacts on the ability for the EU to act is as of yet unclear, possible tensions exist between this provision and solidarity measures necessary in the event of an interruption in energy supply based on Article 122(1) TFEU.

3. *External Relations*

Our account of the crisis has shown that recourse to effective, and above all, coherent EU diplomacy is much needed. The analysis indicated that the effectiveness of such diplomacy was more a question of 'effective bilateralism' rather than multilateralism – thus contradicting the EU's own *leitmotiv* for its external action. This, however, does not mean that the Union should not aim to make more effective use of multilateral instruments at its disposal, seek their reform, or move for increased

¹¹⁴ Fischer, n. 102 above, 57.

¹¹⁵ Yet, in line with the reference to the 'spirit of solidarity' in Art. 194(1) TFEU, it may also do so in promoting the interconnection of energy networks, as part of solidarity measures limiting a (future) crisis' impact. See also U. Ericke & D. Hackländer, 'Europäische Energiepolitik auf der Grundlage der neuen Bestimmungen des Vertrags von Lissabon', *Zeitschrift für Europarechtliche Studien* 11, no. 4 (2008): 595.

¹¹⁶ Article 192(2)(c) TFEU, situated in the preceding Treaty Title XX on Environment, provides for a special legislative procedure when the Council adopts 'measures significantly affecting a Member State's choice between different energy sources and the general structure of its energy supply'. The Council then has to decide unanimously after consulting the European Parliament, the Economic and Social Committee, and the Committee of the Regions. See also Declaration No. 35 attached to the Lisbon Treaty, stating that the (Intergovernmental) 'Conference believes that Article 194 does not affect the right of the Member States to take the necessary measures to ensure their energy supply under the conditions provided for in Article 347'. Art. 347 TFEU contains the age-old clause that 'Member States shall consult each other with a view to taking together the steps needed to prevent the functioning of the internal market being affected by measures which a Member State may be called upon to take in the event of serious internal disturbances affecting the maintenance of law and order, in the event of war, serious international tension constituting a threat of war, or in order to carry out obligations it has accepted for the purpose of maintaining peace and international security.'

‘multilateralization’ of bilateral areas, where appropriate. Article 21(1), second paragraph, of the post-Lisbon TEU clearly states that:

[t]he Union shall seek to develop relations and build partnerships with third countries, and international, regional or global organisations [...] It shall promote multilateral solutions to common problems, in particular in the framework of the United Nations.¹¹⁷

Taking into account that increased coherence and resolve is desired in the EU’s external relations, the Lisbon Treaty’s creation of a new HR/VP, who is both part of the Council¹¹⁸ as well as the Commission,¹¹⁹ assisted by the Union’s own diplomatic corps, the European External Action Service (EEAS)¹²⁰, seems to have been inspired to tackle precisely this challenge.

The HR/VP’s ‘double hat’ was coined in order to bridge the Union’s external economic and political relations. With regard to the creation of the EEAS, this caused some authors to question whether its reach should extend to all aspects of external relations, or whether it should be confined to external political relations.¹²¹ Although energy has a clear external dimension, the discussion on the establishment of the EEAS has focused on the Directorate Generals of the Commission dealing specifically with external relations (DGs Relex and Development) and the Policy Unit, the European Security and Defence Policy (ESDP) and crisis management structures, and directorates of DG-E of the Council Secretariat, letting it hang in the balance whether (elements) of energy policy will be part of the EEAS from the outset.¹²²

¹¹⁷ Article 21(1), second paragraph TEU.

¹¹⁸ Pursuant to Art. 18(3) TEU, the HR presides over the Foreign Affairs Council.

¹¹⁹ Pursuant to Art. 18(4) TEU, the HR is one of the VPs of the Commission and shall ensure the consistency of the Union’s external action. The HR shall be responsible within the Commission for responsibilities incumbent on it in external relations and for coordinating other aspects of the Union’s external action. The HR thereby effectively took over the portfolio of hitherto External Relations Commissioner.

¹²⁰ Pursuant to Art. 27(3) TEU ‘[i]n fulfilling his mandate, the High Representative shall be assisted by a European External Action Service. This service shall work in cooperation with the diplomatic services of the Member States and shall comprise officials from relevant departments of the General Secretariat of the Council and of the Commission as well as staff seconded from national diplomatic services of the Member States’.

¹²¹ G. Grevi & F. Cameron, ‘Towards an EU Foreign Service’, Issue Paper 29 (Brussels: European Policy Centre, 2005), 3.

¹²² ‘Council Decision establishing the organisation and functioning of the European External Action Service’, Council Doc. 11665/1/10 REV 1, ANNEX (Brussels 20 Jul. 2010), 1–6; S. Vanhoonacker & N. Reslow, ‘The European External Action Service: Living Forwards by Understanding Backwards’, *European Foreign Affairs Review* 15, no. 1 (2010): 7–8; S. Duke, ‘Providing for European-Level Diplomacy after Lisbon: The Case of the European External Action Service’, *The Hague Journal of Diplomacy* 4 (2009): 218–219; J. Lieb & A. Maurer, ‘The “How” of the EEAS: Variables, Priorities and Timelines’, Working Paper 28 (Brussels: European Policy Center, 2007), 67; A. Centioni & J. Rawlinson, ‘External Action Service: Where Are We?’, *The Euros*, 22 Mar. 2010, 2, <www.theeuros.eu/External-Action-Service-where-are,3597?lang=en>, 6 Apr. 2010.

Under ‘normal circumstances’ (i.e., in a situation of uninterrupted energy supply), it seems clear that the HR/VP does not have direct authority over EU external energy policy.¹²³ However, there is reason to believe that this could change under ‘abnormal circumstances’, such as in the event of a severe supply interruption like in January 2009, especially when such circumstances carry foreign and security policy implications.

The Council Decision establishing the organization and functioning of the EEAS reads in Article 2(1) that the EEAS shall support the HR/VP:

in fulfilling his mandates as outlined, notably, in Articles 18 and 27 TEU:

- in fulfilling his mandate to conduct the Common Foreign and Security Policy (‘CFSP’) of the European Union, including the Common Security and Defence Policy (‘CSDP’), to contribute by his proposals to the development of that policy, which he shall carry out as mandated by the Council and to ensure the consistency of the Union’s external action;
- in his capacity as President of the Foreign Affairs Council, without prejudice to the normal tasks of the General Secretariat of the Council;
- in his capacity as Vice-President of the Commission for fulfilling within the Commission the responsibilities incumbent on it in external relations, and in coordinating other aspects of the Union’s external action, without prejudice to the normal tasks of the services of the Commission.¹²⁴

The broad formulation of this provision seems to imply that energy (or parts thereof) may well fall under the remit of the HR/VP and the EEAS. This is definitely the case insofar it constitutes a CFSP matter, thus falling under the responsibility of the HR/VP, a situation quite likely if a crisis contains not purely economic but also political and security elements. Furthermore, in her role as VP of the Commission, the HR/VP is responsible for ‘coordinating other aspects of the Union’s external action’,¹²⁵ which ultimately also includes energy.

The EEAS is expected to support and work in cooperation with the General Secretariat of the Council, the Commission services, as well as with the diplomatic services of the Member States in order to ensure consistency between the different areas of the Union external action and between these and its other policies.¹²⁶ Furthermore, both the EEAS and the Commission are to ‘consult each other on all matters relating to the external action of the Union in the exercise of their

¹²³ S. Andoura, L. Hancher & M. van der Woude, ‘Towards a European Energy Community: A Policy Proposal’ (Paris: Notre Europe, 2010), 13; interviews with officials of the Permanent Representations of Belgium and Slovenia to the EU on 22 and 23 Apr. 2010.

¹²⁴ See n. 122 above.

¹²⁵ See also Art. 18(4) TEU.

¹²⁶ Article 3(1) EEAS Decision, n. 122 above.

respective functions'.¹²⁷ This implies that the EEAS could have staff that is responsible for following up external energy policy, either as part of a geographic desk, or a thematic desk within the EEAS' central administration.¹²⁸

With respect to external representation, the extent to which an issue is dominated by either security or technical/market aspects is likely to determine whether the President of the European Council (at the highest political level), the HR/VP, supported by the EEAS and aided by the Union delegations abroad, or the Commission takes the lead. Close cooperation between both the HR/VP and the Commissioner is crucial here.¹²⁹ A recent addition by the European Parliament to the draft Gas Regulation confirms this necessity:

[w]here the Commission is notified by the Competent Authority that an early warning level has been declared in a Member State or where a threat of disruption of gas supplies might have a clear geopolitical dimension, the Union, represented at the highest level, shall take appropriate diplomatic actions having regard to the special role given by the Lisbon Treaty to the Vice-President/High Representative.¹³⁰

The wording 'at the highest level' indicates that it is the task of the President of the European Council – without prejudice to the powers of the HR/VP – to represent the Union in case such diplomatic actions take place at the level of Heads of State and Government.¹³¹

However, the decision between what constitute 'security' and 'technical or market' elements has been subject to a fierce interinstitutional debate, as the creation of the EEAS prompted the Commission to worry that its role could be (partly) relegated to providing technical assistance, whereas the Council worried over a loss of influence of Member States over EU foreign policy.¹³² In any event, in times of a supply interruption carrying both economic, political, and security consequences, it is most likely that the HR/VP – supported by the EEAS – will take up a more prominent role in diplomatic efforts aimed at resolving a dispute, with the Commission providing assistance where appropriate. When diplomatic action

¹²⁷ Article 3(2) EEAS Decision, n. 122 above, excepting from this obligation the CSDP.

¹²⁸ See Art. 4(3)(a), first indent, EEAS Decision, n. 122 above; interview with official from the Polish Delegation of the European People's Party in the European Parliament on 26 Apr. 2010.

¹²⁹ Interviews with officials from the Permanent Representations of the Czech Republic and Belgium to the EU on 19 and 22 Apr. 2010.

¹³⁰ Council of the European Union, n. 92 above, EP Amendment 86, para. 4a (new), 70–71.

¹³¹ Pursuant to Art. 15(6), second paragraph TEU, '[t]he President of the European Council shall, at his level and in that capacity, ensure the external representation of the Union on issues concerning its common foreign and security policy, without prejudice to the powers of the High Representative of the Union for Foreign Affairs and Security Policy'.

¹³² See G. Avery, 'Europe's Foreign Service: From Design to Delivery', in *Policy Brief* (Brussels: European Policy Center, 2009), 3; Centioni & Rawlinson, n. 122 above, 2; Vanhoonacker & Reslow, n. 122 above, 7.

at the level of foreign heads of State or government is required, the President of the European Council will come into play.

The new system still needs to be tested. Future crises and the EU's actions to address them will tell us what roles will exactly be played by the President of the European Council, the HR/VP and EEAS, and the Commission, and where the line between elements pertaining to CFSP and those that do not will be drawn.

VII Concluding Remarks

Our analysis has demonstrated that for the moment the EU lacks a unified response to an energy supply crisis, as internal divergences limit the Union's external resolve. Concrete attempts towards solving this issue are being made, with the draft Gas Regulation as its clearest example.

The latter also illustrates that progress is made as a consequence of 'external shocks'. Not only is this a very costly strategy, but in doing so, the EU also risks sustaining damage to its perceived ability to handle future crisis situations if its preventive efforts do not adequately take into account all the options on the table. Therefore, in the long run, an ambitious approach based on a combination of prevention and the ability to react in a concerted and decisive manner is to be preferred.

Given that the negotiations between the EU and Russia on a new PCA are unlikely to show significant progress in the short to medium term, it would be more beneficial for the Union to focus its efforts on its own abilities. Our analysis showed two clearly demonstrated loopholes in the EU's current strategy to resolve supply crises: (i) the fragmented character of information on the internal market and the coordination thereof in terms of emergency plans; and (ii) the sometimes haphazard manner by which bilateral diplomacy is conducted.

Admittedly, the first issue is greatly alleviated by the obligation under the draft Gas Regulation for Member States to designate a competent authority to assess risks, to establish and regularly update preventive and emergency plans.¹³³ ERGEG even suggests these emergency plans to be coordinated in a regional manner in order to avoid contradictions and ensure full consistency.¹³⁴ However, we believe that the EU should be more ambitious in its efforts as the Lisbon Treaty provides the tools to do so.

The Treaty offers the Union a distinct set of new actors and structures that could make for a more ambitious solution to the first problem and solve the second problem at the same time. When a crisis occurs that carries foreign and security implications, it should be the task of the HR/VP or, at the highest level, the President of the European Council, assisted by the EEAS, to engage in diplomatic efforts

¹³³ Council of the European Union, n. 92 above, Art. 3(2) and Recital Point 27, Commission Proposal Text, 25–26 and 19.

¹³⁴ ERGEG, n. 60 above, 2.

on behalf of the EU with the aim of striking a political agreement to the crisis and ensure full consistency and coherence. Yet, their combined efforts should be based on EU-wide information on the Union's internal market, provided by emergency plans coordinated at Union level under the auspices of the Commissioner for Energy.

To that effect, clear rules of cooperation between the President of the European Council, HR/VP, President of the Commission and Energy Commissioner, and Member States could go a long way for the EU to enhance its ability to adequately resolve a crisis such as in January 2009.