EU-GRASP Working Papers

The EU as a Regional Actor: Energy Security & Climate Change

Sijbren de Jong, Steven Sterkx & Jan Wouters

Working Paper N° 8

February 2010

SEVENTH FRAMEWORK PROGRAMME



EU-GRASP

Changing Multilateralism: the EU as a Global-regional Actor in Security and Peace, or EU-GRASP in short, is an EU funded FP7 Programme. EU-GRASP aims to contribute to the analysis and articulation of the current and future role of the EU as a global actor in multilateral security governance, in a context of challenged multilateralism, where the EU aims at "effective multilateralism". This project therefore examines the notion and practice of multilateralism in order to provide the required theoretical background for assessing the linkages between the EU's current security activities with multi-polarism, international law, regional integration processes and the United Nations system.

Partners

EU-GRASP is coordinated by the United Nations University – Comparative regional Integration Studies (UNU-CRIS). The other partners of EU-GRASP are based worldwide and include: University of Warwick (UK), University of Gothenburg (Sweden), Florence Forum on the Problems of Peace and War (Italy), KULeuven (Belgium), Centre for International Governance Innovation (Canada), Peking University (China), Institute for Security Studies (South Africa) and Ben-Gurion University of the Negev (Israel).

Disclaimer

All views and opinions are those of the authors. This paper is work in progress. Any comments are welcome and can be sent to the authors.

EU-GRASP Working Papers
EU-GRASP Coordination Team: Luk Van Langenhove, Francis Baert & Emmanuel Fanta
Editorial Assistance: Liesbeth Martens
United Nations University UNU-CRIS
72 Poterierei – B-8000 – Bruges – Belgium
Email: fbaert@cris.unu.edu or efanta@cris.unu.edu

Additional information available on the website: www.eugrasp.eu

 The research leading to these results has received funding from the European Community's Seventh Framework Programme (FP7/2007-2013) under grant agreement n° 225722.

Abstract

The EU enacts its security policy on different levels and through various frameworks and structures of cooperation. One of these levels is the regional dimension (i.e. within the Union) where the EU acts as a regional security actor. This paper puts forward an analysis of the regional dimension of energy security and climate change[1] by assessing (i) the institutional dimension underpinning this issue, (ii) the EU's policy output in the field of energy security and climate change, and (iii) an evaluation of the Union's institutional and output dimension. This 'check-up' of EU policy through an assessment of its coherence, current levels of accountability, and the legitimacy of EU action enables a reflection on the merits of EU policy in the security field.

About the Authors

Sijbren de Jong is Research Fellow and PhD Candidate at the Leuven Centre for Global Governance Studies (GGS) KU Leuven.

Steven Sterkx is Project Manager at the Leuven Centre for Global Governance Studies (GGS) KU Leuven.

Jan Wouters is Professor of International Law and International Organisations and Director of the Leuven Centre for Global Governance Studies (GGS) KU Leuven.

[1] Climate change should be seen as being intertwined to the striving for energy security. See *infra* for more detail.

Table of Contents

The EU as a Regional Actor: Engergy Security & Climate Change[2]

Sijbren de Jong, Steven Sterkx & Jan Wouters

Katholieke Universiteit Leuven

Introduction

Energy has been at the heart of European integration, not in the least because two of the founding Treaties provided energy with a central role. Within energy security, a lot of the attention goes to the important role of energy supplies on the one hand and the ones who are in demand of energy on the other. The discourse surrounding the EU centres to a large extent on Europe's energy dependency on foreign supplies and ways to decrease this dependency by engaging in partnerships with supplier countries.

In recent years, the link between our energy security and the environment has become a major political issue for governments around the globe. Bringing the environment back into security studies has the value of linking it back to earlier traditions like geopolitics. Central to this tradition is the struggle for natural resources, bringing in the contemporary discussion on energy security. Current patterns of production and consumption are unsustainable and are leading to increased resource needs and a heightened vulnerability. Environmental degradation as a result of the depletion of natural resources can lead ultimately to regional tensions and violence. Emerging economic and social instability will lead to asymmetric threats to security that cannot be resolved by military force nor within traditional domains of security policy such as defence, foreign relations and strategic planning, but could benefit from partnerships which deal explicitly with these transformations and environmental concerns.

Climate change should be seen as being intertwined with the striving for energy security. In seeking to generate security of supply, diversification of energy sources is of key importance. Tapping into

[2] An earlier version of this paper was presented at an EU-GRASP workshop in July 2009 hosted by UNU-CRIS.

renewable sources of energy not only makes for decreased dependency on fossil fuels, it also potentially helps reduce greenhouse gasses and thereby addresses global warming. Increased energy efficiency contributes to relieving pressure on the usage of fossil fuels, thereby also addressing the issue of greenhouse gas emissions. The EU has set itself the target of working towards reducing its overall emissions to at least 20% below the 1990 levels by 2020, increasing the share of renewables in energy use to 20% by 2020, and increasing its energy efficiency by 20% in 2020. Energy security is a top priority for the EU, yet in striving for energy security, the envisaged "energy mix package" of the future must fit within this 20-20-20 framework that the EU has set itself as goal.

This paper provides first an overview of the development of an EU energy policy and an analysis of its institutional dimension. Second, an overview is given of the Union's policy output and legal instruments in the energy field at EU level. Third, an evaluation is made of the Union's policy coherence, the checks and balances on its output as well as its legitimacy in the field of energy policy.

The Institutional Dimension of Energy Security

The development of an effective energy policy within the Community did not occur until around the mid 1970s, at which point it was spurred on by the oil crisis of 1973 and the EC Member States' and the Community's recognition of the need for an energy policy. This resulted in the adoption of various legislative acts and policy measures.[3] This development was further consolidated by the adoption of the Single European Act (SEA, 1986). The provisions that came with the adoption of the SEA led to the establishment of the internal market by the end of 1992 (Single European Act: Article 14) and inserted the environment title into the EEC Treaty, which refers to the '*prudent and rational utilisation of natural resources*' and to the adoption of measures '*significantly affecting a Member State's choice between different energy sources and the general structure of its energy supply* (Consolidated Version of the Treaty Establishing the European Community 2002: Article 174, 175)'. Although arguably limited to the sphere of environment, this Article may have strong repercussions for the ways in which individual Member States choose the energy sources for their consumption, because it is likely to tie their hands in importing energy from third countries if that energy does

[3] See *inter alia,* Directive 75/339/EEC of 20 May 1975 obliging Member States to maintain minimum stocks of fossil fuel at thermal power stations, OJ L 153/35 (1975); Directive 73/238/EEC of 24 July 1973 on measures to mitigate the effects of difficulties in the supply of crude oil and petroleum products, OJ L 228 (1973); Decision 77/706/EEC on the setting of a community target for a reduction in the consumption of primary sources of energy in the event of difficulties in the supply of crude oil and petroleum products, OJ L 292/9 (1977).

not conform to the requirements imposed by the Council (Haghighi 2008: 468; Delvaux et al. 2008: 21-22).

With the adoption of the Treaty on the European Union came several changes to the EEC Treaty which were relevant to energy law and policy. The TEU introduced Article 3(u) which lists '*measures in the spheres of energy, civil protection and tourism*' as one of the Community's common policies and Article 129b (Consolidated Version, TEC 2002: Article 154) on Trans-European Networks (TEN's), which includes a reference to energy infrastructures (Belyi 2009: 206).[4] The Maastricht Treaty contained a declaration on civil protection, energy and tourism that states that '*[the] Conference declares that the question of introducing into the Treaty establishing the European Community Titles relating to the spheres referred to in Article 3(t) of that Treaty will be examined in accordance with the procedure laid down in Article N(2)*[5] *of that Treaty on European Union, on the basis of a report which the Commission will submit by 1996 at the latest*' (Treaty on European Union 1992: 5). Further, the Commission '*declares that Community action in those spheres will be pursued on the basis of present provisions of the Treaties establishing the European Communities*' (Treaty on European Union 1992). In April 1996 the Commission submitted a report in which it asserted that the continuity and coherence of Community action in the field of energy could be facilitated by inserting into the Treaties provisions which would make such action more efficient and more visible. Specifically, it mentioned the scattered legal bases for the energy sector and called for them to be rationalised and made coherent (European Commission 1996).

The Treaty of Amsterdam[6] inserted further amendments with relevance to energy law and policy: the adoption of a Protocol relating to the application of the principle of subsidiarity; the insertion of an article relating to the "services of general economic interest" (Consolidated Version, TEC 2002: Article 16); the further clarification of the constitutional status of environmental protection (Consolidated Version, TEC 2002: Article 2); and the inclusion of the integration principle in Article 6 TEC which states that '*environmental protection requirements must be integrated into the definition and implementation of the Community policies and activities referred to in Article 3, in*

[4] Art. 154 TEC is the main energy policy instrument for EU support to Trans-European Networks for Energy (TEN-E) development. The first TEN-E guidelines were adopted in 1996 and have had successive revisions, most recently in 2006. See Decision 1364/2006/EC of the European Parliament and of the Council of 20 June 2007 laying down guidelines for trans-European energy networks and repealing Decision 96/391/EC and Decision 1229/2003/EC, OJ L 262/1 of 22 September 2006.
[5] Art. N(2) is current Art. 48 TEU.
[6] Treaty of Amsterdam amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain related acts, OJ C 340/1 (1997).

particular with a view to promoting sustainable development' (Consolidated Version, TEC 2002: Article 6).

Division of Competences in the Field of Energy Security

Currently the EC Treaty holds no provisions that would systematically define the Community's competences in the field of energy security. Current Article 3(1)(u) TEC reads that measures in the sphere of energy form part of the EC's activities, although no energy title and very few energy specific provisions can be found from the material provisions in part three of the EC Treaty (Michel 2003). The lack of any specific chapter or title on energy in the EC Treaty has not prevented the Community from enacting various measures in the energy sphere. However, these measures have been based on general non-energy provisions and principles in the EC Treaty, on the one hand by enforcing the general EC Treaty provisions, and on the other hand by adopting secondary legislation on the basis of its competences in the internal market and environmental measures (Delvaux et al. 2008: 21).

The principal thought on *energy* is that this is an area of policy where the competences are shared between the Community and the Member States (Delvaux et al. 2008: 17). The Lisbon Treaty, providing a more specific overview of the Union's competences, confirms the notion of shared competence by listing energy in Article 4 (2)(i) of the Treaty on the Functioning of the European Union (Consolidated Version 2008). Several EC Treaty provisions are applicable to the energy sector. The most important ones are the rules on the free movement of goods (Articles 28-31), the rules on the right of establishment and the free movement of services and capital (Articles 43-60), the rules on competition (Articles 81-82), and the rules on State Aid (Articles 87-88). Community interventions in the energy market by means of secondary legislations occurred through implicit power based on various provisions of the EC Treaty, such as Articles 93[7], 308[8], 95[9] or 100 (1)[10] TEC (Haghighi 2008: 473; Belyi 2009: 206-208). The adoption of measures pursuant to Article 95 TEC with respect to the functioning of the European internal energy market, have served to gradually

[7] Art. 93 TEC relates to the harmonisation of legislation concerning taxation with respect to the internal market.
[8] Art. 308 TEC can be used to extend Community legislation into new areas and to provide harmonisation measures for matters that do not have a specific legal basis (e.g. the energy sector). This Article is a 'residuary' power to be used 'only when no other provision of the Treaty gives the Community institutions the necessary power to adopt the measure in question'. On the 'residuary' nature see ECJ Case 45/86, *Commission v Council* (Generalised Tariff Preference Case) [1987] ECR 1493, p. 1520 and ECJ Case 242/87, *Commission v Council* [1989] ECR 1425. See also Weatherhill and Beaumont (1999: 157).
[9] Art. 95 TEC relates to the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market.
[10] Art. 100(1) TEC relates to the Council being able to decide upon measures appropriate to the economic situation, in particular if severe difficulties arise in the supply of certain products.

weaken the competences of the Member States in this area. In relation to this, the necessity of guaranteeing an adequate supply of energy gradually became a Community concern through several ECJ's interpretations (Haghighi 2008: 473).

The case law of the ECJ can be seen to have further weakened the competences of the Member States in the field of energy. In the 1983 *Campus Oil* case, the Court allowed Member States to exempt themselves from the obligation of Article 30 TEC on free movement of goods on 'public security' grounds and explicitly described security of energy supply as an objective covered by this exception. Consequently, the Court accepted that a Member State's appropriate complementary measures at national level cannot be excluded, even where Community rules on the matter exist (European Court Reports 1984: para. 31). Later case law from the ECJ, however, has gradually limited the Member States' ability to link energy supply security to public security.[11] The *PreussenElektra* case is illustrative in this regard where, first of all, the Advocate General (AG) argued that it is doubtful whether recourse to the provisions on public security was still possible given the fact that a specific Community Directive already provided some types of measures necessary to ensure security of supply (European Court Reports 2001: para. 209), and, second of all, the Court accepted limitations on Article 30 TEC not on public security grounds but on the grounds of 'protection of the environment' (European Court Reports 2001: para. 68-81). Case law therefore indicates that the Gas and Electricity Directives are considered to be the best guarantees of security so that recourse to purely national measures will no longer be justified. This will, in turn, diminish the competence of the Member States in that field (Haghighi 2008: 474).

EU external relations law together with the above elaborated case law suggest that either the presence of 'externalities' in the internal regulation or 'necessity' can justify the involvement of the Community or would render the regulation 'efficient' for the purpose of the 'effect' doctrine (European Court Reports 2002: para. 93). In this sense, the issue of the internal security of energy supply, as mentioned in the cases of *Campus Oil* and *PreussenElektra*, and the fact that the creation of secondary measures regulating the internal energy market has limited the competence of the Member States to have recourse to independent security measures at domestic level because such measures were no longer found to be 'necessary' serve to strengthen conclusion that Community involvement within the energy field is justified. The expansion of secondary legislative measures has led the ECJ to become gradually more willing to expand Community competence at the external

[11] See *inter alia,* ECJ Case 347/88, *Commission v Hellenic Government* [1990] ECR I-4747; ECJ Case 393/92, *Municipality of Almelo and others v NV Energiebedrijf Ijsselmij* [1994] ECR I-1477, para 51(c); ECJ Case 398/98, *Commission v Hellenic Government* [2001] ECR I-7915.

level where more secondary legislation in a specific field has come to exist and could lead to an external competence for the EC to deal with externalities of energy supply.

Decision-Making Methods

Energy, falling within the 1st pillar, is *in principle* subject to the 'Community method' providing for qualified majority voting in the Council on the basis of a proposal by the Commission. However, energy security has traditionally remained an area of 'high politics' with a large role for the Member States. Therefore, a close look at the various provisions that serve as the basis for EC action in the energy field sheds more light on the decision-making methods employed.

Several articles of the EC Treaty have served as the basis for Community action, as described in paragraph 1.2. Measures falling under Title VI TEC on Common Rules on Competition, Taxation and Approximation of Laws seeking the effective functioning of the internal market include Articles 93 and 95 TEC. Measures taken pursuant to Article 93 TEC proceed on the basis of the Council 'acting unanimously on a proposal from the Commission and after consulting the EP and the Economic and Social Committee'. Measures taken pursuant to Article 95 TEC proceed on the basis of the Council 'acting by a qualified majority after obtaining the opinion of the EP and after consulting the Economic and Social Committee' on a proposal by the Commission to the Parliament and the Council.[12]

Measures taken pursuant to Article 100(1) TEC falling under Title VII TEC on Economic and Monetary Policy proceed on the basis of the Council 'acting by a qualified majority on a proposal from the Commission' without prejudice to any other procedures provided for in the EC Treaty and deciding upon measures appropriate to the economic situation, in particular if difficulties arise in the supply of certain products.

Finally, measures taken pursuant to Article 308 TEC under the General and Final Provisions of the EC Treaty require the Council 'acting unanimously on a proposal from the Commission and after consulting the EP' if such measures prove necessary to attain, in the course of the operation of the common market, one of the objectives of the EC Treaty, and the EC Treaty has not provided the necessary powers.

[12] This procedure is comprised of two articles. Art. 95 TEC refers to the Council acting in accordance with the procedure referred to in Art. 251 TEC which provides for qualified majority voting and requires the involvement of the European Parliament according to the co-decision procedure. Art. 95 TEC further includes the opinion of the Economic and Social Committee.

Although, energy falls *in principle* within the 1st pillar, the usage of Articles 93 and 308 TEC do require unanimity within the Council in order for any measures to be implemented. In addition, measures in the realm of energy security are also taken under the auspices of the CFSP, thereby contributing to a degree of cross-pillarisation.[13] In particular, the appointment of special representatives by the Council to Central Asia and the Southern Caucasus carry with itself an important external energy security dimension.

The Impact of the Treaty of Lisbon

The Treaty on the Functioning of the European Union (TFEU) inserts a specific section on energy into the Treaty, giving the EU clear competences in order to ensure its objectives which include the proper functioning of the energy market, energy supply, and the promotion of energy efficiency and renewable (Consolidated Version 2008: Title XXI). As mentioned in paragraph 3.2, the TFEU confirms shared competence in the field of energy in Article 4(2)(i) TFEU. Furthermore, Article 4(3) states that the Union will also have the competence to carry out activities 'in particular to define programmes', for research and development, albeit without limiting Member State competence in this field.

Article 122(1) TFEU relating to difficulties in the supply of 'certain products' [energy in this case] (the current Article 100(1) TEC) inserts the concept of solidarity. The insertion of this concept was primarily done on the request from the Baltic States and Poland after the recent oil and gas disputes with Russia. The most obvious examples being the January 2006 Ukraine-Russia gas dispute and the ongoing issues over Russia's decision to turn off, in July 2006, the Druzhba oil pipeline to

[13] See *inter alia* Council Joint Action 2009/130/CFSP of 16 February 2009 extending the mandate of the European Union Special Representative for Central Asia, OJ L 46/44 of 17 February 2009. Art. 3(1)(i) explicitly refers to the task of 'provide[ing] input to the formulation of energy security,' as falling within the mandate of the special representative; Council Joint Action 2009/133/CFSP of 16 February 2009 extending the mandate of the Special Representative for the South Caucasus, OJ L 46/53 of 17 February 2009, Art. 2(1)(d) explicitly notes that, 'to encourage and support further cooperation between States of the region, in particular between States of the South Caucasus, including on economic, energy, and transport issues' falls within the mandate of the Special Representative; Council Common Position 1999/691/CFSP of 22 October 1999 on support to democratic forces in the Federal Republic of Yugoslavia (FRY), OJ L 273/1 of 23 October 1999, para. 8 of the preamble speaks of a pilot project proposed by the G17 in the framework of the 'Energy for Democracy' initiative, under which the cities of Nis and Pirot will first be provided with heating oil as energy assistance; Council Common Position 1999/604/CFSP amending Common Position 1999/273/CFSP concerning a ban on the supply of petroleum and petroleum products to the Federal Republic of Yugoslavia, and Common Position 1999/318/CFSP concerning additional restrictive measures against the Federal Republic of Yugoslavia, OJ L 236/1 of 7 September 1999, para. 2 of the preamble speaks of exempting Kosovo and Montenegro from the oil embargo and other sanctions

Lithuania for "environmental reasons".[14] The 2009 Ukraine-Russia gas dispute again showed that these issues remain unresolved to this day.

Article 122(1) reads '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'.

The new Article 194 TFEU in Title XXI serves to strengthen the whole position of energy policy, placing it within the context of the internal market and of protecting the environment. Article 194(1) TFEU in Title XXI reads that 'Union policy on energy shall aim, in a spirit of solidarity between Member States, to: (a) ensure the functioning of the internal market; (b) ensure security of 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'. The European Parliament (EP) and the Council, acting in accordance with the ordinary legislative procedure, shall establish the measures necessary to achieve the above objectives. The measures shall be adopted after consultation of the Economic and Social Committee and the Committee of the Regions (TFEU, Consolidated Version 2008: Article 194[2]). The new Article 176a does raise the question whether all measures in the energy field need to be based on this particular Treaty provision or whether they may be adopted on the basis of other Treaty provisions (Delvaux et al, 2008: 28).

Recalling Article 175(2)(c) TEC, the new measures adopted under EU energy policy pursuant to Title XXI TFEU and in the new 'spirit of solidarity', '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 175(2)(c) TEC'. Furthermore, in the declarations (and notably Declaration 35) Article 176a is not seen as affecting 'the right of the Member States to take the necessary measures to ensure their energy supply' (Conference of the Representatives of the Governments of the Member States 2007: Dec. 35).

[14] The Druzbha oil pipeline is the world's longest oil pipeline. It carries some 4,000 kilometres from Southeast Russia to points in Ukraine, Hungary, Poland, and Germany. The term "Druzhba" means "friendship", thereby inferring that the pipeline was intended to supply oil to the Western regions of the former Soviet Union and its socialist allies in the former Soviet bloc, and to Western Europe. Today it is the principal artery for the transportation of Russian and Kazakh oil to Europe.

The insertion of a specific energy title into the treaties should not, however, be seen as something radically new as it serves more as a codification of existing practice (ab lago 2007: 22; Delvaux et al 2008: 28).

EU Energy Policy Objectives, Output and Legal Instruments

Key Legislative Measures

The EU's energy policy has, throughout the last decade seen the adoption of many different types of instruments related to, *inter alia,* the internal market (Articles 93 and 95 TEC)[15]. In particular measures have been taken to address severe difficulties in the supply of certain products (Article 100(1) TEC),[16] and in cases where Community action proved necessary in order to attain in the course of the operation of the common market or the attainment of one of the objectives of the Treaty, and where the Treaty did not provide for the necessary powers (Article 308 TEC)[17]. EU Directives on opening up the gas market (see *supra*) introduced a different conception of the international gas trade (Belyi 2004). More specifically, the traditional concept of long-term gas supply is being replaced progressively by the concept of gas and electricity markets. This means that instead of having a long-term contract with a supplier, the market evolves into an actual

[15] Measures taken under Art. 93 TEC include: Directive 2003/96 of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity, OJ L 283/51 of 31 October 2003. Measures taken under Art. 95 TEC include *inter alia* Directive 96/92/EEC of 19 December 1996 concerning common rules for the internal market in electricity, OJ L 27/20 of 30 January 1997; Directive 2003/54/EC of 26 June 2003 concerning the common rules for the internal market in electricity and repealing Directive 96/92/EC, OJ L 176/37 of 15 July 2003; Regulation 1228/2003/EC of 26 June 2003 on conditions for access to the network for cross-border exchanges in electricity, OJ L 176/1 of 15 July 2003; Directive 98/30/EC of 22 June 1998 concerning the common rules for the internal market in natural gas, OJ L 204/1 of 21 July 1998; Directive 2003/55/EC of 26 June 2003 concerning the common rules for the internal market in natural gas and repealing Directive 98/30/EC, OJ L 176/57 of 15 July 2003; Directive 2004/67/EC of 24 April 2004 concerning measures to safeguard security of natural gas supply, OJ L 127/92 of 29 April 2004; Regulation No 1775/2005/EC of 28 September 2005 on conditions for access to the natural gas transmission networks, OJ L 289/1 of 3 November 2005 and Directive 2005/89/EC of 18 January 2006 concerning measures to safeguard security of electricity supply and infrastructure investment, OJ L 33/22 of 4 February 2006. In addition, the so-called 'third legislative package' is currently pending in the Council, see: European Commission (2007); European Commission, Proposal for a Regulation establishing an agency for the cooperation of energy regulators COM(2007) 530 final of 19 September 2007; and COM(2007) 528 final of 19 September 2007 concerning a proposal for a Directive amending Directive 2003/54/EC concerning common rules for the internal market in electricity.

[16] Measures taken under Art. 100(1) TEC include *inter alia* 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, OJ L 217/8 of 8 August 2006;Directive 68/414/EEC of 20 December 1968 imposing an obligation on Member States of the EEC to maintain minimum stocks of crude oil, OJ L 308/14 of 23 December 1968; Directive 73/238/EEC of 24 July 1973 on measures to mitigate the effects of difficulties in supply of crude oil and petroleum products, OJ L 228/1 of 16 August 1973 and Directive 98/93/EC of 14 December 1998 Amending Directive 68/414/EEC imposing an obligation on Member States of the EEC to maintain minimum stocks of crude oil and/or petroleum products, OJ L 358/100 of 31 December 1998. In addition, there is currently a proposal pending in the Council, see: European Commission, proposal for a Council Directive imposing an obligation on Member States to maintain minimum stocks of crude oil and/or petroleum products, COM(2008) 775 final of 13 November 2008, p. 3. This proposal represents a codified version and would replace Council Directive 68/414/EC and amend Council Directive 98/93/EC.

[17] See *supra* note 8.

market where customers can take stock of different suppliers and have more flexibility concerning the type of contract (Belyi 2009: 207). Article 308 TEC has been extensively used in the field of energy to set up framework programmes, technological action programmes, research programmes, and international cooperation programmes,[18] as well as to conclude international agreements in the field of energy, such as the Energy Charter Treaty (ECT) (Haghighi 2008: 464-465; Belyi 2009: 212).

In order to discuss legislative proposals and generate thorough, independent advice on the nexus of energy security and climate change, the President of the European Commission decided to set up an Advisory Group on Energy and Climate Change as of March 2007. Apart from discussing the legislative proposals that are being tabled, the group also discusses issues such as G8 meetings and climate change in general. The Group looks at different options facing Europe in terms of future energy policy, based on the adopted energy package. Its work is carried out in cooperation with the Commission's Bureau of European Policy Advisers (BEPA) and brings in expertise from outside the Commission.

Overall, the above summary of energy-related measures adopted at Community level suggests that the Community has been primarily concerned with creating an efficient internal energy market with the expectation that such a market would eventually lead to a secure framework for energy supply (European Commission 2007c: 6; European Commission 2006a: 8; Haghighi 2008: 478; Belyi 2009: 206-208; Youngs 2007: 1). However, the EU energy market falls short of being fully liberalised and Member States still retain the final say over key-decisions such as national energy mixes and relations with supplier states (Benford 2006: 40; Youngs 2007: 6-7). Many Member States in practice continue to conceive of energy security as a state-led responsibility both within and beyond Europe (Youngs 2007: 8). Recent examples include the German support for the North European Gas Pipeline, in spite of the denunciation of the project by Poland and the Baltic States; the unilateral Polish veto on the EU-Russia agreement in November 2006 laying down the conditions of the agreement for the ratification of the Energy Charter Treaty, which was not supported by other Member States; the conclusion of bilateral agreements at the end of 2006 between Italy and France on the one hand and Russia on the other, where both countries committed to importing Russian gas on a long-term basis and to allowing Gazprom partial access to

[18] See *inter alia* Council Decision 1999/23/EC of 14 December 1998 adopting a multi-annual Program to Promote International Cooperation in the energy sector (1998-2002) OJ L 7/23 of 13 January 1999; Council Regulation (EC) 2598/97 of 18 December 1997 extending the program to promote international cooperation in the energy sector 'Synergy Program', OJ L 351/16 of 23 December 1997 and Council Regulation (EC) 701/97 of 14 April 1997, OJ L 104/1 of 22 April 1997.

their distribution markets, in spite of the European Commission's objective to decrease the importance of long-term contracts (Belyi 2009: 206).

EU Strategic Policy Papers

In both its 2006 Green Paper on *a European Strategy for Sustainable, Competitive and Secure Energy* and the 2007 Communication on *An energy policy for Europe,* the Commission acknowledges the EU's dependence on imported hydrocarbons and limited diversification of suppliers and calls for an energy strategy that balances sustainable development, competitiveness, and security of supply (European Commission 2007c: 3-4; European Commission 2006a: 5, 8). It states that the point of departure for the Union's energy policy is threefold: (i) combating climate change; (ii) limiting the EU's external vulnerability, and (iii) promoting growth and jobs (European Commission 2007c: 5). Furthermore, the Commission calls for different ways in which energy security should be reached through measures assisting Member States who are overwhelmingly dependent on one gas supplier to diversify both through the improvement of the EU's contribution to the strategic oil stocks mechanism and through electricity interconnections (European Commission 2006a: 11). The EU's energy and environment policy, revised and agreed upon by the European Council meeting in March 2007, speaks of an integrated climate and energy policy and calls for an increase in the security of supply (European Council 2007: 27-39, Annex 1). It also notes that a Member State's choice of energy mix may have effects on the energy situation in other Member States and on the Union's ability to achieve the objectives of the energy policy for Europe (European Council 2007: 36). Particularly in relation to security of supply, the European Council stresses the importance of making full use of the instruments available to improve the EU's bilateral cooperation with all suppliers and to ensure reliable energy flows into the Union (European Council 2007: 37).

The October 2008 European Council reconfirmed security of energy supply as a priority for the European Union and emphasised that it involved the responsibility and solidarity of all the Member States and requested the Commission to submit proposals or initiatives on a whole range of issues (European Council 2008: 17). In its November 2008 communication, *An EU Energy Security and Solidarity Action Plan*, the Commission acknowledged that while each Member State is responsible for its own security, the EU need to take action to secure its energy future and to protect its essential energy interests. With the internal market for energy, specific national solutions are often insufficient. The combined weight of the EU in world affairs can be more effective than dispersed national actions. For these reasons, energy security is an issue of common EU concern. The Commission thus calls for (i) an intensification of the Union's efforts in developing an effective

external energy policy, identifying infrastructure of major importance to its energy security and then ensuring its construction, and acting coherently to deepen its partnerships with key energy suppliers, transit countries and consumers; and (ii) tapping into the full potential of the Union's oceans and seas for energy generation, rapid evolvement of its transport system and real progress in terms of the interconnection of the European energy market. In its communication, the Commission (2008: 3) proposes a five-point action plan, focusing on:

- Infrastructure needs and the diversification of energy supplies;
- External energy relations;
- Oil and gas stocks and crisis response mechanisms;
- Energy efficiency;
- Making the best use of the EU's indigenous energy resources.

The importance hereof - in particular in relation to an external EU energy policy - was underlined once more by the 2008 review by the International Energy Agency which identified external relations and energy security as priority actions for the Union (International Energy Agency 2008).[19] In its *Green Paper,* the Commission (2008b: 3) recalls the war that took place between Georgia and Russia over the separatist region of South-Ossetia in August of 2008. Hinting at the strategic importance of the region in terms of energy, it goes on to emphasise that it is now more than ever a critical time for energy security and that the EU needs to intensify its efforts with regard to the security of energy supply. Further spurred by the recent interruption of gas supplies from Russia to the EU via Ukraine, the Council, during its extraordinary Council meeting last January, agreed on the necessity to urgently develop and strengthen medium and long-term measures in priority areas such as: transparency regarding gas flows; enhancing demand and storage volumes in both Member States and their industries; the strengthening of regional and bilateral solidarity arrangements addressing disruption of supplies; the speeding up of the revision of the Security and Gas Supply Directive by the end of 2009; the improvement of storage and connections and the diversification of transport routes and sources (Council of the European Union 2009a: 2). The Council reaffirmed these goals once more as EU priorities in its meeting of 19 February 2009 where it called for interconnection and diversification of energy suppliers, sources and supply routes, and the development of a common approach to external energy policy, thereby labelling energy policy as a key part of EU external relations (Council of the European Union 2009b: 8-11).

[19] The International Energy Agency is an intergovernmental organisation that was founded during the oil crisis of 1973-1974, its initial role being to coordinate measures in time of oil supply emergencies. It now acts as energy policy advisor to 28 Member Countries (including 19 EU Member States) in their efforts to ensure reliable, affordable and clean energy for their citizens.

Network Development

Network development is seen as an important element of energy policy in order to "plug gaps" or deal with "bottlenecks" for reasons of internal security of supply. Some of the main pipelines serving Europe's customers are overstretched or in need of maintenance. Therefore, an outward look is also needed in terms of infrastructure development, as well as an interconnection of EU network policy and EU energy policy. According to the Commission (2008b: 4, 6, 11), the objectives of Trans-European Networks for Energy (TEN-E) should be driven by European energy policy (the 20-20-20 objectives, and the complementary goals of security of supply and solidarity, sustainability and competitiveness). In 2009, the Commission proposed a *Baltic Interconnection Plan* covering gas, electricity and storage. The plan identifies the key missing infrastructure infrastructures necessary for connecting the Baltic region with the rest of the EU, and proposed among other things establishing a secure and diverse energy supply for the region (European Commission 2008a: 4). However, new import routes, notably from Central Asia and the Caspian as well as from the Middle East and Africa, will also be needed (European Commission 2008b: 6; Youngs 2007: 3, 12).[20]

The Commission calls for the development of a S*outhern gas corridor* for the supply of gas from Caspian and Middle Eastern sources, deemed one of the highest energy security priorities.[21] To this end, cooperation with Member States concerned is needed, as well as third (notable transit) countries, while respecting both the EU *acquis* and the legitimate concerns regarding energy security of the countries in question (European Commission 2008a: 4-5; European Commission 2007c: 19).[22] Such concerns should also be reflected in the EU's external instruments. For example, international agreements could be used to prepare the ground for energy interconnections with the EU market, early information and policy development. International trade agreements could also be used to offer clear conditions of access to the EU market (and vice versa) and dispute-resolving procedures (European Commission 2008b: 9). In 2009, the Commission produced an assessment of

[20] See also Ministerial Declaration on enhanced cooperation between the EU, the Littoral States of the Black and Caspian Seas and their neighbouring countries of 30 November 2006. This so-called *Baku Initiative* incorporates the Commission, the Caspian littoral States and their neighbours, with the declared aim of developing regional energy markets and network interconnections in the Caspian and Central Asia. Available from: http://ec.europa.eu/dgs/energy_transport/international/regional/caspian/doc/2006_11_30_astana_conclusions.pdf. [Accessed on 29 April 2009].

[21] This New Europe Transmission System (NETS) project aims to integrate gas transmission operators across Central and South Eastern Europe with a view to create the framework for a regional gas market.

[22] See also Youngs (2007: 2), which speaks of a "pan European energy community" and a "common regulatory space."

the global liquefied natural gas (LNG) situation and identified gaps[23] with a view to proposing a *LNG action plan*.

Calls have also been made by the Commission to link Europe with the Southern Mediterranean (Mediterranean Energy Ring). This is with the intention of: developing the region's vast solar and wind energy potential; developing a North-South gas and electricity interconnection within Central and South-Eastern Europe; providing a blueprint of a North Sea offshore electricity grid to interconnect national electricity grids in North-West Europe together and plug in the numerous planned off shore wind projects. The North Sea offshore grid, together with the Mediterranean Energy Ring and the Baltic Interconnection, should become one of the building blocks of a future European supergrid (European Commission 2008a: 5-6). Next to gas and electricity supply, the Commission in its *Green Paper* calls for an extension of TEN-E's scope to oil pipelines, as the rising volumes of maritime oil transport present serious risks to supply and maritime security (European Commission 2008b: 11). Looking to the future, the Commission calls for a reflection on how the existing TEN-E instrument could be replaced by a new instrument, the so-called *EU Energy Security and Infrastructure Instrument,* with the possible objectives of (i) completing the internal market, (ii) ensuring the development of the grid to permit the achievement of the EU's renewable energy objectives and (iii) guaranteeing the EU's security of energy supply, through assistance for key infrastructure projects within and outside the EU (European Commission 2008b: 13).[24]

International Cooperation

International energy network projects serving the EU's security of energy supply necessarily involve the agreement of third country governments as internal developments in the EU energy markets cannot be considered in isolation from external matters, namely the EU's existing arrangements with supplier States (Benford 2006: 41). It is therefore important that the EU's international cooperation framework encourages the development of projects with third country governments (European Commission 2008b: 9). In this field of external relations the EU currently holds Memoranda of Understanding on energy with a number of third countries,[25] as well as so-

[23] Liquefication facilities in producer-countries, LNG terminals and ship-based regasification in the EU are also seen as important in providing liquidity and diversification to EU gas markets.
[24] See also the Council of the European Union (2009: 7), emphasising the development of such an instrument once more.
[25] See for example the Memoranda of Understanding on cooperation in the field of energy between the European Union and Ukraine, Turkmenistan and Kazakhstan. Ukraine available from: http://ec.europa.eu/dgs/energy_transport/international/bilateral/ukraine/doc/mou_en_final_en.pdf; Turkmenistan available from: http://ec.europa.eu/energy/international/international_cooperation/doc/mou_turkmenistan.pdf; Kazakhstan available from:

called 'Energy Dialogues'[26]. The EU-Russia Energy Dialogue takes on a particular important role in this regard given the strong mutual interest and interdependence in the energy field between the EU and Russia, in particular regarding the supply of natural gas and (to a lesser degree) with respect to oil. The EU offers the largest consumer market for Russian gas and Russia not only oversees the largest natural gas reserves but also exercises full control over the key pipelines that provide the main access to these reserves. The EU's broad challenge thus becomes managing this interdependence with a view to gaining maximum control over outcomes, namely ensuring security of supply (Benford 2006: 42).

The EU-Russia Energy Dialogue was established after the Paris summit of October 2000 in order to facilitate this interdependence. Five themes of mutual interest were agreed upon: ensuring security of energy supplies of the European continent; the development of the vast potential of the Russian economy, in particular Russia's energy resources; the opportunities of the pan-European market; the challenge of climate change; and the conditions framing the use of nuclear energy (EU-Russia Energy Dialogue 2001: 1). On 26 June 2008 in Khanty-Mansiysk the negotiations on a New-EU-Russia Agreement, replacing the current 1997 Partnership and Cooperation Agreement,[27] were started (EU-Russia Energy Dialogue 2008: 8). In the latest *progress report*, the EU and Russia note the need to ensure the principles agreed upon at the G8 Summit in Saint Petersburg in 2006, as well as the issues of demand, supply, transportation and transit reliability. Energy efficiency, the Early Warning Mechanism[28] and nuclear power are reflected in the energy section of the future Strategic Partnership between Russia and the EU Member States (EU-Russia Energy Dialogue 2008: 8). Next to the EU-Russia Energy Dialogue, the most comprehensive approach to Russia with respect to energy can be found in the ECT. Signed in 1994, and provisionally in force since 1998,[29] it aims to 'strengthen the rule of law on energy issues, by creating a level playing field of rules to be observed by all participating governments, thus minimising the risks associated with energy-related

http://ec.europa.eu/energy/international/international_cooperation/doc/mou_kazakshtan_en.pdf. All accessed on 22 April 2009.

[26] Examples include the EU-Russia Energy Dialogue, the EU-Norway Energy Dialogue and the EU-OPEC Energy Dialogue. The EU-OPEC Energy Dialogue serves as a forum for joint assessment of the factors affecting prices, upstream and downstream investments needed in both producer and consumer countries and the impact of technological developments.

[27] Council and Commission Decision 97/800/ECSC/EC/Euratom of 30 October 1997 on the conclusion of the Partnership and Cooperation Agreement between the European Communities and their Member States, on the one part, and the Russian Federation, on the other part, OJ L 327/1 of 28 November 1997.

[28] The Early Warning Mechanism is a relatively new element of the EU-Russia Energy Dialogue. It is based on the agreement in principle by leaders at the EU-Russia Summit in Samara in May 2007. The Mechanism shall be used to identify potential supply and demand problems in oil and gas well in advance and allow for the preparedness of Russia and the EU to minimise the impact of potential disruptions. See EU-Russia Energy Dialogue (2007: 6).

[29] Art. 45 of the Treaty states that even without ratification, the Treaty is provisionally applicable provided that it does not contradict existing domestic legislation.

investments and trade'. The Treaty, however, has not been ratified by Russia due to reservations of the country's national gas company, Gazprom, regarding the regulation of transit matters in particular surrounding the Regional Economic Integration Organisation (REIO) clause that should apply to the ECT in the eyes of the EU (Benford 2006: 42; Belyi 2009: 213).

Multilateral fora such as the Energy Community are building an integrated market in Southeast Europe adjacent to the EU, encompassing an extension of the EU *acquis* in relation to the internal market, security of supply legislation for electricity and gas, the environment and renewables. In political terms the Treaty integrates South-east Europe into the EU regime of practices; however the South-eastern European countries do not participate in decision-making at the EU level (Belyi 2009: 210-211; Youngs 2007: 3).[30] Negotiations are currently underway with Ukraine, the Republic of Moldova and Turkey for accession to the Energy Community (European Commission 2008a: 7). Furthermore, in its *action plan* the Commission calls for the further development of energy relations with Iraq and the Gulf Cooperation Council[31] in the field of hydrocarbons (Belyi 2009: 209; Youngs 2007: 9; Echagüe 2007), the stepping up of cooperation with countries such as Australia, Canada and Japan as well as with emerging consumer countries such as China and India. Particular attention is given to North African countries such as Algeria, Egypt and Libya in view of their potential importance ranging from hydrocarbons to their largely untapped potential in renewable energies. Nigeria is mentioned in connection with the Trans-Sahara Gas Pipeline[32], where the EU sees a crucial role for the new Africa-EU Energy Partnership[33] in deepening the energy dialogue and spurring on concrete initiatives (European Commission 2008a: 9; European Commission 2008f).

Emergency Response, Energy Efficiency and Renewables

Currently the Union possesses a mandatory regime of emergency oil stocks (see *supra*) and a Security of Gas Supply Directive (see *supra*). In light of the Strategic Energy Review, the

[30] See also http://www.energy-community.org/portal/page/portal/ENC_HOME/ENERGY_COMMUNITY/Legal/EU_Legislation. Accessed on 22 April 2009.

[31] Currently the EU does not hold an energy dialogue or any other institutionalised relations with the Gulf Cooperation Council (GCC) countries (Bahrain, Kuwait, Oman, Qatar, Saudi Arabia and the United Arab Emirates), though in 1989 the Community did sign a cooperation agreement with the GCC aiming to establish a free trade area.

[32] This proposed pipeline is to run from Nigeria to Algeria, crossing Niger.

[33] See Joint Statement of the African Union Commission (AUC) and the European Commission (EC) On the Implementation of the Africa-EU Energy Partnership, Addis Ababa, Ethiopia, 8 September 2008. Available from: http://africa-eu-partnership.org/alfresco/d/d/workspace/SpacesStore/dc9647f8-0709-11de-920a-fd7297480e25/090208%20Signed%20Joint%20Statement%20on%20Energy%20Partnership.pdf?guest=true. Accessed on April 23 2009.

Commission proposes a revision of the emergency oil stocks legislation in order to improve coherence with the International Energy Agency regime, increase the reliability and transparency of available stocks, simplify compliance and verification, and clarify emergency procedures through a new proposal for a Council Directive on minimum stocks of crude oil and/or petroleum products (European Commission 2008a: 10). At the same time, the Commission deems the current legal framework that frames the implementation and effectiveness of the Security of Gas Supply Directive improvable. In particular, greater harmonisation of security of supply standards and predefined emergency measures on regional and EU levels are needed. However, strategic gas stocks are very expensive (at least 5 times more expensive than strategic oil stocks). Therefore, a more effective approach in the eyes of the Commission seems to be to promote development of commercial storages, diverse supply connections enabling flexible sourcing from LNG or neighbouring providers within the EU internal market, and rapid demand reduction through interruptible contracts and fuel switching in electricity generation.[34] It furthermore calls for an improvement of EU level crisis response coordination, both among Member States and in relations with suppliers and transit countries (European Commission 2008a: 11). The development of effective emergency and crisis response mechanisms have gained all the more impetus in light of the recent Russia-Ukraine gas row. In hindsight, the Commissioner for Energy noted the solidarity displayed during the crisis by all actors, public and private, as well as the EU's ability to speak with one voice, that of the Presidency and the Commission, and recalled that the core elements of the EU energy policy are security and solidarity. The Commissioner pointed out that there is a need for the development of an EU energy strategy, the improvement of energy efficiency, proposals on oil stocks and on the revision of the Security of Gas Supply Directive, more transparency in both the internal market and external relations, and more investment (Council of the European Union 2009b: 6).

Energy efficiency[35] also plays a crucial role, as consuming less through energy efficiency is a durable way to reduce dependency on fossil fuels and imports (European Commission 2008a: 11; European Commission 2007c: 11). This increased energy efficiency coupled with the development of renewable energies - such as wind[36], solar, hydro, biomass energy[37] and marine resources - can

[34] The Council shares this thought. See Council of the European Union (2009: 8).
[35] On energy efficiency, see European Commission (2008c).
[36] On offshore wind energy see European Commission, 2008, Communication from the Commission to the European Parliament, the Council, The European Economic and Social Committee and the Committee of the Regions, *Offshore Wind Energy: Action needed to deliver on the Energy Policy Objectives for 2020 and beyond,* COM(2008) 768.
[37] On biofuels see European Commission, 2006, Communication from the Commission: *An EU Strategy for Biofuels*, COM(2006) 34.

be seen as a great potential source of indigenous EU energy. The Commission further stresses the role of technology, as increased technological development is needed in order to attain the greenhouse gas objectives. Increased technological development also presents a security of supply priority (European Commission 2008a: 13-14). The new Renewable Energy Directive emphasises repeatedly the role energy efficiency and renewable energy can play to ensure security of supply (European Parliament and Council of the European Union, 2009: 2, 4, 9, 27, 81-82, 110).

In terms of security of supply, EU uranium supplies necessary for nuclear power stations are located within stable regions such as Australia and Canada. However, as the majority of the nuclear power operating plants within the EU will reach the end of their originally designed lifetimes within the next 30 to 40 years (European Commission 2008d: 5), the share of nuclear energy within the Union will decrease significantly if no decisions are made about new investments. As the decision to whether or not invest in nuclear power is the individual choice of each Member State, a common legal framework, with respect to the safety of nuclear installations and the management of nuclear waste, is needed (European Commission 2008a: 15).

Evaluation of the Institutional and Output Dimensions

Coherence

In the 2006 Communication on the internal energy market and the final Report on the Competition Sectoral Enquiry, the Commission demonstrated that the present rules and measures have not yet achieved their objectives (European Commission 2006b; European Commission 2006c). In order to do so, a coherent series of measures needs to be taken with the objective of creating a European Gas and Electricity Grid and truly competitive European-wide energy market (European Commission 2007c: 7). In its 2007 Communication on *an energy policy for Europe*, the Commission states that existing measures on areas such as renewable electricity, biofuels, energy efficiency and the internal energy market have achieved important results, yet lack the coherence necessary to bring sustainability, security of supply and competitiveness (European Commission 2007c: 6).

The Commission goes on to state that the main reason for the failure to reach the agreed targets for renewable energy (the higher costs of renewable energy sources today compared to “traditional” sources of energy set aside) is the lack of a coherent and effective policy framework throughout the EU and of a stable long-term vision. Consequently, only a limited number of Member States have made serious progress in this area. In order to shift niche renewables into the mainstream, more action is thus required (European Commission 2007c: 13). Furthermore, the EU must develop a

comprehensive strategy on integrating renewable energy sources into the grid, in full cooperation with national and regional authorities and market actors. This should address such issues as cost allocation along the supply chain, back-up costs, transmission technologies, the link between local and European grids and regulatory coherence (European Commission 2008b: 7). With respect to energy efficiency the Commission calls for a more coherent use of taxation measures in order to achieve more efficient use of energy. In terms of external representation and reaching further coherence at the external level, the EU should continue to strive where appropriate for membership in relevant international organisations and deepen its partnerships with key energy suppliers, transit countries and consumers (European Commission 2007c: 24; European Commission 2008a: 17).

In terms of European network development the EU is in need of improving the coherence between different network actions and increasing the leverage of the various funding possibilities for infrastructure development, including TEN-E, Structural funds and the European Investment Bank (EIB) (European Commission 2008b: 5). The European Council of 15-16 October 2008 gave some orientations for network priorities for the EU. The priorities as indicated by the Commission within its *EU energy security and solidarity action plan* (see *infra*) are in need of a realignment of policy and instruments and call for a more coherent energy network policy which is fully consistent with its energy and climate goals (European Commission 2008b: 7). Furthermore, regarding projects external to the EU (several have been mentioned throughout this paper), ways need to be found to fully exploit available financial instruments in full coherence with internal instruments, in particular the TEN-E instrument funds (European Commission 2008b: 12). The TEN-E instrument was not designed to deal with today's energy challenges and is, as such, not properly aligned with the new energy policy for Europe. It lacks coherence with the internal market and other developments, i.e. research and external policies. Its budget is furthermore inadequate (European Commission 2008b:13). These reflections should be taken in consideration when formulating an EU Energy Security and Infrastructure Instrument (European Commission 2008b: 12).

In terms of the capacity of the EU to deal with interruptions of supply, a revision of the EU emergency strategic oil stocks legislation is needed in order to improve coherence with the International Energy Agency regime, increase the reliability and transparency of available stocks, simplify compliance and verification, and clarify emergency procedures (European Commission 2008a: 10).

Accountability

As explained in paragraph 1.1 on the division of competences, the articles most commonly used as the legal basis for Community action in the field of energy security are Articles 93, 95, 100(1) and 308 TEC. Furthermore, as mentioned in paragraph 3.1, Article 156 TEC on Trans-European Networks includes a reference to energy infrastructures and has been used as the legal basis for EU support of TEN-E development (see *supra*). All articles, except for 100(1), provide for the involvement of the Parliament, albeit in different ways. Under Articles 93 TEC and 308 TEC it is the *consultation* procedure that is followed whereas the *co-decision* procedure is used for Articles 95 and 156 TEC. Measures taken under Article 100(1) do not provide for EP involvement. Here it is the Council that acts by qualified majority on a proposal from the Commission. Given the nature of the article and the speed required for the implementation of effective policy, it is however questionable whether EP involvement would be conducive to a quick decision.

In its resolutions the EP regularly addresses the issue of energy security. In the past the Parliament has called upon the Commission and the Member States to recognise the socio-economic importance of local and indigenous sources of energy in the EU and to encourage their development. It did so as a means of contributing to the security of energy supply in Europe and for the integration of offshore wind installations into the trans-European energy network, as well as for Member States to commit to the development of missing energy interconnections to isolated and border regions of the EU, such as the Baltic States (European Parliament 2006: points 45, 46; and 53). The Commission has addressed these issues in its EU Energy Security and Solidarity Action Plan (European Commission 2008a: 3-5, 11). The addressing of these issues shows a high level of congruence between the Commission and the EP, possibly due to pressure from the Parliament.

The Parliament called upon the Commission and the Council to develop a strategic energy partnership with countries such as China, India, South Africa, Brazil and Mexico (European Parliament 2006: point 64). In the G8 context, the Commission agreed on an International Strategic Energy Partnership with China, India and Korea and thereby partly addressed the Parliament's call (European Commission 2008a: 13). The Parliament further urged Member States and the Union to demand the ratification of the Transit Protocol and the Energy Charter Treaty by Russia (European Parliament 2006: point 66; European Parliament 2007: point 14). In relation to diversifying the Union's gas market, the Parliament stressed the need to seek ways of securing greater energy supplies directly from producers in Central Asia, i.e. Kazakhstan, Azerbaijan, Turkmenistan and Uzbekistan (European Parliament 2006: point 73). The Parliament has noted that the incorporation

of a so-called "energy security clause" in trade, association, and partnership and cooperation agreements is needed (European Parliament 2006: point 56c; European Parliament 2007: point 32) which was acknowledged by the Commission in 2008 (European Commission 2008a: 7, 13).

The ratification of the Energy Charter Treaty and the Transit Protocol is noted by the Commission (2008: 15), though not in as strong a wording as by the Parliament, yet the Commission (2008: 4) also states the need to develop stronger ties with countries such as Turkmenistan and Azerbaijan. Furthermore, the Parliament has called for the inclusion of Turkey into the Energy Community Treaty (European Parliament 2006: point 74; European Parliament 2007: points 15 and 44) and for Member States and the Commission to carefully assess the need for regulatory intervention of the EU energy Market, including the TEN-E instrument. Negotiations with Turkey are currently underway (European Commission 2008a: 7), and the Commission (2007c: 4; 2008: 3; 2008b: 9) has noted the need for regulatory intervention both in its 2007, and 2008 Communications.

Legitimacy

Input Legitimacy

As can be seen from the above analysis of accountability, the Union's *input* legitimacy is sufficient in terms of the accountability arrangements present. When it comes to the main concerns of European citizens, energy security gives a diverse picture. Overall energy related issues are rising in importance in the eyes of European citizens and require EU-wide attention.

In the 66th Eurobarometer of December 2006, energy related issues were not listed as being of concern to European citizens, whereas in the 67th Eurobarometer of June 2007, 4% of the EU-27 listed energy related issues as being of concern (Eurobarometer 2007a: 67).[38] More explicit mentioning of the question of security of supply came with the 68th Eurobarometer of December 2007, in particular relating to rising oil prices (Eurobarometer 2007b: 3). Furthermore, 68% of the respondents stated that energy should be a theme that is dealt with at EU level, instead of at the level Member States' national administrations, which represented a 7% increase compared to spring 2007 (Eurobarometer 2007b: 29-30).[39] Also 27% of the respondents acknowledged that energy represents an area that should be focused on more strongly in order to strengthen the

[38] Response to the question: "What do you think are the two most important issues facing (OUR COUNTRY) at the moment?"
[39] Response to question: "Sagen Sie mir bitte für jeden der folgenden Bereiche, ob er Ihrer Meinung nach von der (NATIONALITÄT) Regierung oder gemeinsam innerhalb der Europäischen Union entschieden werden sollte."

European Union in the future, which represents a 2% increase compared to the spring of 2007 (Eurobarometer 2007b: 40).[40]

The most recent Eurobarometer shows that Europeans are particularly negative about energy prices in their country compared to the European average, as 45% indicated that the situation is somewhat less good than the European average with regard to energy prices (Eurobarometer 2008: 18).[41] 9% of the respondents further indicated that energy related issues are the most important issues impacting on their personal lives, whereas 5% indicated that energy related issues were the most important issues facing their country (Eurobarometer 2008: 25, 27).[42] Currently 63% of the respondents claim that energy related issues should be dealt with at the EU level, compared to 68% a year earlier (Eurobarometer 2008: 50).[43] Interestingly, 3 out of 5 respondents claimed that the recent Russia-Georgia conflict of August 2008 could have an impact on the security of energy supply in the EU (Eurobarometer 2008: 60).[44] When it comes to budget spending, the popular opinion is that most of the EU budget is spent on administrative and personnel costs and buildings (26%), economic growth (24%) and agriculture and rural development (24%). With respect to energy, 13% of the respondents think that most of the EU budget is spent on energy issues, whereas 22% of the respondents indicated that they would like the EU budget to be spent on energy related issues, compared to 38% on economic growth, 36% on employment and social affairs and 32% on public health (Eurobarometer 2008: 68).[45]

Output Legitimacy

With regard to *output* legitimacy it is first of all important to distinguish which goals the EU has set itself with respect to energy security. The first Strategic Energy Review led to the European Council agreement in March 2007 on energy policy targets for Europe (European Council 2007). With respect to the internal market for gas and electricity the European Council called *inter alia* for effective unbundling of operations; enhanced powers and independence *of* and cooperation *among* national energy regulators; improved regional cross-border exchange; enhancement of competition

[40] Response to question: "Welche Belange sollten Ihrer Meinung nach durch die europäischen Institutionen in den nächsten Jahren verstärkt beachtet werden, um die Europäische Union in Zukunft zu stärken?

[41] Response to question: "For each of the following domains, would you say that the situation in (OUR COUNTRY) is better or less good than the average of the European countries?".

[42] Response to questions: "And personally, what are the two most important issues you are facing at the moment?" and "What do you think are the two most important issues facing (OUR COUNTRY) at the moment?".

[43] Response to question: "For each of the following areas, do you think that decisions should be made by the (NATIONALITY) Government, or made jointly within the European Union?"

[44] Response to question: "Do you think that this conflict could have an impact on the security of energy supply in the European Union?".

[45] Response to questions: "On which of the following do you think most of the European Union budget is spent?" And "on which of the following would you like European Union budget to be spent?".

and security of supply through facilitated integration of new power plants into the electricity grid in all Member States; increased transparency in energy market operations; and better consumer protection. In addition, the European Council *inter alia* invited the Commission to elaborate together with Member States the medium and long-term forecasts for gas and electricity supply and demand, to identify the additional investment required to satisfy the EU's strategic needs, and to assess access to gas storage in the EU (European Council 2007).

The proposed third legislative package by the Commission, currently pending in the Council, serves to do just the above. The Commission clearly affirms the need for more effective unbundling through ownership unbundling (European Commission 2007d: 5; European Commission 2007a: 5). Furthermore, the Commission concluded that existing cross-border cooperation and exchange is insufficient and therefore proposed an Agency for the Cooperation of Energy Regulators that provides a framework for national regulators to cooperate; gives regulatory oversight between transmission operators, preferably of a binding nature; has individual decision powers and a general advisory role (European Commission 2007b: 11). The Commission aims to lower the barriers for new entrants through unbundling and improved transparency, and through the strengthening of the powers of national regulatory authorities (European Commission 2007d: 16-17; European Commission 2007a: 16-17). These enhanced powers of national regulatory authorities also encompass stronger consumer protection measures. In addition, the Commission proposes to strengthen the rights of consumers through enabling them to change supplier at any time. Moreover, energy companies will be required to settle bills within a month of the consumer changing supplier (European Commission 2007a: 8, 19). The Commission furthermore proposes to extend the transparency requirements to cover gas stocks, forecasts of demand and supply, costs for balancing the network, and trading (European Commission 2007a: 16). Increased security of supply through monitoring by transmission system operators is proposed by means of the amendments to Regulations 1228/2003/EC and 1775/2005/EC that give the task of making system adequacy forecasts for every summer and winter as well as in the long term to the Network of Transmission System Operators (European Commission 2007a: 19).

With regard to security of supply the European Council calls *inter alia* for effective diversification of energy sources and transport routes; developing more effective crisis response mechanisms; improving oil data transparency and reviewing EU oil supply infrastructures; an analysis of the availability and costs of gas storage facilities in the EU; and the establishment of an Energy Observatory within the Commission. With regard to the external dimension of EU energy policy, the

European Council *inter alia* called for negotiating and finalising a post-partnership and cooperation agreement with Russia; intensifying the EU relationship with Central Asia, the Caspian and Black Sea regions; strengthening bilateral energy dialogues with the USA, as well as with China, India, Brazil, and other emerging economies; ensuring the implementation of the Energy Community Treaty and possibly extending it to Norway, Turkey, Ukraine and Moldova; enhancing energy relationships with Algeria, Egypt, and other producing countries in the Mashreq/Maghreb region; building a special dialogue with African countries on energy; and promoting access to energy in the context of the United Nations Commission on Sustainable Development (UN-CSD) (European Council 2007: 18-19).

As described extensively before, in its EU Energy Security and Solidarity Action Plan, the Commission proposes various infrastructural projects. In the period 2002-2006, 57 electricity projects and 23 gas projects of common interest were completed. Out of these 80 projects, 68 were located on a priority axis as defined in the guidelines adopted in 2003 (European Commission 2008e: 4). Furthermore, the EU exerted a greater focus on energy in the EU's international relations through increased cooperation in multilateral fora such as the Energy Community, the EU-OPEC Energy Dialogue, and the Africa-EU Partnership with a focus on the Trans-Sahara Gas Pipeline. In addition, the Union increased and strengthened its bilateral energy dialogues; extended the Energy Community Treaty to the above named countries; continued negotiations with a view to finalising a New-EU-Russia Agreement; and improved energy relations with Algeria, Egypt and other Mashreq/Maghreb countries.[46] In response to the demand for more effective crisis response mechanisms, the Commission proposed a new Council Directive concerning minimum stocks of crude oil and/or petroleum products and it has reviewed the Security of Gas Supply Directive (see *supra*). The Commission further recalled that strategic gas stocks are very expensive and that it would be more effective to promote commercial storages, diverse supply connections and enable flexible sourcing from LNG or neighbouring providers within the EU's internal market, along with rapid demand reduction through interruptible contracts and fuel switching in electricity generation. The Commission aims to propose a revised Security of Gas Supply Directive in 2010 (European Commission 2008a: 11). The European Commission's Market Observatory for Energy has been set up in 2007, thereby addressing the European Council's demand.

[46] For a full overview, see European Commission (2008).

With respect to energy efficiency, the Council called *inter alia* for the rapid implementation of the five main priorities highlighted in the Council conclusions of 23 November 2006[47] and welcomes proposals for a new international agreement on energy efficiency (European Council 2007: 20). Overall, the Commission reports that energy efficiency has improved on average by 1,3% per year between 1997 and 2006 on an EU-wide level, with industry achieving the most increase and households and transport staying behind (European Commission, 2008c).

The targets for the share of electricity derived from renewable energy in total Community electricity consumption and for renewables used in the transport sector were set back in 2001 and 2003 at 21% and 5.75% respectively, to be achieved by 2010 (European Parliament and Council of the European Union 2001, 2003). For 2020 these targets lie at 20% and 10% respectively. In terms of the progress made with regard to renewable energy, the picture is rather uneven. Some Member States made considerable progress, whilst others are far behind. It is more likely that the EU will reach a 19% share in electricity rather than 21%, and 4% instead of 5,75% in the transport sector. In terms of reasons for this uneven progress, the inadequate basis for supporting solid growth in renewable energy use through the current legal framework is mentioned. Barriers include administrative procedures, grid access, and difficulties guaranteeing adequate support and measures from Member States to ensure that growth occurs (European Commission 2009). The European Council called for a new comprehensive directive on the use of all renewable energy resources. The new Directive on renewable energy - that contains provisions on overall national targets, national action plans, and criteria and provisions to ensure sustainable production and use of bio-energy - aims to improve the current legal framework and remove the obstacles to improvement (European Parliament and Council of the European Union 2009).

Conclusion

In sum, it can be said that the internal market in electricity and gas has not yet reached completion. The proposed "third legislative package" does well to fill the voids in terms of both regulatory oversight as well as common rules for the effective functioning of the internal energy market. However, as the package is still pending in the Council, it is not until formal adoption that these measures will have effect and their impact can be assessed. Furthermore, much work is still to be done on the incorporation of renewable energy sources into the Member States' national energy

[47] Council of the European Union (2006: 8). It distinguishes five main priorities relating to more energy efficient transport: dynamic minimum efficiency requirements for energy-using equipment, energy-efficient and energy-saving behaviour of consumers, energy technology and innovations and the energy savings from buildings.

mixes. A more consistent approach, in line with the Union's diversification aims, would likely ensure a more coherent energy security policy, taking due account of the climate change goals in terms of renewable energy. In terms of network development, the current instruments are not able to cope well enough with today's challenges, both internally and externally. A stronger link with the internal market's development should be enforced as well as its role in supporting network development outside of the EU. Addressing these concerns in the development of the new EU Energy Security and Infrastructure Instrument (see *supra*) should lead to the improvement of both consistency and coherence in internal as well as external action.

In terms of accountability, both judging from the provisions as laid down in the EC Treaty and by the response to its resolutions, the Parliament is significantly involved when it comes to issues of energy security and its remarks and calls are addressed by the Commission. This is of course partly due to the higher degree of Parliamentary involvement as provided for in the Union's first pillar policies. The extent to which the Parliament is able to monitor and evaluate the behaviour of the Union's executive actors and to modify that behaviour in accordance with their preferences is thus significant.

With regard to legitimacy, it seems that in terms of the development of the internal gas and electricity markets the Commission is addressing the concerns of the European Council by means of its third legislative package and it legitimately corresponds to the policy goals. However, in terms of security of supply, the picture is somewhat different. Diversification has been on the agenda for a long time and although progress has been made (i.e. under the TEN-E Programme), the EU is still to a large degree dependent on a small number of suppliers. With regard to crisis response mechanisms, much depends on the new Council Directive concerning minimum stocks of crude oil and/or petroleum products, the reviewed Security of Gas Supply Directive and the possibilities of circumventing strategic gas storage in the ways suggested by the Commission. The external dimension of EU energy policy seems to develop broadly in line with the European Council's demands as can be seen from the Commission's policy documents. The establishment of Energy Dialogues with countries such as Russia are examples of increased cooperation. Yet, as the gas disputes of 2006 and 2009 have shown, much progress is still to be made in this area. With respect to energy efficiency it is the Commission's new Energy Efficiency Package which proposes a multi-faceted effort to improve energy efficiency throughout the Union and follows the European Council's demands in this respect. Progress on renewable energy is currently lagging behind and

more effort is needed in order to attain the goals as set out for 2010 and 2020 in order for EU policy on renewables to be legitimately effective.

References

Official Documents

Conference of the Representatives of the Governments of the Member States, 2007. *Final Act.* Brussels, 3 December 2007.

Council of the European Union, 2006. Council conclusions on the Action Plan on Energy Efficiency, Council doc. 15210/06. 23 November 2006.

Council of the European Union, 2009. Extraordinary Council meeting on Transport, Telecommunications and Energy, Council Doc. 5215/09. Brussels, 12 January 2009.

Council of the European Union, 2009b. 2924th Council meeting Transport, Telecommunications and Energy, Council Doc. 6670/09. Brussels, 19 February 2009.

Eurobarometer, 2007a. *Standard Eurobarometer 67*, *First Results*, June 2007.

Eurobarometer, 2007b. *Standard Eurobarometer 68*, *First Results*, December 2007.

Eurobarometer, 2008. *Standard Eurobarometer 70, First Results*, December 2008.

European Commission, 1996. Report from the Commission to the Council On civil protection, tourism and energy, SEC(96) 496, 3 April 1996.

European Commission, 2006a. *Green Paper: A European Strategy for Sustainable, Competitive and Secure Energy*, COM(2006) 105, 8 March 2006.

European Commission, 2006b. Communication of the Commission to the European Parliament and the Council on prospects for the internal gas and electricity market, COM(2006) 841, 10 January 2007.

European Commission, 2006c. Sector Enquiry under Article 17 of Regulation 1/2003/EC on the gas and electricity markets (final report), Communication from the Commission, COM(2006) 851, 10 January 2007.

European Commission, 2007a. Proposal for a Directive amending Directive 2003/54/EC concerning common rules for the internal market in electricity, COM(2007) 528, 19 September 2007.

European Commission, 2007b. Proposal for a Regulation establishing an agency for the cooperation of energy regulators COM(2007) 530, 19 September 2007.

European Commission, 2007c. *An Energy Policy for Europe:* Communication from the Commission to the European Council and the European Parliament, COM(2007) 1, 10 January 2007.

European Commission, 2007d. Proposal for a Directive amending Directive 2003/55/EC concerning common rules for the internal market in natural gas, COM(2007) 529, 19 September 2007

European Commission, 2008a. *An EU Energy Security and Solidarity Action Plan:* Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions*,* COM(2008) 781, 13 November 2008.

European Commission, 2008b. *Green Paper towards a secure, sustainable and competitive European energy network,* COM(2008) 782 final, 13 November 2008.

European Commission, 2008c. *Energy efficiency: delivering the 20% target*, COM(2008) 772, 13 November 2008.

European Commission, 2008d. Update of the nuclear illustrative programme in the context of the second strategic energy review: Communication from the Commission to the European Parliament, the Council and the Economic and Social Committee, COM(2008) 776, 13 November 2008.

European Commission, 2008e. Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee, and the Committee of the Regions on the implementation of the Trans-European energy networks programme in the period 2002-2006, COM(2008) 770, 13 November 2008.

European Commission, 2008f. Proposal for a Council Directive imposing an obligation on Member States to maintain minimum stocks of crude oil and/or petroleum products. COM(2008) 775, 13 November 2008.

European Commission, 2009. Summary. *Progress Report on Renewable Energy 2009*, IP/09/639, Brussels, 24 April 2009.

European Council, 2007. *Presidency Conclusions,* Brussels, 8-9 March 2007.

European Council, 2008, *Presidency Conclusions*, Brussels, 15-16 October 2008.

European Court Reports, 1984. Case 72/83: *Campus Oil Limited and others v Minister for Industry and Energy and others,* 10 July 1984*,* ECR p. 2727.

European Court Reports, 2001. Case C-379/98: *PreussenElektra AG and Schleswag AG*, 13 March 2001, ECR p. I-02099.

European Court Reports, 2002. Case C-467/98: *Commission of the European Communities v. Kingdom of Denmark,* Opinion of Advocate General A. Tizzano, 5 November 2002, ECR p. I-09519.

European Parliament, 2006. Resolution on a European strategy for sustainable, competitive and secure energy – Green paper, 2006/2113(INI).

European Parliament, 2007. Resolution of 26 September 2007 on towards a common European foreign policy on energy, 2007/2000(INI).

European Parliament and Council of the European Union, 2001. Directive 2001/77EC of the European Parliament and of the Council of 27 September 2001 on the promotion of electricity produced from renewable energy sources in the electricity market, OJ L 283/33, 27 October 2001.

European Parliament and Council of the European Union, 2003. Directive 2003/30/EC of the European Parliament and of the Council of 8 May 2003 on the promotion of the use of biofuels or other renewables for transport, OJ L 123/42, 17 May 2003.

European Parliament and Council of the European Union, 2009. Directive of the European Parliament and of the Council on the promotion of the use of energy from renewable sources

amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC, Doc. No. PE-CONS 3736/08, 26 March 2009.

EU-Russia Energy Dialogue, 2001. *Synthesis Report*. Brussels/Moscow, September 2001.

EU-Russia Energy Dialogue, 2008. *Ninth Progress Report*. Paris, October 2008.

EU-Russia Energy Dialogue, 2007. *Eighth Progress Report*. Brussels/Moscow, October 2007.

International Energy Agency, 2008. IEA Energy Policies Review: The European Union. Paris: OECD/IEA.

Single European Act (SEA). Signed on 17 February 1986. Official Journal of the European Communities, L. 169/1, 1987.

Treaty Establishing the European Community, Consolidated Version. Official Journal of the European Communities, C. 32, 24 December 2002.

Treaty on European Union. Official Journal of the European Communities, C. 191, 29 July 1992.

Treaty on the Functioning of the European Union, Consolidated Version. Official Journal of the European Communities, C. 115/47, 9 May 2008.

Doctrine

Belyi, A., 2004. Le Marché Unique Européen d'Energie face aux Conceptions Traditionelles de la Securité d'Approvisionnement. *Revue de l'Energie,* 558, pp. 368-375.

Belyi, A., 2009. EU External Energy Policies: A Paradox of Integration. In J. Orbie, ed., *Europe's Global Role.* Aldershot: Ashgate, pp. 205-215.

Benford, J., 2006. Special Report 1: EU Energy Policy: internal developments and external challenges. *The Economist Intelligence Unit*. 15 *May 2006*, pp. 39-46.

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

Echagüe, A., 2007. The European Union and the Gulf Cooperation Council, FRIDE Working Paper. Madrid: Fundación par alas Relaciones Internacionales y el Diálogos Exterior, May 2007.

Haghighi, S., 2008. Energy Security and the Division of Competences between the European Community and its Member States. *European Law Journal*, *14*(4), pp. 461-482.

ab lago, D., 2007. Energy: EU's powers are boosted but "wording is to be explored." *Europolitics Special Edition: Treaty of Lisbon, Here is What Changes!* 35(3407), p.22.

Michel, V., 2003. Le défi de la répartition des competences. *Cahiers de droit européen*, vol. 1-2, pp. 17-86.

Youngs, R., 2007. Europe's External Energy Policy: Between Geopolitics and the Market. Working Document No. 278. Brussels: CEPS.

EU-GRASP Working Papers

EU-GRASP

Changing Multilateralism: the EU as a Global-regional Actor in Security and Peace, or EU-GRASP in short, is an EU funded FP7 Programme. EU-GRASP aims to contribute to the analysis and articulation of the current and future role of the EU as a global actor in multilateral security governance, in a context of challenged multilateralism, where the EU aims at "effective multilateralism". This project therefore examines the notion and practice of multilateralism in order to provide the required theoretical background for assessing the linkages between the EU's current security activities with multi-polarism, international law, regional integration processes and the United Nations system.

Partners

EU-GRASP is coordinated by the United Nations University – Comparative Regional Integration Studies (UNU-CRIS). The other partners of EU-GRASP are based worldwide and include: University of Warwick (UK), University of Gothenburg (Sweden), Florence Forum on the Problems of Peace and War (Italy), KULeuven (Belgium), Centre for International Governance Innovation (Canada), Peking University (China), Institute for Security Studies (South Africa) and Ben-Gurion University of the Negev (Israel).

EU-GRASP Working Papers

Contact: EU-GRASP Coordination Team
72 Poterierei – B-8000 – Bruges – Belgium
Email: fbaert@cris.unu.edu or efanta@cris.unu.edu

Additional information available on the website: www.eugrasp.eu