

Energy Governance in EU- Russia Energy Relations: Paving the Way Towards an Energy Union

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Natasha A. Georgiou* and Andrea Rocco**

Abstract: EU-Russia relations are in desperate need of legislative and institutional reform given the fragmented legal infrastructure regulating energy trade between these two powers. The paper will argue that the energy partnership is a highly strategic relationship that has profound implications for the international arena as far as energy security and stability are concerned, for which a solid over-arching legal framework is required. Other simmering issues include the absence of reciprocity in energy market access and the lack of coherence in external EU energy relations which has resulted in bilateralism emerging as the default approach of engagement. These issues are interrelated and closely affiliated to the need for a revised bilateral and international legal framework, as diverse positions and a lack of cooperation amongst Member States undermine collective EU actions and legislative initiatives. In this respect the paper advocates that the Energy Union may be a comprehensive solution to these challenges, by implementing a cohesive and fully functioning energy policy that will strengthen EU solidarity and coherence in the Union's external relations, thereby bolstering EU energy security.

Keywords: energy governance; energy security; Energy Union; EU solidarity; EU external energy policy; EU-Russia relations

Introduction

The EU-Russia relationship evolved quite rapidly over ten years from what initially started off as a donor-recipient relationship. The 1990s saw Russia opening its economy to international trade with the EU becoming its most important trading partner. Given its wealth in natural resources, Russia became the largest provider of natural gas to the EU. However, energy relations between the EU and Russia have come under increasing pressure in recent years, following a series of trade disputes and supply disruptions, bringing Russia's reliability as a trade partner into question. The matter was brought to the fore following the 2006 and 2009 gas crises when gas supplies to Europe were hindered following transit disputes between Russia and Ukraine. In particular, the last dispute was by far the most serious of its kind with far-reaching consequences for the whole of Europe.¹

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The gas crises revealed Europe's vulnerability in its energy dependence on Russia and subsequently made energy security a top priority on the EU agenda. Consequently, EU-Russia energy relations have become paradoxical in nature.² Despite interdependence and close proximity, relations are tense, somewhat antagonistic and at times riddled with mistrust.³ Tensions have been further exacerbated by Russia's withdrawal from the Energy Charter Treaty (ECT) as well as the outdated Partnership and Cooperation Agreement (PCA), raising concerns about the basis of legal ties between these two powers.

There is no denying that the EU-Russia energy partnership is potentially one of the most important international relationships to have evolved in the 21st Century, the development of which will have profound implications for the international arena, as far as energy security and stability are concerned. A common legal framework appears to be the vital ingredient essential to ensuring cooperation in EU-Russia bilateral relations, eliminating any potential trade disputes which could jeopardise the Union's secure energy supplies and in turn, EU energy security.

In this respect, a number of simmering issues which have inhibited any constructive engagement on the part of the EU towards Russia still remain.⁴ These issues concern (i) the legal framework in place; (ii) reciprocity; and (iii) lack of coherence amongst EU Member States in EU external relations.⁵ The paper will analyse each in turn before undertaking an in-depth assessment of the Energy Union as a potential solution to these recurring issues with 'a stronger emphasis on security of supply, solidarity and trust' being one of the cornerstones of the Energy Union initiative. In this respect, the paper will consider whether the five pillars of the Energy Union (which reflect the Lisbon Treaty's Article 194⁶) are able to collectively tackle the wider EU concerns *vis-à-vis* Russia, such as energy security and the geopolitics of energy, by eradicating fragmentation within the EU energy market through the centralisation of energy competence and energy security governance.

The Need for a Revised Bilateral and International Legal Framework

¹ Simon Pirani, Jonathan Stern and Katja Yafimava, 'The Russo-Ukrainian Gas Dispute of January 2009: A Comprehensive Assessment' (2009) Oxford Institute for Energy Studies 4.

² Sijbren De Jong and Jan Wouters, 'European Energy Security Governance: Key-Challenges and Opportunities in EU-Russia Energy Relations' (2011) Leuven Centre for Global Governance Studies 23.

³ Rafael Leal-Arcas, 'The EU and Russia as Energy Trading Partners: Friends or Foes?' (2009) 14(3) European Foreign Affairs Review 348.

⁴ *Ibid.*

⁵ De Jong and Wouters (n 2).

⁶ Article 194 TFEU, which introduced the energy field for the first time in a specific section of the Treaty (Title XXI), by listing it among the competences shared between Member States and the Union

Bilateral relations between the EU and Russia have predominantly been based on the PCA⁷, which was signed in 1994 and entered into force on 1st December 1997 for an initial duration of ten years. The agreement, which has been renewed annually since 2007, has provided a legal framework for bilateral trade and has regulated political, economic and cultural relations between the EU and Russia. The PCA covers a wide range of policy areas however its main focus has been aimed at promoting trade, investment and harmonious economic relations. Under Article 106, the PCA can automatically rollover unless either party gives notice of termination. Both the EU and Russia have agreed to leave it in place until a new agreement is signed.⁸ The PCA therefore remains the basis for EU-Russia relations until replaced by a new agreement.⁹

However, a revision of this framework is urgently needed as significant legal obstacles need to be tackled such as the binding nature of the provisions for the purpose of fostering a strengthened EU-Russia energy partnership. All EU institutions have recognised the need to revise the legal framework of EU-Russia relations given the limitations of an incoherent energy policy towards Russia after EU enlargement.¹⁰ The challenges surrounding modernisation of EU-Russia relations need to be addressed as Russia's withdrawal from the ECT in 2009 (see below) has effectively rendered EU-Russia energy cooperation essentially based on non-legally binding dialogues and commitments, the most important being the EU-Russia energy dialogue which at best can be described as a 'soft law' mechanism, which lacks legally binding norms regarding investment protection, transit and dispute resolution.¹¹

Bilateral relations aside, from an international perspective, the ECT and its Transit Protocol constitute the only intergovernmental agreement in the energy field that has legally binding rules backed by a dispute settlement mechanism.¹² The ECT is significant in that it is the first binding multilateral instrument aimed at the promotion and protection of foreign investment in the energy sphere; and in addition thereto, it is the first multilateral agreement with detailed provisions on energy transit.¹³ However, despite the significance of the ECT as a legal framework in the energy field, Russia never ratified the treaty and instead opted for provisional application under Article 45 ECT. Moscow, which had stalled on ratification,

⁷ Agreement of Partnership and Cooperation Establishing a Partnership Between the European Communities on the one part, and the Russian Federation, of the other part, dated 24 June 2004.

⁸ Katinka Barysch, 'Report from the 4th Friedrich-Ebert Stiftung and Foundation for Unity for Russia Roundtable' (2006) Friedrich-Ebert Stiftung 2 <http://www.cer.org.uk/pdf/partnership_with_russia_barysch_dec06.pdf> accessed 10 March 2015.

⁹ Delegation of the European Union to Russia, 'Political Relations: Legal Framework' (2012) <http://eeas.europa.eu/delegations/russia/eu_russia/political_relations/legal_framework/index_en.htm> accessed 24 September 2016.

¹⁰ Peter Van Elsuwege, 'Towards a Modernisation of EU-Russia Legal Relations?' (2012) EU-Russia Papers 5, Centre for EU-Russia Studies, University of Tartu 3.

¹¹ Ibid 6.

¹² Yulia Selivanova, 'Managing the Patchwork of Agreements in Trade and Investment' in Andreas Goldthau and Jan M. Witte (eds), *Global Energy Governance: The New Rules of the Game*, (Brookings Institution Press 2010) 61.

¹³ Ibid.

having linked it to consensus on the Transit Protocol, finally announced to the disappointment of the EU, that it would terminate provisional application on 20 August 2009.¹⁴

Russia's announcement to terminate provisional application and withdraw from the ECT tarnished Russia's reputation within the international community given its disregard to standards of international law.¹⁵ Furthermore, as Konoplyanik aptly points out, it ironically deprived Russian investments of additional protection abroad, which should have been a source of concern, given Russia's issues with the third energy package (TEP).¹⁶ Nevertheless, Russia's withdrawal from the ECT did not have immediate consequences for investment protection given that an Arbitral tribunal for the Yukos case¹⁷ held that Russia was bound by the ECT for investment pre-dating its withdrawal on the 19 October 2009, despite not having ratified the treaty.¹⁸ This meant that all investments prior to the withdrawal date would be protected for an additional 20 years.¹⁹

The issues concerning an obsolete PCA and Russia's withdrawal from the ECT are interrelated given that, from an EU perspective, the new bilateral agreement between the EU and Russia should be strongly based on the principles of the Energy Charter and other principles fundamental to EU values such as reciprocity, transparency and non-discrimination.²⁰ From a Russian perspective however, the ECT, which proposes free access to Russia's strategic oil and gas sector as well as its production and transit infrastructure, is to its detriment, for which it receives no reciprocal gain.²¹ The inability to reconcile these matters is a fundamental problem that has hindered further development on a bilateral and international legal framework.

On 22 August 2012 Russia finally became a member of the WTO after almost 20 years of protracted negotiation. Russia's accession was perceived as a monumental occasion given

¹⁴ Practical Law, 'Russia Withdrawing from Energy Charter Treaty' (2009) <<http://uk.practicallaw.com/7-422-4842?service=dispute>> accessed 24 September 2016.

¹⁵ Andrei Konoplyanik, 'Russia: Don't Oppose the Energy Charter, Help to Adapt it' (2009) 76(7) *Petroleum Economist* 2.

¹⁶ *Ibid.*

¹⁷ The Yukos case, which was believed to be politically motivated, is arguably the most controversial investment arbitration case of all time. As CEO of Russia's largest oil firm, Mikhail Khodorkovsky was arrested for alleged tax fraud and Yukos was subsequently dismantled and auctioned off. See Richard Youngs, *Energy Security: Europe's New Foreign Policy Challenge* (Routledge 2009).

¹⁸ EUobserver, 'Investors Call for Tough EU-Russia Energy Treaty' (2009) <<http://euobserver.com/?aid=29084>> accessed 10 September 2016; Konoplyanik (n 15) 3.

¹⁹ After long and complex litigation proceedings, a final award was rendered in July 2014 of US\$50 billion against the Russian state however Russia appealed to the District Court of The Hague, which ruled in April 2016 that Russia was not bound by the ECT because it had not ratified the Treaty. This judgement has subsequently suspended any enforcement of Yukos-related fines, pending a final appeal by investors to the Supreme Court of the Netherlands. This view of non-applicability of the ECT to Russia is contentious. It therefore remains to be seen whether the view of non-applicability of the ECT to Russia is maintained in the appeal to the Supreme Court of the Netherlands.

²⁰ European Commission, *Review of EU-Russia Relations COM (2008) 740*, 5 November 2008; European Commission, *External Energy Relations – From Principles to Action, COM (2006) 590*, 12 October 2006.

²¹ Fyodor Lukyanov, 'Russia-EU: The Partnership That Went Astray' (2008) 60(6) *Europe-Asia Studies* 1110.

the country's definitive embrace as a market economy and the potential for deepening EU-Russia trade relations.²² The occasion was also hailed as an opportunity to enhance the current legal framework, which was considered limited in nature under the PCA. It was hoped that the multilateral commitment under the WTO would enhance the bilateral commitment under the PCA as a solid legal framework, so that any further trade conflict and disputes could be avoided.

Although the EU-Russia legal framework will benefit from Russia's accession to the WTO, given it will be bound by enforceable international trade rules, some academics have argued that Russia's WTO accession will have a limited impact on EU-Russia energy relations given the limited commitments made by the country on its WTO accession.²³ Inevitably, the WTO's ability to bolster the PCA and the legal infrastructure (as a valuable contribution to the legal framework) ultimately depends on Russia's ability to live up to its WTO commitments and whether it becomes an active player in the WTO, which remains to be seen.²⁴

The new EU-Russia Partnership Agreement (PA) under negotiation, following Russia's WTO membership was expected to provide a comprehensive framework for bilateral trade and investment relations, with a view to improving the regulatory environment by building upon the WTO rules and going beyond the PCA provisions.²⁵ The EU welcomed Russia's WTO membership and has been eager to pursue a deep and comprehensive economic integration agreement following Russia's accession,²⁶ which is expected to boost further economic development and relations between these two global powers.

In this respect, the EU seems to be in favour of a new agreement with clearly defined terms on energy and security based on the Union's *acquis* which it hopes to export.²⁷ Whereas it is unlikely that Russia, as a major gas exporter, will agree to a new PA with provisions incorporated through an extension of the EU's *acquis*.²⁸ In the same vein, despite Moscow's desire to remain outside the ambit of EU legal regulation, it is doubtful whether the EU will ever agree to an agreement with Moscow on terms incompatible with EU law.²⁹ These manifestly inconsistent views have subsequently reduced negotiations on a revised bilateral framework, to a piecemeal manner. Furthermore, following Russia annexation of Crimea and the continued destabilisation of Ukraine, the EU has suspended all bilateral talks and

²² Guillaume Van der Loo, 'EU-Russia Trade Relations: It Takes WTO to Tango?' (2013) 40.1 Legal Issues of Economic Integration 7.

²³ *Ibid* 22.

²⁴ Van der Loo (n 22) 32.

²⁵ European Commission 'Trade – Russia,' <<http://ec.europa.eu/trade/creating-opportunities/bilateral-relations/countries/russia/>> (2016) accessed 14 September 2016.

²⁶ Leal-Arcas (n 3) 346.

²⁷ Andrei Konoplyanik, 'A Common Russia-EU Energy Space: The New EU-Russia Partnership Agreement, Acquis Communautaire and the Energy Charter' (2009) 27(2) Oil Gas and Energy Law Journal 261.

²⁸ Tatiana Romanova, 'The Russian Perspective on the Energy Dialogue' (2008) 16(2) Journal of Contemporary European Studies 223.

²⁹ Konoplyanik (n 15) 2.

sanctions have been imposed. The EU and Russia can therefore be said to have entered a period of stalemate.³⁰

The Need for Reciprocal Energy Market Access (Reciprocity)

In the absence of a bilateral EU Russia agreement, the reciprocity principle emerged as the principle of access to energy resource and infrastructure and in this context restrictions on energy investments to gain political leverage became the new order of the day in EU-Russia energy relations.³¹ Fundamental differences of perception and discrepancies in the understanding of reciprocity have become a major feature in EU-Russia relations. In turn, the issue of reciprocity based on key energy market reforms and subsequent cases have created difficulties between EU Member States and the European Commission. Inevitably a true partnership should be founded on mutual trust, equal rights and participation, which would transpire as equal access to energy markets.³² The fact that this is not the case in EU-Russia relations brings to question whether cooperation is likely or even achievable.

The TEP³³ and its Gazprom clause³⁴ were intended to address concerns in Brussels regarding restrictions imposed on EU companies trying to invest in Russia's energy market.³⁵ The Yukos case of 2003 served as a stark reminder of the lengths to which the Russian state would go to retain control over its oil and gas sector. However, the cases of Sakhalin II³⁶ and Shtokman³⁷ in 2006 raised the most concerns in Brussels as both cases were flagrant

³⁰ Christian Nitoiu, 'Is Meaningful Cooperation Between the EU and Russia Still Possible?' in Christian Nitoiu, *Avoiding a 'Cold War': The Future of EU-Russia Relations in the Context of the Ukraine Crisis* (LSE IDEAS 2016) 94.

³¹ Andrei Belyi, 'Reciprocity as a Factor of the Energy Investment Regimes in the EU-Russia Energy Relations' (2009) 2(2) *Journal of World Energy Law & Business* 123.

³² Sijbren De Jong, Jan Wouters and Steven Sterk, 'The 2009 Russian-Ukrainian Gas Dispute: Lessons for European Energy Crisis Management after Lisbon' (2010) 15(4) *European Foreign Affairs Review* 525.

³³ The TEP's unbundling rules require the effective separation between the operation of gas transmission networks from supply and production activities of vertically integrated energy companies.

³⁴ This follows from Article 11 of Directive 2009/73 of 13 July 2009 concerning common rules for the internal market in natural gas, Official Journal of the European Union (2009a), L 211/94. Significantly, undertakings from third countries, which intend to acquire control over a gas network, need to comply with the same unbundling requirements as EU undertakings. This has significant implications for entities such as Gazprom (thus famously dubbed the 'Gazprom clause'), which faces a legal obligation to 'unbundle' the ownership and operation of its gas pipelines on EU territory and to allow access to these pipelines to other energy companies. See also Peter Van Elsuwege, 'Towards a Modernisation of EU-Russia Legal Relations?' (2012) *EU-Russia Papers* 5, Centre for EU-Russia Studies, University of Tartu 24 <<http://hdl.handle.net/1854/LU-2134081>> accessed 8 September 2016.

³⁵ Belyi (n 31) 124.

³⁶ Sakhalin II, an oil and gas development project on Sakhalin Island in Russia, was governed by a Partnership Sharing Agreement (PSA) which meant that the Russian state could not receive any profit until all costs incurred by the foreign company had been recovered. Shell was criticised of the high cost overruns which had subsequently brought about massive losses to the state, including serious environmental damages to the region. All environmental concerns and issues regarding the project were swiftly resolved when Shell agreed to sell a majority stake in the project to Gazprom.

³⁷ Shtokman is one of the world's largest gas fields, for which Gazprom was in need of a partner as it lacked the necessary advanced technology to extract gas from this field. A short list of candidates was announced in September 2005, which included Norwegian Statoil, Norsk Hydro; American ChevronTexaco and ConocoPhillips; and French Total. Lengthy negotiations ensued until Gazprom finally declared that it no longer needed a partner, which was due to the fact that the candidates had not

examples of arbitrary state intervention in the oil and gas sector. Further concerns were raised with Russia's adoption of the Law on Foreign Investments in Strategic Companies (Law No. 57-FZ) in April 2008,³⁸ which set out the oil and gas sector as a strategic sector for which investment now required government approval.³⁹ As a result foreign investors were required to obtain consent for any acquisition in excess of 50% in companies deemed to be strategic, which enabled the designated authority to monitor the activities of foreign investors in the energy sector and other sectors of the economy.⁴⁰

The subsequent amendment of a number of laws, in particular the 2008 revision of the Russian Law on the Subsurface, was another cause for concern in Brussels. Law No. 58-FZ amended and repealed certain legislative provisions including the Law on the Subsurface, which was the fundamental legislative act and general framework for licensing, exploration and development activities relating to natural resources in Russia.⁴¹ The amendment subsequently enabled the Russian government to grant approval to terminate the right to mineral exploration and production whether the foreign entity had a license or not.⁴² Significantly, the license could only be granted to Russian entities controlled by the state, with at least five years' experience in this sort of exploration.⁴³ As a result of these limitations, only Gazprom and Rosneft qualified for the licenses.⁴⁴ Subsequently, Law No. 57-FZ and Law No. 58-FZ drew widespread criticism given that it was fundamentally inconsistent with the ECT's investment provisions and international business practice.⁴⁵

Bilateral Pipeline Deals and the South Stream Project

Inconsistencies between the EU's TEP and Russia's unfavourable foreign investment climate were brought to the fore by the case of South Stream. The case related to a joint venture between Russia and Bulgaria regarding the South Stream gas pipeline, which was incompatible with EU law. The agreement violated EU ownership unbundling rules in that it provided exclusive gas transportation to the shareholders of South Stream. An amendment to the agreement was subsequently made making such exclusivity subject to the Commission's

made a substantial enough offer of a stake in exchange for Shtokman. A decision was finally made in 2007 when Total, Statoil and Norsk Hydro finally agreed to become partners with Gazprom.

³⁸ Law No. 57-FZ 'On the Procedure for Contributing Foreign Investments in Legal Entities which are of Strategic Importance for the Defence of the Country and Security of the State' ('Law on Foreign Investments in Strategic Companies').

³⁹ Article 7 Law No. 57-FZ 'On the Procedure for Contributing Foreign Investments in Legal Entities which are of Strategic Importance for the Defence of the Country and Security of the State' ('Law on Foreign Investments in Strategic Companies'). See also Sergey Seliverstov, 'Energy Security of Russia and the EU: Current Legal Problems' (2009) Note de L'Institut Francais des Relations Internationales (IFRI) 16.

⁴⁰ Seliverstov (n 39).

⁴¹ Kaj Hóber, 'Law and Policy in the Russian Oil and Gas Sector' (2009) 27(3) Journal of Energy & Natural Resources Law 432.

⁴² Ibid 438.

⁴³ Seliverstov (n 39) 17.

⁴⁴ Ibid 18.

⁴⁵ Sophie Nappert, 'EU-Russia Relations in the Energy Field: The Continuing Role of International Law' (2010) 3 International Association for Energy Economics 12.

approval.⁴⁶ The problem however related to six intergovernmental agreements, which breached EU law. In particular, the agreement between Russia and Bulgaria, which provided for unrestricted transit of Russian gas through Bulgaria, violated the EU's third party access rules.⁴⁷ Bulgaria assured the Commission it would revise the agreement, which prompted criticism from Putin regarding EU legislation and the ownership unbundling rules.⁴⁸ The Commission's objections to South Stream ensued, citing breached EU law, which eventually resulted in Russia aborting the project.

The different views held by Moscow and Brussels with regard to their respective legislation is a source of contention in EU-Russia relations. Russia views its laws on foreign investment (namely Law No. 57-FZ and Law No. 58-FZ) as a necessity for the purpose of protecting its strategic industry, which is a lifeline of the Russian economy.⁴⁹ However Moscow views the EU's TEP as detrimental to the investment climate between the EU and Russia.⁵⁰ When carefully considered though, the EU's TEP and unbundling rules by comparison are not as restrictive as the Russian laws on foreign investment given that the TEP and its unbundling rules are applicable to all incumbents operating in the European market (irrespective of their jurisdiction of incorporation), whereas the Russian laws are considered to be particularly restrictive towards non-Russian entities. In this respect, a change in Russia's policy would be more justified, which is the view shared by new Member States.

Divided views on reciprocal market access have created somewhat of a rift within the EU between old and new Member States. This has subsequently made a compromise on reciprocity harder to achieve which has facilitated Russia taking advantage of the lack of a unified stance on the matter.⁵¹ Instead Europe should speak with one voice, overcoming opposition from larger Member States. True reciprocity should be imposed through the establishment of across-the-board unbundling rather than a watered down version of unbundling which was considered less onerous to the strategic energy sectors and thus favoured by the Member States opposing the Commission's plans with the reciprocity clauses as a compromise.⁵²

⁴⁶ Euractiv, 'Commission urges Bulgaria to change Gazprom clause' (2010) <<https://www.euractiv.com/section/energy/news/commission-urges-bulgaria-to-change-gazprom-clause>> accessed 20 September 2016; EUobserver, 'Putin Leaves Bulgaria With a Gas Deal and a New Puppy' <<http://waz.euobserver.com/887/31264>> accessed 10 March 2015.

⁴⁷ Euractiv (n 46).

⁴⁸ Ibid.

⁴⁹ EUobserver, 'EU and Russia to Sign Trade Memo Amid US Mockery' (2010) <<http://euobserver.com/9/31442>> accessed 10 September 2016; Euractiv, 'EU Backs Russia's WTO Bid at 'Best Ever Summit'' <<http://www.euractiv.com/en/global-europe/eu-backs-russias-wto-bid-best-ever-summit-news-500397>> accessed 10 March 2015.

⁵⁰ Ibid.

⁵¹ Riccardo Alcaro and Emiliano Alessandri, 'Engaging Russia: Prospects for a Long-Term European Security Compact' (2010) *European Foreign Affairs Review* 15(1) 204.

⁵² Katinka Barysch, 'Reciprocity will not secure Europe's energy' (2007) *CER Bulletin* 55 <http://www.cer.org.uk/articles/55_barysch.html> accessed 10 March 2015.

The Need for Coherence in External Energy Relations

The EU has much to gain from a united stance towards Russia, given the recurring energy cuts, lack of equal market access and the protracted negotiations on a revised bilateral agreement, all of which are detrimental to energy cooperation.⁵³ However, different priorities, historical ties, national loyalty, energy mix and market positions have resulted in a discord within the EU in its approach towards Russia.⁵⁴ The EU's inability to speak with one voice is the reason why the EU has failed to develop a coherent strategic approach towards Russia.⁵⁵

Developing a coherent external energy policy depends to a large degree on institutions following general rules rather than cutting individual deals.⁵⁶ The Commission which is in favour of pursuing an external energy policy was keen to express in launching its 2020 Energy Strategy that national initiatives do not leverage the size and strength of the EU market.⁵⁷ EU Member States that prefer to pursue individual barter deals inadvertently enable supplier countries to pursue their own agenda, thus creating a vicious circle, which is hard to break.⁵⁸ Inevitably, in order to overcome this practice, it is important that Member States act to the benefit of a collective whole in their bilateral relations with Russia rather than pursuing what is to their exclusive benefit.⁵⁹

However some Member States have questioned to what extent a common energy policy was truly in their interest with countries such as France, Germany, UK, Italy and the Netherlands, reluctant to relinquish sovereignty based on their market size and power.⁶⁰ Different energy exposures of individual Member States have largely been the obstacle to a strengthened commitment to external EU energy relations.⁶¹ The lack of coherence and unified stance within the EU was apparent in a series of high profile cases, the deal between Gazprom and Germany E-ON Ruhrgas arguably being the most prominent. The deal for the construction of the Nord Stream pipeline was seen by some as a deliberate move to bypass traditional transit

⁵³ Kevin Rosner, 'The European Union: On Energy, Disunity' in Gal Luft and Anne Korin, *Energy Security Challenges for the 21st Century* (Greenwood Publishing Group 2009) 166.

⁵⁴ Alcaro and Alessandri (n 51) 166.

⁵⁵ Leal-Arcas (n 3) 351.

⁵⁶ European Commission, Energy 2020 A Strategy for Competitive, Sustainable and Secure Energy, COM (2010) 639, 10 November 2010.

⁵⁷ Ibid.

⁵⁸ Richard Youngs, *Energy Security: Europe's New Foreign Policy Challenge* (Routledge 2009) 82.

⁵⁹ European Commission, Energy 2020 A Strategy for Competitive, Sustainable and Secure Energy, COM (2010) 639, 10 November 2010.

⁶⁰ Katinka Barysch, 'Should the Nabucco Pipeline Project be Shelved?' (2010) Centre for European Reform 4.

⁶¹ Andrew Macintosh, 'Security of Europe's Gas Supply: EU Vulnerability' (2010) 222 CEPS Policy Brief 2.

countries, on a bilateral commercial basis, lacking any form of solidarity.⁶² Today, these controversial pipelines are still eminent with the Nord Stream 2 a case in point.

The Lisbon Treaty and Solidarity

The Treaty of Lisbon⁶³ introduced the energy field for the first time in a specific section of the Treaty (Title XXI), by listing it among the competences shared between Member States and the Union. In particular, Article 194(1) states that the EU enjoys the power to

(a) ensure the functioning of the energy market; (b) ensure security of energy supply in the Union; (c) promote energy efficiency and energy saving and the development of new and renewable forms of energy; and (d) promote the interconnection of energy networks.

Significantly, Article 194 stipulates that the aims of the Union's energy policy shall be pursued 'in a spirit of solidarity' between Member States. In this respect, the signing of bilateral deals with suppliers such as Gazprom, are repeatedly seen as undermining the development of a coherent external energy policy.⁶⁴ Several Eastern European Member States have been keen on the Commission playing a more active role when it comes to energy which other Member States have been quick to shut down on the grounds that the EU lacked competence and that foreign policy was a Member State responsibility.⁶⁵

One feature of the Lisbon Treaty that warrants specific attention is the solidarity mechanism in Art. 122(1) TFEU (with specific reference to 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.⁶⁶

The Council made repeated references to solidarity during the 2009 crisis and therefore this mechanism can be seen as a test of Member State dedication to the Lisbon Treaty's solidarity

⁶² Ariel Cohen, 'The North European Gas Pipeline Threatens Europe's Energy Security' (2006) 1980 Backgrounder (Heritage Foundation); Gordon Feller, 'Nord Stream Pipeline Project Stokes Controversy' (2007) 234(3) Pipeline & Gas Journal 92.

⁶³ The Treaty of Lisbon entered into force on 1 December 2009 as the latest landmark in the Union's evolved constitutional architecture. It amended the EU treaties and renamed them into the current Treaty on the European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU).

⁶⁴ Barysch (n 60).

⁶⁵ Ibid 5.

⁶⁶ Art. 122(1) TFEU is the former Art. 100(1) TEC.

provision based on the level of implementation thereof.⁶⁷ However given the fact that solidarity is not a quantitative concept, it is therefore subject to Member State interpretation and the amount of backing it is afforded in times of crisis.⁶⁸ Nevertheless, specific mention of energy in relation to supply creates a legal basis whereby the Union can intervene to the extent that there are any supply disruptions.⁶⁹ In this respect, the solidarity principle sets a platform for the measures to be taken during a time of crisis to ensure security of supply.⁷⁰

In addition to the above, a more assertive EU appears to be emerging within the energy sphere with the Commission undertaking a mandate to bolster European energy security. The impetus for this assertive stance was triggered by the progressive shift of competences from Member States to the EU. The progressive centralisation of energy decision-making has subsequently had an impact on the geopolitical relations of the EU with third countries, by increasing the efficiency of the internal market as a single block and reinforcing the bargaining power of EU Members. The final step towards the centralisation of energy competences at the European level was the publication of the Energy Union strategy.

The Path towards the Energy Union

The long awaited Energy Security Package which was recently announced on 12 February 2016, is the latest step undertaken by the EU towards the creation of the European Energy Union.⁷¹ Even though the idea of a new common energy policy has been advocated since 2010 by former European Commission President Jacques Delors and the then European Parliament Polish President Jerzy Buzek,⁷² the idea of a proper Energy Union first materialised in spring 2014, after the suspension of Russian gas supply due to the Russia-Ukraine dispute following the annexation of Crimea.⁷³

The current president of the European Commission Jean-Claude Juncker put the Energy Union as one of the top priorities of his mandate during its 2014 presidential campaign.⁷⁴ The reason behind that is simple. Many EU Member States rely heavily on a limited number of

⁶⁷ Sijbren De Jong, Jan Wouters and Steven Sterk, 'The 2009 Russian-Ukrainian Gas Dispute: Lessons for European Energy Crisis Management after Lisbon' (2010) 15(4) *European Foreign Affairs Review* 525.

⁶⁸ Sijbren De Jong and Jan Wouters, 'European Energy Security Governance: Key-Challenges and Opportunities in EU-Russia Energy Relations' (2011) *Leuven Centre for Global Governance Studies* 41.

⁶⁹ *Ibid.*

⁷⁰ *Ibid.*

⁷¹ European Commission, 'Press Release: Towards Energy Union: The Commission presents sustainable energy security package' (2016) <http://europa.eu/rapid/press-release_IP-16-307_en.htm> accessed 20 August 2016.

⁷² Sami Andoura, Leigh Hancher and Marc Van Der Woude 'Towards a European Energy Community' (2009) <<http://www.notre-europe.eu/media/etud76-energy-en.pdf?pdf=ok>> accessed 20 August 2016.

⁷³ The 2014 natural gas interruptions have been the third part of the 'gas wars' involving Russia and Ukraine. The first two gas wars took place in 2006 and 2009.

⁷⁴ Jean-Claude Juncker, 'A New Start for Europe: My Agenda for Jobs, Growth, Fairness and Democratic Change' (2014) <http://ec.europa.eu/priorities/sites/beta-political/files/juncker-political-guidelines_en.pdf> accessed 26 August 2016.

energy suppliers. Some of them, especially in the Eastern part, have one supplier only,⁷⁵ which leaves these countries vulnerable in the event of any unexpected energy supply disruptions.

Improving energy interconnections between new Member States, especially in those countries which once were part of the former Soviet Union, and modernising infrastructure would help minimise disruptions and energy dependency. In addition, the completion of the internal energy market would allow easier access to energy markets across national borders and improve the affordability of energy and the competitiveness of energy prices for citizens and businesses.

In November 2014, Maroš Šefčovič, the EU Vice-President in charge of the Energy Union project, announced the five key pillars of the Energy Union strategy, which were then fleshed out on 25 February 2015, when Commissioner Šefčovič officially presented the Energy Union package.⁷⁶ These are:

- 1) stronger emphasis on security of supply, solidarity and trust;
- 2) the finalisation of the internal energy market;
- 3) the moderation of demand for security through energy efficiency;
- 4) the decarbonisation of the energy mix;
- 5) improved efforts in research, innovation and competitiveness.⁷⁷

The five pillars above fully reflect the content of Article 194 TFEU and synthesize the most important steps of the European energy policy for the years to come.

Outline of the Energy Union's Pillars

The first point of the Energy Union strategy stresses the importance of the security of energy supply. With this in mind, the Commission strives for the consolidation of joint approaches aimed at strengthening solidarity between Member States, in particular in times of crisis, so that members could be assured that in situations of tight supply they can rely on their

⁷⁵ European Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, the Committee of Regions, and the European Investment Bank: A Framework Strategy for a Resilient Energy Union with a Forward-Looking Climate Change Policy' (2015) 2 <http://eur-lex.europa.eu/resource.html?uri=cellar:1bd46c90-bdd4-11e4-bbe1-01aa75ed71a1.0001.03/DOC_1&format=PDF> accessed 25 August 2016.

⁷⁶ European Commission, 'Energy Union: secure, sustainable, competitive, affordable energy for every European' (2015) <http://europa.eu/rapid/press-release_IP-15-4497_en.htm> accessed 12 August 2016.

⁷⁷ Maroš Šefčovič, 'Opening Speech - EU Energy Policy and Competitiveness' (2014) <http://europa.eu/rapid/press-release_SPEECH-14-1883_en.htm> accessed 28 August 2016. The five pillars outlined are based on the three long-established objectives of EU energy policy: security of supply, sustainability and competitiveness.

neighbours.⁷⁸ The list of the actors involved in this cooperative project extends to Member States, transmission system operators, the energy industry and all other stakeholders, which have to work closely together to ensure a high-level of energy security for European citizens and companies.⁷⁹ A closer integration of the EU, the Energy Community and their third partners is also relevant, so that the European reforms and incentives are extended to neighbour energy transit countries.⁸⁰ This action is complementary to the diversification of supply, which is to be pursued through the funding and construction of the so-called 'Projects of Common Interest'.⁸¹

In relation to third supplying countries, such as Russia, the EU has to speak with one voice, improving its ability to project its weight on a global scale. From this perspective, the EU trade policy is key in contributing towards greater security and diversification through the inclusion of energy-related provisions in the trade agreements with its partners. When the EU negotiates agreements with countries that are important for the security of supply, the Commission shall seek to negotiate energy specific provisions contributing to the energy security and sustainable energy goals of the Energy Union.

As an additional tool, the European plan mentions the possibility to setup voluntary demand aggregation mechanisms for collective purchasing of gas during a crisis and where Member States are dependent on a single supplier. This reshaped the single buyer option, one of the ideas which came up at the first stages of the reform process to lower suppliers' bargaining power.⁸² In any event, these demand aggregation mechanisms would need to comply with

⁷⁸ To ensure the diversification in gas supplies, work on the Southern Gas Corridor must be intensified to enable Central Asian countries to export their gas to Europe. In Northern Europe, the establishment of liquid gas hubs with multiple suppliers is greatly enhancing supply security.

⁷⁹ European Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, the Committee of Regions, and the European Investment Bank: A Framework Strategy for a Resilient Energy Union with a Forward-Looking Climate Change Policy' (2015) 7 <http://eur-lex.europa.eu/resource.html?uri=cellar:1bd46c90-bdd4-11e4-bbe1-01aa75ed71a1.0001.03/DOC_1&format=PDF> accessed 25 August 2016.

⁸⁰ The Energy Community Treaty is an international agreement signed in Athens on 25 October 2005, through which State parties committed themselves to liberalise their energy markets according to the EU *aquis* and the CJEU case-law. To date, the members of the Energy Community are the following: Albania, Bosnia and Herzegovina, Montenegro, Ukraine, Kosovo, Moldova, Serbia, Macedonia (as parties); Georgia, Armenia, Norway, Turkey (as observers).

⁸¹ These are projects identified by the European Commission which are essential for completing the European internal energy market and for reaching the EU's energy policy objectives. To become a PCI, a project must have a significant impact on the energy markets and market integration of at least two EU countries, boost competition on energy markets and boost the EU's energy security by diversifying sources, and contribute to the EU's climate and energy goals by integrating renewables. PCIs may benefit from accelerated planning and permit granting, a single national authority for obtaining permits, improved regulatory conditions, lower administrative costs due to streamlined environmental assessment processes, increased public participation via consultations, increased visibility to investors and access to financial support.

⁸² Donald Tusk, 'A united Europe can end Russia's energy stranglehold' (2014) <<http://www.ft.com/cms/s/0/91508464-c661-11e3-ba0e-00144feabdc0.html#axzz3XSpZt4OX>> accessed 16 August 2016.

WTO law and EU competition rules, in particular with the Commission guidelines on horizontal cooperation agreements.⁸³

As for the second point - the finalisation of the internal energy market – Commissioner Šefčovič underlined that ‘the current market design does not lead to sufficient investments, market concentration and weak competition remain an issue and the European energy landscape is still too fragmented’.⁸⁴

The Commission’s plan aims at achieving Member States’ full implementation and enforcement of the third energy package, in particular as regards unbundling and the independence of regulators. This goes together with the continuous antitrust enforcement, ensuring a free energy flow by addressing territorial restrictions in supply contracts as well as upstream/downstream and network foreclosure.

In addition to that, the push for a better integration of the transmission operators, starting from a regional level, and the development of both short and long-term markets through the exploitation of the full potential of LNG will influence price formation and its stabilisation to the benefit of the users.

All these activities will entail further powers vested in the European institutions, in particular to the European Networks of Transmission System Operators for Electricity and Gas (ENTSOs) and to the Agency for Cooperation of Energy Regulators (ACER),⁸⁵ the setup of regional operational centres to effectively plan and manage cross-border gas flows, the fine-tuning of the network codes already in place, the adoption of facilitated permit procedures and funding resources for Projects of Common Interest.

The third point of the Energy Union strategy pinpoints the utmost importance of energy efficiency for the security of supply of the Union. In 2014 the European Council set an indicative target of at least 27% of energy efficiency improvement by 2030 in comparison to

⁸³ European Commission, ‘Commission Regulation (EU) No 1217/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of research and development agreements’ [2010] OJ L285/46. The best-known example of demand aggregation mechanism proposed in the past is the Caspian Development Corporation. This was a reply to Turkmenistan’s offer to sell the EU 30 bcm of gas per year. Turkmenistan wanted a single buyer (it sell 60 bcm to China every year), but no single buyer in the EU could take more than 5 bcm. So aggregation was almost mandatory, even if it was heavily criticised by EU companies.

⁸⁴ European Commission, ‘Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, the Committee of Regions, and the European Investment Bank: A Framework Strategy for a Resilient Energy Union with a Forward-Looking Climate Change Policy’ (2015) 7 <http://eur-lex.europa.eu/resource.html?uri=cellar:1bd46c90-bdd4-11e4-bbe1-01aa75ed71a1.0001.03/DOC_1&format=PDF> accessed 25 August 2016.

⁸⁵ To date, ACER benefits of limited decision-making rights, e.g. it can only take decisions at the request of the national regulators or if they fail to take a decision within a certain timeframe.

the business-as-usual scenario⁸⁶. This objective will be reviewed by 2020, having in mind to achieve a level of 30%.⁸⁷ The Energy Union strategy highlights that most of the work to achieve the efficiency objectives set has to be done at national level. In this context, the primary role of the Commission is to create the appropriate framework for national policies to be applied.

Huge efficiency gains are to be captured with regard to district heating and cooling, the largest single sources of energy demand in Europe. Moreover, the Energy Union strategy urges a 'comprehensive road transport package' with measures aimed at improving the efficiency of vehicles, road use, alternative fuels and their infrastructure, and public procurement of clean vehicles. Considerable fuel savings could also be realised by removing barriers to less greenhouse gas intensive modes of transport, such as rail, maritime transport and inland waterways, and by making these modes more attractive. All these initiatives will contribute to lower the European energy needs and therefore the importations from abroad.

As regards the decarbonisation of the European economy, the fourth pillar of the European strategy, the Energy Union strategy recalls the content of the agreement on the 2030 climate and energy framework, which has set the EU commitment of at least 40% of domestic reduction in greenhouse gas emissions compared to 1990.⁸⁸ This makes an ambitious contribution to the international climate negotiations which has been reinforced at a global scale by the signing of the Paris Agreement in late 2015.

The cornerstone of Europe's climate policy is a well-functioning EU Emissions Trading System, stimulating cost-efficient greenhouse gas emission reductions. This is coupled with the EU objective of becoming the world leader in renewable energy, developing the next generation of technically advanced and competitive renewable energies. With this aim, existing legislation and new market rules need to be fully implemented, enabling the roll-out of new technologies allowing an efficient energy transition. This process will necessarily be guided by the Commission which will set out cooperation and convergence of national support schemes leading to more cross border opening.

Lastly, the Energy Union strategy puts research and innovation at the very heart of the EU project. In this respect, the European plan sets out four key priorities: (i) develop the next generation of renewable energy technologies, including environment-friendly production and use of biomass and biofuels, together with energy storage; (ii) facilitate the participation of consumers in the energy transition through smart grids, smart home appliances, smart cities,

⁸⁶ European Council, 'European Council (23 and 24 October 2014) Conclusions on 2030 Climate and Energy Policy Framework' 5 <http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/ec/145356.pdf> accessed 28 August 2016.

⁸⁷ Ibid 6.

⁸⁸ Ibid 2.

and home automation systems; (iii) provide efficient energy systems, and harnessing technology to make the building stock energy neutral; and (iv) incentivise sustainable transport systems that develop and deploy at large scale innovative technologies and services to increase energy efficiency and reduce greenhouse gas emissions.⁸⁹ In this context, public procurement is seen as a potential catalyst for industrial and business innovation, and green growth both within the EU and beyond its borders, supporting other countries in their efforts to establish modern and sustainable energy systems.⁹⁰

In light of the above, it is worth analysing the relationship between the security of the energy supply element and the other four pillars of the energy security package. In principle, the progressive improvement of the internal gas market contributes to lower the barriers to trade and leads to a more efficient resource allocation between EU Member States. Overall, this decreases the amount of energy imported from third countries. The same holds true for energy efficiency. Indeed, the adoption of techniques improving the efficiency of the energy processes increases the amount of energy saved and, consequently, lowers need for energy importation. By the same token, the incentivisation of green energy production and the push for research activities and innovation are of utmost importance to secure energy supply. Energy from renewable sources is produced locally, thanks to the action of the natural sources of the territory. Therefore, in a system dependent from third countries, renewable energies help to lower the importation. Lastly, research activities and innovation help the development of new and more efficient energy production systems which accelerate the energy saving process described.

Remarkably, energy efficiency and green energy incentivisation policies are determined at the national level. States actively influence the national energy differentiation by giving privates the incentives to invest in the sector and help the diffusion of more efficient green energy productions.⁹¹ This can have a spill-over effect in the national job market.

From the above, it can be deduced that pillars 2) to 5) of the Energy Union strategy ultimately improve the security of supply element. However, while internal market accomplishment, energy efficiency and green energy diffusion implicitly increase the security of the energy supply, this is not true the other way around. Security of supply is therefore an end, not a mean, in the reciprocal relations with the other pillars outlined. The predominance of the security of supply element reflects one of the fundamental aims of national States since their creation, which is now one of the key dimensions of the EU. As the Council of the EU states:

⁸⁹ European Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, the Committee of Regions, and the European Investment Bank: A Framework Strategy for a Resilient Energy Union with a Forward-Looking Climate Change Policy' (2015) 16 <http://eur-lex.europa.eu/resource.html?uri=cellar:1bd46c90-bdd4-11e4-bbe1-01aa75ed71a1.0001.03/DOC_1&format=PDF> accessed 25 August 2016.

⁹⁰ Ibid 17.

⁹¹ Limitations are imposed by European and international trade rules on subsidies.

completion of the internal energy market is a pre-requisite to achieve, in the most cost-effective way, the main objectives of the EU energy policy: sustainability, competitiveness and security of energy supply.⁹²

A good start to the Commission's plan was confirmed on 18 November 2015 in the first State of the Energy Union report.⁹³ Thereafter, on 16 February 2016 the energy security package proposed the amendment of two important pieces of legislation: Decision 994/2012/EU and Regulation 2012/994/EU. The proposals made include a shift of competence from Member States to the EU as regards the negotiation of intergovernmental agreements (IGAs') between Member States and third suppliers and provide mechanisms to prevent security of supply disruptions. In addition to that, the energy security package sets out a communication focused on LNG and gas storage, and proposed for the first time a heating and cooling strategy focused on removing barriers to decarbonisation in buildings and industry.⁹⁴ Differently from the last two proposals dealing with market differentiation and energy saving, the first two are particularly relevant for our purposes because they show the evolution and the strategic direction of the EU approach to non-EU suppliers (in particular, Russia and Gazprom) operating in the European natural gas market.

Security of supply improvement

Treaty negotiation with third countries: a change in perspective

In 2012 the European institutions issued Decision 994/2012/EU (the 'IGA Decision'), establishing an information exchange mechanism with regard to IGAs signed between Member States and third countries in the field of energy.⁹⁵ This has been the first attempt made by the EU to control the content of the energy agreements concluded by its members with countries which are not bound by EU law. IGAs are usually bilateral agreements that form the basis of private commercial contracts and investments.⁹⁶ Their purpose is to provide

⁹² Council of the European Union, 'Completion of the Internal Energy Market' (2014) <www.consilium.europa.eu/en/workarea/downloadasset.aspx?id...> access 21 August 2016.

⁹³ The report listed the first outputs of the Energy Union plan. These are, by way of example, the completion of an underground power line between France and Spain that doubles their interconnection capacity, proposals to revise the energy label for white goods and the launch of a new Strategic Energy Technology Plan.

⁹⁴ European Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions: on an EU strategy for liquefied natural gas and gas storage' (2016) <https://ec.europa.eu/energy/sites/ener/files/documents/1_EN_ACT_part1_v10-1.pdf> accessed 24 August 2016.

⁹⁵ European Parliament and Council Decision 2012/994/EU establishing an information exchange mechanism with regard to intergovernmental agreements between Member States and third countries in the field of energy [2012] OJ L299/13.

⁹⁶ Pursuant to Article 2 of Decision 994/2012/EU: 'intergovernmental agreement' means any legally binding agreement between one or more Member States and one or more third countries having an impact on the operation or the functioning of the internal energy market or on the security of energy supply in the Union; however, where such a legally binding agreement also covers other issues, only

legal certainty for the construction of import and export infrastructure, to facilitate the purchase of oil and gas, or to establish a more general framework for energy cooperation.⁹⁷ Since EU energy market rules may not always be in the commercial interests of non-EU energy suppliers, single Member States may be pushed by their supplying countries to include in their IGAs clauses that hinder the functioning of the EU internal energy market. To overcome this problem, the EU's approach towards these agreements has radically changed in the last few years.

The IGA Decision requires Member States to notify the Commission of all their energy agreements with non-EU countries after they have been concluded. In case of agreements under negotiation, Member States may inform the Commission about the content to be negotiated but they are not under the obligation of doing so.⁹⁸ Information included under the agreements may be shared with other Member States, with the exception of any confidential part specifically indicated by the sender. The Commission verifies whether the agreements signed comply with EU law, in particular with the rules on internal market and competition. In case of breach, it invites Member States to amend or terminate the IGAs in question. According to public international law, a state cannot amend or end its IGAs early without the consent of the other party.⁹⁹ Hence, in the case of the agreement falling foul of EU law, the (political) renegotiation of the agreement signed is required.

The Commission's analysis of all notified IGAs showed that around one-third of them contained provisions that were not compliant with EU law.¹⁰⁰ To date no such agreement has been successfully renegotiated.¹⁰¹ The adoption of the IGA Decision deeply affected the construction of the South Stream project.¹⁰² In particular, the EC considered the IGAs signed between Russia and six EU members at odds with Directive 2009/73/EC, a pro-competitive regulation part of the TEP, entered into force after those IGAs were signed.¹⁰³ Notably, Russia preferred not to embark in lengthy renegotiations with the countries concerned – it

those provisions that relate to energy, including general provisions applicable to those energy-related provisions, shall constitute an 'intergovernmental agreement'

⁹⁷ Sonja van Renssen, 'EU Takes on Gas in First Battle for European Energy Union' (2016) <<http://www.energypost.eu/eu-takes-gas-first-battle-european-energy-union/>> accessed 21 August 2016.

⁹⁸ Article 3, IGA Decision. The impact assessment on the revision of the IGA Decision underlines that no draft IGA has ever been submitted to the Commission on a voluntary basis for an *ex-ante* check. See European Commission, 'Impact Assessment: on establishing an information exchange mechanism with regard to intergovernmental agreements and non-binding instruments between Member States and third countries in the field of energy and repealing Decision No 994/2012/EU' 48 <https://ec.europa.eu/energy/sites/ener/files/documents/1_EN_impact_assessment_part1_v6.pdf> accessed 25 August 2016.

⁹⁹ Vienna Convention on the Law of the Treaties (adopted on 23 May 1969) Art. 37-54.

¹⁰⁰ European Commission, 'Intergovernmental agreements in energy' (2016) <europa.eu/rapid/press-release_MEMO-16-309_en.pdf> accessed 20 August 2016.

¹⁰¹ Ibid. Only one IGA has been signed after 2012, but some of the 15-30 year IGAs dating back years ago will be coming up for renewal.

¹⁰² For an overview on the project see: <http://www.south-stream-transport.com/project/>.

¹⁰³ See: Euractiv, 'South Stream bilateral deals breach EU law, Commission says' (2013) <<http://www.euractiv.com/section/competition/news/south-stream-bilateral-deals-breach-eu-law-commission-says/>> accessed 20 August 2016.

took years to conclude all the agreements – and stopped the project albeit the construction of the infrastructure had already started.

To overcome that problem of *ex post* renegotiation, on 16 February 2016 the Commission presented the sustainable energy security package, which, *inter alia*, includes amendments to the IGA Decision.¹⁰⁴ The most relevant introduction provided is the adoption of a mandatory *ex ante* compatibility control by the Commission of the treaties to be signed.¹⁰⁵ Accordingly, Member States will have to notify their draft IGAs to the Commission before concluding them, and they are obliged not to sign the relevant IGA until the Commission has issued its opinion or the period set out for the Commission scrutiny has elapsed.¹⁰⁶ When concluding the proposed intergovernmental agreement or amendment, Member States will have to take full account of the Commission's opinion.

The new decision, just like the IGA Decision, will not cover commercial agreements between companies. The current control mechanism of the commercial contracts - especially with regard to EU competition law - has not changed.

Apart from the EU security of supply side, the new IGA decision could have a positive impact also on the business of individual companies involved in energy projects. Possible issues relating to non-compliance with EU law would be tackled at an early stage, providing legal certainty to investors and project promoters, by avoiding cancellation or delay costs.¹⁰⁷

The IGA Decision has been issued on the basis of Article 194 TFEU and so is the proposal to reform it. The mandatory *ex-ante* control by the Commission included under the new proposal entails a shift of competences from Member States to the EU. This action is justified by virtue of the subsidiarity principle application, whereby in case of shared competence, the Union can take action only when it is more effective than the action taken at national, regional or local level.¹⁰⁸ Past experience showed that the *ex-post* control included under the IGA Decision did not work, creating substantial damage for the investment projects concerned and, ultimately,

¹⁰⁴ European Commission, 'Towards Energy Union: The Commission presents sustainable energy security package' (2016) <http://europa.eu/rapid/press-release_IP-16-307_en.htm> accessed 20 August 2016.

¹⁰⁵ *Ibid.* The new decision covers also 'non-binding instruments', defined as 'non-binding arrangement between one or more Member States and one or more third countries, such as a memorandum of understanding, joint declaration, ministerial joint declaration, joint action or joint code of conduct, which contains interpretation of Union law, sets the conditions for energy supply (such as volumes and prices) or the development of energy infrastructures'.

¹⁰⁶ Pursuant to Article 5 of the proposal to reform the IGA Decision, the Commission shall inform the Member State concerned of any doubts it may have as to the compatibility of the draft intergovernmental agreement or amendment within six weeks of the date of notification of the complete draft intergovernmental agreement or amendment. In this case, it shall inform the Member State concerned of its opinion on the compatibility with Union law of the draft intergovernmental agreement or amendment concerned within 12 weeks of the date of notification.

¹⁰⁷ European Commission, 'Intergovernmental agreements in energy' (2016) <europa.eu/rapid/press-release_MEMO-16-309_en.pdf> accessed 20 August 2016.

¹⁰⁸ Treaty on European Union (TEU) Art. 5(3).

for the citizens who could not benefit from the infrastructure envisioned. A preventive check such as the one outlined in the proposal to reform the IGA Decision is certainly a 'more effective' option to achieve the compliance of the IGAs with EU law.

The commercial agreements of the EU market operators

With the adoption of the new IGA Decision, all Member States concerned will receive the same level of information on cross-border projects. This will help avoid double investments or infrastructure gaps.¹⁰⁹ However, the IGA Decision is only a piece of the puzzle. Indeed, it is not enough alone to secure the gas supply because it addresses only to the EU Members and their intergovernmental energy agreements. Companies are not directly caught by the regulation and for this reason they may act in contrast with the aims pursued by the IGA Decision.

To tackle this issue, the Energy Union strategy adopted in February 2015 indicates that: 'an important element in ensuring energy (and in particular gas) security is full compliance of agreements related to the buying of energy from third countries with EU law'.¹¹⁰ This was repeated by the European Council on 19 March 2015, when it called for 'full compliance with EU law of all agreements related to the buying of gas from external suppliers, notably by reinforcing transparency of such agreements and compatibility with EU energy security provisions'.¹¹¹ With this aim, the EU is planning to adopt a revised Regulation 2010/994/EU on the safeguard security of gas supply.¹¹²

Accordingly, in the future gas companies would have to notify all 'security of supply relevant contracts' to the Commission and national authorities.¹¹³ These are contracts for more than one year that place more than 40% of the gas consumption in a Member State in the hands of a single third country supplier or its affiliates.¹¹⁴ Moreover, both the Commission and national authorities may demand to scrutinise contracts that do not meet the 40% threshold, if they deem it necessary to assess security of supply, and request 'additional information, including contractual information' in non-emergency situations.¹¹⁵ This information would be in addition to what companies are already obligated to communicate under the current regulation (e.g. minimum daily, monthly and yearly volumes).

¹⁰⁹ European Commission, 'Intergovernmental agreements in energy' (2016) <europa.eu/rapid/press-release_MEMO-16-309_en.pdf> accessed 20 August 2016.

¹¹⁰ European Commission, 'Consultation on the review of the Intergovernmental Agreements Decision' (2015) <<https://ec.europa.eu/energy/en/consultations/consultation-review-intergovernmentalagreements-decision>> accessed 22 August 2016.

¹¹¹ Ibid.

¹¹² European Commission, 'Proposal for a Regulation of the European Parliament and of the Council Concerning Measures to Safeguard the Security of Gas Supply and Repealing Regulation (EU) No 994/2010' [2016] COM (2016) 52 final <http://eur-lex.europa.eu/resource.html?uri=cellar:33516200-d4a2-11e5-a4b5-01aa75ed71a1.0018.02/DOC_1&format=PDF> accessed 20 August 2016.

¹¹³ Ibid 11.

¹¹⁴ Ibid.

¹¹⁵ Van Renssen (n 97).

At the heart of draft proposals to revise the 2010 security of gas supply regulation is a call for mandatory regional risk assessments, preventive action and emergency plans. These will follow a pre-set template, be peer-reviewed and require Commission approval.¹¹⁶ The preventive action and emergency plans will play a key role in the overall coordination mechanism, ensuring that the security of supply framework is correctly applied and that no measure that could jeopardise the security of supply of another Member State, region or the EU as a whole is taken by Member States. The countries members of the Energy Community will also play a role in this coordination process. Further, the proposal introduces a solidarity principle among Member States to ensure the supply of households and essential social services, such as healthcare, in case their supply was affected due to a severe crisis. However, the solidarity mechanism will apply when markets alone are no longer able to deal adequately with a gas supply disruption.

In any event, a fully-integrated energy market will not be easy to achieve. In practice, it took five years to convince Romania (which has sufficient amounts of gas) Bulgaria (which has no gas) and Greece (which has a LNG terminal) to work together. Moreover, the regional approach used by the EU could in the end result in incompatible markets, missing out on benefits of bringing more disparate nations together.¹¹⁷ The EU should carefully evaluate this risk. Indeed, EU members widely differ in terms of their respective internal energy mix and production and the needs of one member are not always the same needs of another member across the continent.

Conclusive remarks

From the above analysis, it is clear that the EU-Russia relationship is a complex partnership driven by mutual interdependence. Nevertheless, mutual trust is lacking in this relationship, which is often seen in the sceptical manoeuvres and shifts in their respective stances.

In particular, reciprocal market access remains to be a contentious issue in EU-Russia relations. Brussels, which is ultimately concerned with a lack of upstream access to Russian energy markets, in turn has restricted Moscow's participation within the EU's internal market in as far as Russia's participation is not consistent with the EU's unbundling rules. Although this tit-for-tat behaviour does not necessarily mean that a stalemate will prevail, attempts from Brussels to persuade Moscow to change its position on the matter have been unsuccessful.

¹¹⁶ European Commission, 'Security of Gas Supply Regulation' (2016) <http://europa.eu/rapid/press-release_MEMO-16-308_en.htm> accessed 23 August 2016. There will be a peer review team per region composed of experts from Member States other than the Member States in the region (up to five) and from the European Network of Transmission System Operators for Gas (ENTSOG).

¹¹⁷ Sonja van Renssen, 'Georg Zachmann, Bruegel Institute: The EU must go for an Energy Union – or renationalise energy markets' (2015) <<http://www.energypost.eu/interview-georg-zachmann-eu-must-go-energy-union-renationalise-energy-markets/>> accessed 25 August 2016.

Such attempts have predominantly been undermined by dividedness within the Union between old and new Member States. Old Member States' preference for doing business bilaterally has ultimately resulted in manoeuvres from the Kremlin to divide-and-rule by cutting bilateral deals, which undermine solidarity.

From a bilateral perspective, the most pressing issue is the need for a revised legal framework by way of a new bilateral agreement and a solution to the future role of the ECT. Despite Russia's accession to the WTO, there are doubts as to whether this general trade framework can specifically address cooperation in the energy sphere. Amongst the substantive issues, such as the nature of the new PA, the role of the ECT and the WTO's effectiveness in regulating energy; Russia believes its concerns have not been adequately addressed as an equal player at the negotiating table. However it would appear that the EU is unlikely to abandon the legal nature of such an agreement and the rules of the ECT, in its entirety; and that ultimately a less controversial way forward will need to be agreed to address thorny issues such as a new PCA and the role of the ECT.

Under the European perspective, the struggle against dependence from third countries has been put at the very core of the new Commission's mandate.¹¹⁸ This is nothing but an acceleration of the process started years ago with the progressive liberalisation of the European energy market and it is leading to the centralisation of the energy matters at the European level. This trend recently culminated in the Energy Union project, the most concrete attempt of the EU institutions to speak with one voice in relation to third supplying countries.

In this regard, through the IGA Decision the Union gained for the first time an active role in the treaty making process of its members in the energy field. The information exchange mechanism set out thereunder reflects the duty of cooperation and the solidarity principle in the energy field which have been embedded in the Lisbon Treaty since 2009. The proposed reform of the IGA Decision aims at reinforcing the role of the Union through the further enhancement of cooperation with its members. This should have positive effects on the security of the European energy supply. The new decision should also indirectly improve competition in the market by guaranteeing a level playing field with the presence of minimum common standard conditions in the IGAs signed. All the above should enhance the possibility for EU companies to freely invest and compete on equal footing in the internal energy market.

In addition to the new IGA decision, the proposed scrutiny over the commercial agreements concluded by domestic undertakings and third suppliers should contribute to the enhancement the Union's security of supply. Notwithstanding, the correct functioning of the coordination mechanisms put in place will need to be tested. Indeed, the regional approach adopted could end up creating homogenous areas deeply differing from one another. This

¹¹⁸ Junker (n 75).

would complicate the aggregation process hampering the achievement of an effective market integration. Therefore, it is fundamental for the EU to clearly define the path to follow, paying attention to the progressive aggregation of the single regions in a way to create similar areas easy to be integrated.

It is worth noting that the EU intervention *vis-à-vis* third entities included in the 2016 energy security package is two-fold. On the one hand, the EU took a step further in the regulation of private undertakings' actions by asking them to communicate the content of their agreements which impact on the security of the supply of the Union. On the other hand, the EU directly intervened at the level of energy trade policy by setting out rules preventing third states, in particular Russia, to use their bargaining power to circumvent EU law in the IGAs signed with Member States. Hence, the recent approach of the European regulator extends not only to private undertaking operating in the market such as Gazprom, but also sets limits to energy negotiations between third states and EU members. This two-fold approach is justified by the strategic role of natural gas companies which, for ownership rights and/or management reasons, often act not only as commercial operators but also as geopolitical weapons in the hands of national governments.

The overall effect of the measures above should be a powerful push for the integration of national markets in a union able to speak with one voice towards third countries, which could bypass the bilateralism typical of the divide and rule standard applied by the likes of Gazprom *vis-à-vis* the EU Member States. This, jointly with the full implementation of the TEP and the enforcement of the EU antitrust rules, aims at boosting EU energy independence and should ultimately have an influence on the geopolitical leverage of the Union towards major suppliers. Indeed, the improved coordination between should decrease the dependency from extra-EU suppliers and thus the geopolitical influence of the countries where they are incorporated.