

# THE IMPACT OF THE POST LISBON ENERGY POLICY ON EU NATURAL GAS SUPPLYING COUNTRIES

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# The Impact of the Post Lisbon Energy Policy on EU Natural Gas Supplying Countries

Andrea Rocco \*

**Abstract** The regulation of the European energy field radically changed with the adoption of the Lisbon Treaty. This introduced the matter of energy as a shared competence between Member States and the Union. Afterwards, the widespread application of the subsidiarity principle fostered the centralisation of the energy matters at the EU level: The Energy Union project and the pieces of legislation issued thereafter are examples of this trend. These focus on securing the EU natural gas supply, in the attempt of contrasting the dominant position of Russia, the EU most important supplier. Since security of supply requires a diversification of the gas supply, other countries are involved in this process.

This paper analyses the effects of the post Lisbon approach and of the recent EU energy regulatory measures on the EU-Russia natural gas relationship. Moreover, it provides insights on the possible impact of the EU energy policy on the other EU natural gas suppliers. We argue that, notwithstanding the measures adopted could effectively boost EU independence and facilitate negotiations on equal footing with extra-EU suppliers, the future of the EU-Russia relationship will still be driven by bilateral interests of economic and political nature.

**Keywords** energy governance; energy security; Energy Union; EU solidarity; EU external energy policy; EU-Russia relations; Foreign Direct Investments; Lisbon Treaty; natural gas.

## 1. Introduction

The European Union ('the Union' or 'the EU') is currently the largest energy importer in the world, importing 53% of the energy it consumes at an annual cost of around 400 billion euros.<sup>1</sup> Relationships based on trust with supplier countries are therefore essential to the well-being of European citizens. One of the most imported energy sources is natural gas, which serves as the principal back-up when power generation from renewable sources fails to meet demand.<sup>2</sup>

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<sup>1</sup> European Commission, 'Press Release: Energy Union: Secure, Sustainable, Competitive, Affordable Energy for Every European' (2016) <<http://europa.eu/rapid/press-releaseIP-15-4497en.htm>> accessed 16 July 2016.

<sup>2</sup> See Eurostat, 'Share in Renewables of Energy Consumption in the EU' (2016) <<http://ec.europa.eu/eurostat/web/energy/data/shares>> accessed 16 July 2017; Elena Verdolini, Francesco Vona and David Popp, 'Bridging the Gap: Do Fast Reacting Fossil Technologies Facilitate Renewable Energy Diffusion?' (2016) National Bureau of Economic Research Working Paper 22454/2016 <[http://www.nber.org/papers/w22454?utm\\_campaign=ntw&utm\\_medium=email&utm\\_source=ntw](http://www.nber.org/papers/w22454?utm_campaign=ntw&utm_medium=email&utm_source=ntw)> last accessed 16 July 2017.

Natural gas currently amounts to 23.8% of the total energy consumed in the EU and is the only 'grey' energy source that has seen an increase in the consumption since the 1990s, thanks also to the technological developments related to gas liquefaction.<sup>3</sup> Indeed, since 1990 the share of coal and lignite in EU28 primary energy consumption decreased from 28.9% to 18.2%, whereas oil dropped from 35% to 30.1%.<sup>4</sup> The foregoing features reflect a worldwide trend which witnesses the success of natural gas on a global scale.

Russia is the biggest natural gas supplier of the EU.<sup>5</sup> Bilateral relations between the EU and Russia have predominantly been based on the Partnership and Cooperation Agreement ('PCA'),<sup>6</sup> signed in 1994 and entered into force on 1<sup>st</sup> 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 focus has been aimed at promoting trade, investment and harmonious economic relations.

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 and the gas shortages that affected EU Members between 2006 and 2014.<sup>7</sup> The need to define a common legal framework for energy trade and investments is a feature characterising the relationship of the EU with all its gas suppliers. However, different priorities, historical ties, national loyalty, energy mixes and market positions have resulted in a discord within the EU in its approach towards all its suppliers.<sup>8</sup> EU Members that preferred to pursue individual barter deals inadvertently enabled supplying countries to pursue their own agenda.<sup>9</sup> Inevitably, 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.<sup>10</sup>

This article outlines an emerging 'new' approach of the EU in the gas sector, which started to take shape with the adoption of the Lisbon Treaty in 2009, and that is still 'under construction'. This approach significantly differs from the previous one; it is characterised by the progressive centralisation of the energy competences at the European level, a primary role of the EU institutions in dealing with energy issues of European

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<sup>3</sup> European Environment Agency, 'Primary Energy Consumption by Fuel' (2016) <<http://www.eea.europa.eu/data-and-maps/indicators/primary-energy-consumption-by-fuel6/assessment>> accessed 22 May 2016.

<sup>4</sup> *Ibid.*

<sup>5</sup> Market trends are outlined in section 6.

<sup>6</sup> Agreement of Partnership and Cooperation Establishing a Partnership Between the European Communities and their Member States, of one part, and the Russian Federation, of the other part [1997].

<sup>7</sup> Peter Van Elsuwege, 'Towards a Modernisation of EU-Russia Legal Relations?' (2012) 5 EU-Russia Papers, Centre for EU-Russia Studies, University of Tartu 3 <<http://hdl.handle.net/1854/LU-2134081>> accessed 8 September 2016. 'Gas wars' is an expression that refers to the disputes between Ukrainian oil and gas company Naftogaz and Russian gas supplier Gazprom over natural gas supplies, prices, and debts. These disputes have grown beyond simple business disputes into transnational political issues – involving political leaders from several countries – threatening natural gas supplies in numerous European countries dependent from Russian gas transported through Ukraine.

<sup>8</sup> Riccardo Alcaro and Emiliano Alessandri, 'Engaging Russia: Prospects for a Long-Term European Security Compact' (2010) 15(1) European Foreign Affairs Review 66.

<sup>9</sup> Richard Youngs, *Energy Security: Europe's New Foreign Policy Challenge* (Routledge 2009) 82.

<sup>10</sup> European Commission, 'Energy 2020 A Strategy for Competitive, Sustainable and Secure Energy' COM (2010) 639 final European Commission.

relevance, the focus on the security of supply of the Union and a push for technological innovation.

The new approach could impact on the EU relationship with its energy partners. In particular, by promoting a united European stance towards third country suppliers, the post-Lisbon approach could overcome the lack of coherence which characterised the EU energy policy before. Overall, the legislation adopted post-Lisbon will enhance the EU security of supply through the possibility to conclude specific bilateral energy agreements and the scrutiny of the commercial agreements between undertakings, and empowers the EU with new legal tools to rebalance the energy relationships with its suppliers.

In the next sections, we will outline the characteristics of the post-Lisbon energy approach, starting from the new competence allocation between the EU and its Member States regarding energy and foreign direct investments.

## **2. The Novelties of the Lisbon Treaty with Impact on the Energy Field**

### **2.1 Energy and Solidarity**

The Treaty of Lisbon first introduced the energy field in a specific section of the Treaty (Title XXI),<sup>11</sup> and listed it among the competences shared between Member States and the Union.<sup>12</sup> Before Lisbon, the EU could intervene in the energy sector only indirectly, by means of Article 175 TEC (on environmental protection), Article 95 (approximation of laws), Articles 155 and 156 (trans-European networks), and Article 100 (difficulties in supply).<sup>13</sup> These articles typically required burdensome procedures (qualified majorities or, in some cases under Article 175, unanimity), whereas, under the Lisbon Treaty, energy follows the faster ordinary legislative procedure.<sup>14</sup>

Article 194(1) TFEU states:

In the context of the establishment and functioning of the internal market [...] Union policy on energy shall aim, in a spirit of solidarity between Member States, to:

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

The TFEU outlines that Article 194(1) refers to internal measures only.<sup>15</sup> Any form of external action by the EU will have to be implied from its internal rules, in compliance with the *ERTA* jurisprudence.<sup>16</sup> In a landmark preliminary reference case about green

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<sup>11</sup> 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 existing 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).

<sup>12</sup> TFEU, Article 4(2).

<sup>13</sup> Jean-Claude Piris, *The Lisbon Treaty: A Legal and Political Analysis* (CUP 2010) 318.

<sup>14</sup> TFEU, Article 194(2).

<sup>15</sup> Heiko Krüger, *European Energy Law and Policy: An Introduction* (EE 2016) 149.

<sup>16</sup> Case C-22/70 *Commission v Council* [1971] ECR 263. See Rafael Leal-Arcas and Juan Alemany Rios, 'The Creation of a European Energy Union' (2015) 5 *European Energy Journal* 29.

energy, the Court of Justice of the European Union confirmed the Union's external competence in the field of energy based on *ERTA* case-law.<sup>17</sup>

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 commercial agreements signed between market operators were repeatedly seen as undermining the development of a coherent external energy policy.<sup>18</sup> 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.<sup>19</sup>

In addition to the 'solidarity spirit' of Article 194, one feature of the Lisbon Treaty that warrants attention with specific reference to energy is the solidarity mechanism of Article 122(1) TFEU:

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 Council made repeated references to solidarity during the 2009 gas crisis and therefore this mechanism can be seen as a test of Member State dedication to the Lisbon Treaty's solidarity provision based on the level of implementation thereof.<sup>20</sup> However, given the fact that solidarity is not a quantitative concept, it is therefore subject to Member States' interpretation and support in times of crisis.<sup>21</sup> Nevertheless, the specific mention of energy in relation to supply included under Article 122 creates a legal basis whereby the Union can intervene to the extent that there are any supply disruptions.<sup>22</sup> In this respect, the solidarity principle sets a legal base for the measures to be taken in a time of crisis to ensure security of supply.<sup>23</sup>

## 2.2 Foreign Direct Investment

With the adoption of the Lisbon Treaty, foreign direct investment ('FDI') has become an exclusive EU competence, integrated into the Common Commercial Policy ('CCP'). This results from the combined reading of Article 3(1)(e) (setting out the exclusive EU competence for CCP), and Article 207 TFEU (on FDIs), and could have an impact on the EU-Russia energy relationship.

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<sup>17</sup> Case C-66/13 *Green Network SpA v Autorità per l'Energia Elettrica e il Gas* [2014] ECLI:EU:C:2014:156.

<sup>18</sup> Katinka Barysch, 'Should the Nabucco Pipeline Project be Shelved?' (2010) Centre for European Reform 4 <[http://www.cer.eu/sites/default/files/publications/attachments/pdf/2011/pb\\_nabucco\\_5may10-221.pdf](http://www.cer.eu/sites/default/files/publications/attachments/pdf/2011/pb_nabucco_5may10-221.pdf)> accessed 17 March 2017.

<sup>19</sup> *Ibid* 5.

<sup>20</sup> 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.

<sup>21</sup> 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.

<sup>22</sup> *Ibid*.

<sup>23</sup> *Ibid*.

The expression ‘foreign direct investment’ is not defined in the Treaty.<sup>24</sup> Notwithstanding, the relationship between Article 207 on one side and the bilateral investment treaties (‘BITs’) signed by the Member States (‘MSs’) with third countries on the other side immediately became a contentious issue. What was missing in the Lisbon Treaty, and also became an issue in practice, were any transitional provisions clarifying the status of existing extra-EU BITs,<sup>25</sup> which have now come under the Union’s exclusive competence. This led to interpretative *lacunae* regarding the new EU competence on FDIs. It was only in 2012 that Regulation 1219/2012 confirmed that extra-EU BITs remain binding on the MSs under public international law, putting an end to controversies regarding the legal effect of BITs between EU Member States and non-EU countries.<sup>26</sup> Accordingly, international agreements concluded before the State accession to the EU find application even in case of clash with EU law.<sup>27</sup> However, as the regulation explains, these treaties will be progressively replaced by investment agreements signed by the EU and third states on the basis of the new EU competence.<sup>28</sup> When such agreements are signed, Member States will be required to withdraw their authorisation of the respective existing BITs.

To date, about half of the BITs world-wide have at least one EU Member State as a party.<sup>29</sup> These include also intra-EU BITs, which the EU is trying to root out because of the possible conflicts with the internal market rules. With its exclusive competence on foreign direct investments, the EU will progressively take a primary role in the treaty making processes of global investment law. This trend is evidenced by the negotiations of the Comprehensive Economic and Trade Agreement (CETA), one of the most important multilateral investment treaties of the last years, which the European Commission (‘EC’) negotiated in the name of the whole Union.

In the context of the negotiations of investment chapter of the EU-Singapore free trade agreement (EUSFTA), aiming at superseding the existing BITs between Singapore and EU MSs, the EC requested a preliminary opinion to the Court of Justice of the European Union (‘CJEU’) on the extent and nature of the EU CCP competence to conclude the trade agreement, ‘since differences of opinion became apparent in consultations within Trade Policy Committee’.<sup>30</sup> In May 2017, the CJEU issued its opinion, which clarifies the impact of the new competence on the power allocation between the EU and its Members.

According to the CJEU, in relation to the EUSFTA the EU has the exclusive competence to regulate goods and services market access, public procurement, non-fossil fuel energy generation, foreign direct investment protections, IP rights, competition rules, sustainable

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<sup>24</sup> Kevin Kazimirek, ‘The New EU Competence over Foreign Direct Investment and its Impact on the EU’s Role as a Global Player’ Jean Monnet Centre for Europeanisation and Transnational Regulations Oldenburg (2012) 23 <[http://www.cetro.uni-oldenburg.de/download/CETRO\\_Selected\\_Theses-Kazimirek.pdf](http://www.cetro.uni-oldenburg.de/download/CETRO_Selected_Theses-Kazimirek.pdf)> accessed 12 June 2016.

<sup>25</sup> European Parliament and Council Regulation 1219/2012 of 12 December 2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries’ [2012] OJ L351, Recital 4..

<sup>26</sup> *Ibid.*

<sup>27</sup> *Ibid.*

<sup>28</sup> Regulation (EU) No 1219/2012, Arts 5-6.

<sup>29</sup> Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (2<sup>nd</sup> edn, OUP 2012) 11.

<sup>30</sup> Court of Justice of the European Union, ‘OPINION 2/15 OF THE COURT (Full Court)’ (16 May 2017) ECLI:EU:C:2017:376 <[http://curia.europa.eu/juris/document/document\\_print.jsf?doclang=EN&text=&pageIndex=0&part=1&mode=req&docid=190727&occ=first&dir=&cid=441679](http://curia.europa.eu/juris/document/document_print.jsf?doclang=EN&text=&pageIndex=0&part=1&mode=req&docid=190727&occ=first&dir=&cid=441679)> accessed 20 May 2017.

development, exchanging information in areas requiring mediation, cooperation and disputes.<sup>31</sup> Under the EUSFTA, two areas would specifically need the approval from national parliaments before they can be applied, namely non-direct foreign investments (e.g. portfolio investments) and the regime governing dispute settlement between investors and States (ISDS provisions).<sup>32</sup>

The opinion of the CJEU shed light on the question of ‘mixity’, which created conflicts between the EU and MSs also with regards to CETA, with national governments claiming a primary role in the negotiation process after several protests spread around Europe for a more conservative approach to trade liberalisation in defence of national goods and services.

In sum, the CJEU made clear that the scope of the CCP competences transferred to the Union by the Lisbon Treaty, albeit strengthened,<sup>33</sup> is not sufficiently broad to cover all the aspects which are usually included under a BIT.<sup>34</sup> Therefore, the adoption of an all-encompassing investment agreement necessarily requires the intervention of national parliaments. One way around this, which could help avoid delays and complications, would be for the EU to reconsider the content of its trade agreements and avoid the inclusion of non-direct investment or ISDS provisions, to facilitate their conclusion by the EU alone. This would be a major change of EU current policy and it is not clear whether it would be contemplated. Another viable option for the EU might be to adopt ISDS as a standalone protocol, subject to separate conclusion and approval, but this could leave investors without any protection in the interim.<sup>35</sup>

In addition to the new position on FDI, which could allow the conclusion of an EU-Russia agreement substituting the BITs signed by individual MSs, a more assertive EU approach 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 could have 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 overall bargaining power of EU Members. The last step towards the centralisation of energy competences at the European level was the publication of the Energy Union plan.

### **3. The European Energy Union**

#### **3.1 Introduction**

The long awaited Sustainable Energy Security Package which was announced on 12 February 2016, is the latest step undertaken by the EU towards the creation of the

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<sup>31</sup> *Ibid.*, 238, 304.

<sup>32</sup> *Ibid.*

<sup>33</sup> With the Lisbon Treaty, the Common Commercial Policy now covers trade in services, the commercial aspects of intellectual property as well as foreign direct investments. This greatly expands the EU’s exclusive competence in the field. See Paul Craig and Gráinne de Búrca, *EU Law: Text, Cases and Materials* (5<sup>th</sup> edn, CUP 2011) 322.

<sup>34</sup> Kazimirek (n 24).

<sup>35</sup> Herbert Smith Freehills LLP, ‘The European Court of Justice Renders its Opinion on the EU-Singapore Free Trade Agreement: Investment Chapter Is Not within EU’s Exclusive Competence’ (2017) <<http://www.lexology.com/library/detail.aspx?g=e2568c28-1a23-47fa-874d-8959bd2f8b97>> accessed 10 June 2016.

European Energy Union.<sup>36</sup> Even though the idea of a new common energy policy has been advocated for since 2010 by former European Commission President Jacques Delors and the then European Parliament Polish President Jerzy Buzek,<sup>37</sup> the idea of a proper Energy Union first materialised in spring 2014, after the concerns about a potential politically motivated disruption of all EU gas supplies from Russia due to the Crimea crisis.<sup>38</sup>

The current president of the European Commission Jean-Claude Juncker made the Energy Union a top priority of his mandate during his presidential campaign.<sup>39</sup> The reason behind this is simple: Many EU Member States rely heavily on a limited number of energy suppliers. Some of them, especially in the Eastern part of Europe, have one supplier only, which leaves those countries very vulnerable in the event of any unexpected energy supply disruptions.<sup>40</sup>

Improving energy interconnections between new Member States, especially in those countries which once were part of the former Soviet Union, and modernising their infrastructure would help to 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.<sup>41</sup> 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.<sup>42</sup>

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<sup>36</sup> 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](http://europa.eu/rapid/press-release_IP-16-307_en.htm)> accessed 20 August 2016.

<sup>37</sup> 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.

<sup>38</sup> 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.

<sup>39</sup> 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](http://ec.europa.eu/priorities/sites/beta-political/files/juncker-political-guidelines_en.pdf)> accessed 26 August 2016.

<sup>40</sup> 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' COM (2015) 080 final, 2.

<sup>41</sup> European Commission, 'Energy Union: Secure, Sustainable, Competitive, Affordable Energy for Every European' (2015) <[http://europa.eu/rapid/press-release\\_IP-15-4497\\_en.htm](http://europa.eu/rapid/press-release_IP-15-4497_en.htm)> accessed 12 August 2016.

<sup>42</sup> Maroš Šefčovič, 'Opening Speech - EU Energy Policy and Competitiveness' (2014) <[http://europa.eu/rapid/press-release\\_SPEECH-14-1883\\_en.htm](http://europa.eu/rapid/press-release_SPEECH-14-1883_en.htm)> accessed 28 August 2016. The five pillars of the Energy Union are based on the three long-established objectives of EU energy policy: security of supply, sustainability and competitiveness.



The five pillars above fully reflect the content of Article 194(1) TFEU and sum up the most important steps of the European energy policy for years to come.<sup>43</sup>

### 3.2 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 neighbours.<sup>44</sup> 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 will have to work closely together to ensure a high-level of energy security for European citizens and companies.<sup>45</sup> A closer integration of the EU, the Energy Community and their third partners is also relevant,<sup>46</sup> so that the European reforms and incentives are extended to neighbour energy transit countries. This action is complementary to the diversification of supply, which is to be pursued through the funding and construction of Projects of Common Interest.<sup>47</sup>

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

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<sup>43</sup> Urbán Rusnak, Secretary General of the Energy Charter Treaty, highlighted the relevance of the Energy Charter Treaty to each of the five dimensions of the Energy Union. Rusnak emphasised that 'the foundation for the external policy of an Energy Union has already been laid by the establishment of the Energy Charter Treaty'. See Energy Charter Secretariat, 'The Energy Union Conference 'The Five Dimensions of the European Energy Union Session'' (2015) <[https://eu2015.lv/images/notikumi/2015\\_02\\_06\\_SGs\\_address\\_in\\_Riga.pdf](https://eu2015.lv/images/notikumi/2015_02_06_SGs_address_in_Riga.pdf)> accessed 18 June 2017.

<sup>44</sup> To ensure the diversification of the gas supply, work on the Southern Gas Corridor must be intensified to enable Central Asian countries to export their gas to Europe. In Northern Europe, the recent establishment of liquid gas hubs with multiple suppliers is greatly enhancing supply differentiation. See European Commission, 'Quarterly Report on European Gas Markets' (2014) <[https://ec.europa.eu/energy/sites/ener/files/documents/quarterly-gas\\_q3\\_2014\\_final\\_0.pdf](https://ec.europa.eu/energy/sites/ener/files/documents/quarterly-gas_q3_2014_final_0.pdf)> accessed 18 June 2017.

<sup>45</sup> European Commission (n 40) 7.

<sup>46</sup> The Energy Community Treaty is an international agreement signed in Athens on 25 October 2005, through which some non-EU countries committed themselves to liberalise their energy markets according to the EU *aquis*. To date, in addition to the EU, the members of the Energy Community are the following: Albania, Bosnia and Herzegovina, Georgia, Montenegro, Ukraine, Kosovo, Moldova, Serbia, Macedonia (as parties); Armenia, Norway, Turkey (as observers).

<sup>47</sup> Projects of Common Interest ('PCIs') are identified by the European Commission as 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 and the EU's energy security by diversifying sources, contribute to the EU's climate and energy goals by integrating renewables. PCIs may benefit from accelerated planning and permit granting, 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. To date, support under the Connecting Europe Facility (CEF) is provided in two forms – grants and financial instruments. Grants should be seen as a funding resource of last resort. However, the limited amount of EU support (the CEF has €5.3 billion for all energy projects from 2014-20) and the rather political choice of where to allocate funds have prevented outright success. See: Simone Tagliapietra and Georg Zachmann, 'Rethinking the Security of the European Union's Gas Supply' (2016) Bruegel Policy Contributions <<http://bruegel.org/2016/01/rethinking-the-security-of-the-european-unions-gas-supply/>> accessed 8 January 2018.

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 of setting up voluntary demand aggregation mechanisms to collectively purchase gas during a crisis and also 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.<sup>48</sup> In any event, it is recognised that these demand aggregation mechanisms would need to comply with World Trade Organization ('WTO') law and EU competition rules, in particular with the Commission's guidelines on horizontal cooperation agreements.<sup>49</sup>

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'.<sup>50</sup>

The Commission's plan aims at achieving Member States' full implementation and enforcement of the Third Energy Package, in particular as regards to unbundling and to the independence of national regulators.<sup>51</sup> 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 liquefied natural gas ('LNG') will influence gas price formation and its stabilisation to the benefit of final users.

All these activities will entail further powers vested in the European regulators, in particular the European Networks of Transmission System Operators for Electricity and Gas (ENTSOs) and the Agency for Cooperation of Energy Regulators (ACER),<sup>52</sup> 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.

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

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<sup>48</sup> 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.

<sup>49</sup> European 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 sells 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.

<sup>50</sup> European Commission (n 31) 9.

<sup>51</sup> *Ibid.*

<sup>52</sup> To date, ACER benefits of limited decision-making rights. It can only take decisions at the request of the national regulators or if these latter fail to take a decision within a certain timeframe.

to the business-as-usual scenario.<sup>53</sup> This objective will be reviewed by 2020, with the goal being a level of 30%.<sup>54</sup> The Energy Union strategy highlights that most of the work to achieve the efficiency objectives set has to be done at the national level. In this context, the role of the Commission is to create the appropriate framework for the application of national policies.

Huge efficiency gains are to be captured with regard to district heating and cooling, the largest single sources of energy demand in Europe.<sup>55</sup> 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.<sup>56</sup> 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 decrease energy imports from outside the EU.

As regards the decarbonisation of the European economy, the fourth pillar of the European plan, 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.<sup>57</sup> 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 renewables by developing the next generation of technically advanced and competitive green energies. With this aim, existing legislation and new market rules need to be fully implemented, enabling the roll-out of new technologies and allowing for an efficient energy transition. This process will necessarily be guided by the Commission, which will promote 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, 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.<sup>58</sup> 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

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<sup>53</sup> 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](http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/ec/145356.pdf)> accessed 28 August 2016.

<sup>54</sup> *Ibid* 6.

<sup>55</sup> European Commission (n 40) 12.

<sup>56</sup> *Ibid* 14.

<sup>57</sup> European Council (n 53) 2.

<sup>58</sup> European Commission (n 40) 16.

borders, supporting other countries in their efforts to establish modern and sustainable energy systems.<sup>59</sup>

### 3.3 Security of Supply: The First Pillar of the Energy Union

Considering the content of the previous sections, it is worth outlining some general considerations about the relationship between security of the energy supply and the other four pillars of the Energy Union package. Indeed, with the Eastern enlargement of the EU and the gas wars with Russia, security of supply came under the spotlight and became the main objective of the EU energy policy. This trend is now reflected in the Energy Union strategy.

In principle, the progressive improvement of the internal gas market contributes to lowering the barriers to trade and to allowing 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 energy importation. By the same token, green energy production is of utmost importance to secure the energy supply and to enhance the diversification of the energy mix. Energy from renewable sources is produced locally, by the natural sources of the territory. Hence, in a system dependent from third countries, renewable energies help to lower energy importation. Lastly, research activities and innovation help the development of new and more efficient energy production systems which accelerate the energy saving process described above. Remarkably, energy efficiency and green energy incentive policies are determined at the national level. States actively influence the national energy diversification by giving private parties the incentives to invest in the sector and help the diffusion of more efficient green energy productions.<sup>60</sup> This can have a spill-over effect in national job markets.

The strategic importance of the security of supply reflects one of the fundamental aims of nation States since their creation, which is now one of the key dimensions of the EU.<sup>61</sup> As the Council of the EU stated:

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.<sup>62</sup>

Over the last six decades, EU energy policy has been characterised by a continuing search for a balance among security of supply, environmental goals and market liberalisation goals, which constitute the three pillars of the EU energy policy.<sup>63</sup>

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<sup>59</sup> *Ibid* 17.

<sup>60</sup> Limitations are imposed by European and international trade rules on subsidies.

<sup>61</sup> This concept has been outlined also in the first section of this paper.

<sup>62</sup> Council of the European Union, 'Completion of the Internal Energy Market' (2014) <[www.consilium.europa.eu/en/workarea/downloadasset.aspx?id...](http://www.consilium.europa.eu/en/workarea/downloadasset.aspx?id...)> access 21 August 2016.

<sup>63</sup> Bart Van Vooren, 'Europe Unplugged Progress, Potential and Limitations of EU External Energy Policy Three Years Post-Lisbon' (2012) 5 Swedish Institute for European Policy Studies, 13 <[http://www.sieps.se/sites/default/files/2012\\_5.pdf](http://www.sieps.se/sites/default/files/2012_5.pdf)> last accessed 11 June 2017.

The good start of the Commission's plan was confirmed on 18 November 2015 in the first State of the Energy Union report.<sup>64</sup> Thereafter, on 16 February 2016 the Sustainable Energy Security Package proposed the amendment of two important pieces of legislation: Decision 994/2012/EU and Regulation 2012/994/EU. The proposals included a shift of competence from Member States to the EU as regards to the negotiation of intergovernmental agreements ('IGAs') in the field of energy between Member States and third suppliers and provided mechanisms to prevent security of supply disruptions. In addition to that, the Sustainable Energy Security Package set 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.<sup>65</sup> Notwithstanding the possible impact of the last two proposals on EU-Russia energy relations – in principle, LNG increases supply diversification, whereas the implementation of environmental-friendly policies decreases the dependency from imported 'grey' sources – the analysis of the first two measures is particularly relevant for our purposes since they directly target third countries' energy policies and extra-EU companies operating in the Union. This shapes the international energy relationships of the Union with its suppliers.

In light of the above, the next section analyses the proposals to amend Decision 994/2012/EU and Regulation 2012/994/EU.

#### **4. Post Energy Union Regulatory Measures**

##### **4.1 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.<sup>66</sup> This was 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.<sup>67</sup> Their purpose is to provide 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

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<sup>64</sup> European Commission, 'First Report on the State of the Energy Union' (2015) <[https://ec.europa.eu/commission/energy-union-and-climate/state-energy-union\\_en](https://ec.europa.eu/commission/energy-union-and-climate/state-energy-union_en)> accessed 11 June 2017..

<sup>65</sup> 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' COM (2016) 49 final, and European Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions: An EU Strategy on Heating and Cooling' COM (2016) 51 final.

<sup>66</sup> European Parliament and Council Decision 994/2012/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.

<sup>67</sup> Pursuant to Article 2 of the IGA Decision, an '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 those provisions that relate to energy, including general provisions applicable to those energy-related provisions, shall constitute an 'intergovernmental agreement'.

cooperation.<sup>68</sup> 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 anti-competitive 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 since the Lisbon Treaty was adopted.

The IGA Decision requires Member States to notify the Commission of all their energy agreements with non-EU countries once 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 under no obligation to do so.<sup>69</sup> Information included under the agreements may be shared with other Member States, except for any confidential part specifically indicated by the sender.<sup>70</sup> 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 unilaterally amend or revoke its IGAs obligations early without the consent of the other party.<sup>71</sup> Hence, the (political) renegotiation is required in the case of agreements falling foul of EU law.

The Commission's analysis of all notified IGAs showed that around one-third of them contained provisions that were not compliant with EU law.<sup>72</sup> To date, no such agreement has been successfully renegotiated.<sup>73</sup> The adoption of the IGA Decision deeply affected the construction of the South Stream.<sup>74</sup> In particular, the EC considered the IGAs signed between Russia and six EU members at odds with the Third Energy Package.<sup>75</sup> Notably, Russia preferred not to embark in lengthy renegotiations with the countries concerned – it took years to conclude all the agreements – and stopped the project, even though the construction of the infrastructure had already started.

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<sup>68</sup> 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.

<sup>69</sup> Article 3, IGA Decision. The impact assessment on the revision of the IGA Decision reveals 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](https://ec.europa.eu/energy/sites/ener/files/documents/1_EN_impact_assessment_part1_v6.pdf)> accessed 25 August 2016.

<sup>70</sup> IGA Decision, Article 3(3).

<sup>71</sup> Vienna Convention on the Law of the Treaties (adopted on 23 May 1969) Art 37-54.

<sup>72</sup> European Commission, 'Intergovernmental Agreements in Energy' (2016) <[europa.eu/rapid/press-releaseMEMO-16-309en.pdf](http://europa.eu/rapid/press-releaseMEMO-16-309en.pdf)> accessed 20 August 2016.

<sup>73</sup> *Ibid.* Only one IGA has been signed after 2012, but some of the IGAs dating back 15-30-years ago will be coming up for renewal soon.

<sup>74</sup> The project was meant to link the EU with Russian gas bypassing Ukraine through pipelines lying under the Black Sea. For an overview of the project see: <<http://www.south-stream-transport.com/project/>> accessed 20 August 2016.

<sup>75</sup> 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. All agreements concerning the South Stream were cases of established incompatibility between BITs and EU law after the accession to the EU of the signatories. Pursuant to Article 351(2) TFEU: 'To the extent that such agreements are not compatible with the Treaties, the Member State or States concerned shall take all appropriate steps to eliminate the incompatibilities established. Member States shall, where necessary, assist each other to this end and shall, where appropriate, adopt a common attitude'.

To overcome the problems of *ex post* renegotiation, on 16 February 2016 the Commission presented the Sustainable Energy Security Package, which, *inter alia*, includes modifications to the IGA Decision.<sup>76</sup> The most relevant amendment proposed is the adoption of a mandatory *ex ante* compatibility control by the Commission of the treaties to be signed.<sup>77</sup> Additionally, Member States will have to send 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 to scrutinise each IGA has elapsed.<sup>78</sup> When concluding the proposed intergovernmental agreement or amendment, Member States will have to take full account of the Commission's opinion.

Differently from the IGA Decision, the new proposal also requires the notification of non-binding instruments.<sup>79</sup> Even if legally non-binding, such instruments can be used to set out a detailed framework for energy infrastructure and energy supply, for example in the form of Memorandum of Understanding, or other soft law mechanisms. In this respect, non-binding instruments can have an impact on the internal energy market similar to intergovernmental agreements as their implementation might result in a violation of EU law.<sup>80</sup>

The final version of the proposal was adopted in April 2017.<sup>81</sup> The new decision, just like the IGA Decision, does not cover commercial agreements between companies. The current control mechanism of the commercial contracts – especially with regard to EU competition law – has not changed.<sup>82</sup>

Along with a positive impact on the EU security of supply, the new IGA decision could also have a positive influence 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, and by avoiding cancellation or delay costs, the new IGA decision provides legal certainty to investors and project promoters.<sup>83</sup>

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<sup>76</sup> European Commission, 'Towards Energy Union: The Commission Presents Sustainable Energy Security Package' (2016) <<http://europa.eu/rapid/press-release-IP-16-307en.htm>> accessed 20 August 2016. See section 2.2.

<sup>77</sup> *Ibid.*

<sup>78</sup> 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.

<sup>79</sup> Article 2 of the proposal to reform the IGA Decision defines 'non-binding instruments' 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'. See Van Vooren (n 63) 69.

<sup>80</sup> Proposal to reform the IGA Decision, recital 11.

<sup>81</sup> European Parliament and Council Decision 2017/684 of 5 April 2017 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 [2017] OJ L99/17.

<sup>82</sup> See section 4.2.

<sup>83</sup> European Commission, 'Intergovernmental Agreements in Energy' (2016) <[europa.eu/rapid/press-release\\_MEMO-16-309en.pdf](http://europa.eu/rapid/press-release_MEMO-16-309en.pdf)> accessed 20 August 2016. For a critique, see Valentin Jeutner, 'A Critique

The IGA Decision was issued on the basis of Article 194 TFEU and so is the proposal to reform it. The mandatory *ex-ante* Commission control included under the new proposal entails a shift of competences from Member States to the EU. This action is justified by virtue of the application of the subsidiarity principle, 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.<sup>84</sup> Past experience has shown that the *ex-post* control included under the IGA Decision did not work, creating substantial damage for the investment projects concerned and, ultimately, for the EU citizens who could not benefit from the infrastructure envisioned. A preventive check, such as the one outlined in the new IGA Decision, is certainly a ‘more effective’ option to achieve the compliance of IGAs with EU law.

## 4.2 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 avoiding double investments and infrastructure gaps.<sup>85</sup> However, the IGA Decision is only one piece of a larger puzzle. Indeed, taken alone, it is not enough to secure the gas supply because it addresses only EU Members and their intergovernmental energy agreements with non-EU countries (inter-state level).

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’.<sup>86</sup> This was reaffirmed 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’.<sup>87</sup> With this aim, the EU has planned to adopt a revised Regulation 2010/994/EU on the safeguard security of gas supply (the ‘SoS Regulation’).<sup>88</sup> This was the first detailed intervention issued as a response to the 2009 Russian-Ukrainian gas crisis, aimed at securing the EU supply of gas. The SoS Regulation repealed Directive 2004/67/EC,<sup>89</sup> which set out basic security of supply standards and emergency mechanisms to be used when markets alone are no longer able to deal adequately with a gas supply disruption.<sup>90</sup> The SoS Regulation requires the designation of a competent authority in charge of guaranteeing energy security, the setup preventive action and emergency plans, the installation of permanent bi-directional capacity on all cross-border interconnections between Member States and the disclosure to national regulatory authorities (‘NRAs’) of basic information of commercial contracts

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of the EU Commission’s Proposal Concerning Intergovernmental Energy Agreements’ (2016) 5 International Energy Law Review 181-189 <<https://ssrn.com/abstract=2911579>> accessed 18 June 2017.

<sup>84</sup> Treaty on European Union (TEU), Article 5(3).

<sup>85</sup> European Commission (n 83).

<sup>86</sup> 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.

<sup>87</sup> European Council Conclusions 19-20 March 2015, EUCO 11/15.

<sup>88</sup> 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’ COM (2016) 52 final <[http://eur-lex.europa.eu/resource.html?uri=cellar:33516200-d4a2-11e5-a4b5-01aa75ed71a1.0018.02/DOC\\_1&format=PDF](http://eur-lex.europa.eu/resource.html?uri=cellar:33516200-d4a2-11e5-a4b5-01aa75ed71a1.0018.02/DOC_1&format=PDF)> accessed 20 August 2016.

<sup>89</sup> Council Directive 2004/67/EC of 26 April 2004 concerning measures to safeguard security of natural gas supply [2004] OJ L127/92.

<sup>90</sup> *Ibid*, Arts 4 and 8.



between undertakings and third suppliers (e.g. duration, contracted total and daily volumes, contracted delivery points), to be notified in aggregate form to the Commission.<sup>91</sup>

At the heart of the 2016 draft proposal to revise the SoS 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.<sup>92</sup> 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 single EU Member States. Members of the Energy Community will also play a role in this coordination process.<sup>93</sup> Further, in accordance with Articles 122 and 194 TFEU, 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.<sup>94</sup> However, the solidarity mechanism will apply when markets alone are no longer able to deal adequately with a gas supply disruption. Although a call for European solidarity was present in Regulation 994/2010 and even in its predecessor document, in the new proposal the solidarity principle is now linked to clearly defined obligations for the first time.<sup>95</sup>

The new regulation was published in the Official Journal of the European Union on 28 October 2017 and entered into force on 1 November 2017, except for the provisions relating to the solidarity mechanism which will apply from 1 December 2018.<sup>96</sup> In addition to the above, the text adopted requires gas companies to notify national authorities of all security of supply relevant contracts.<sup>97</sup> These are contracts for more than one year that place more than 28% of the gas consumption in a Member State in the hands of a single third country supplier or of its affiliated companies.<sup>98</sup> Moreover, the Commission and national authorities may ask to scrutinise contracts that do not meet the 28% threshold, if they deem it necessary to assess security of supply, and may request additional information, including contractual information, in non-emergency situations.<sup>99</sup> This information would be added to what companies are already obliged to communicate under the SoS regulation.

As for the IGA Decision, the issuance of the SoS Regulation and its reform are based on Article 194 TFEU and the application of the subsidiarity principle. Given the importance of the matter and the poor results of the first EU intervention (Directive 2004/67/EC),<sup>100</sup>

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<sup>91</sup> SoS Regulation, Article 13.

<sup>92</sup> European Commission, 'Security of Gas Supply Regulation' (2016) <[http://europa.eu/rapid/press-release\\_MEMO-16-308\\_en.htm](http://europa.eu/rapid/press-release_MEMO-16-308_en.htm)> accessed 23 August 2016. Accordingly, a peer review team per region composed of experts from Member States and from the European Network of Transmission System Operators for Gas (ENTSO-G) will be established.

<sup>93</sup> See footnote 46 for an explanation of the Energy Community.

<sup>94</sup> European Commission (n 79).

<sup>95</sup> Ruven Fleming, 'New EU Gas Security of Supply Regulation 2017/1938' (2017) <<http://energyandclimatelaw.blogspot.it/2017/10/new-gas-security-of-supply-regulation.html>> accessed 25 November 2017.

<sup>96</sup> European Parliament and Council Decision 2017/1938 of 25 October 2017 concerning measures to safeguard the security of gas supply and repealing Regulation (EU) No 994/2010 OJ L 280/17.

<sup>97</sup> *Ibid.*, Article 14.

<sup>98</sup> *Ibid.*

<sup>99</sup> *Ibid.*

<sup>100</sup> See SoS Regulation, recital 5.

this piece of legislation has been issued as a regulation, which is directly applicable in the EU MSs.

## 5. The Characteristics of the New EU Approach

The 2003 European Security Strategy did not include energy security in its threat assessment, which was dominated by the aftermath of the 9/11.<sup>101</sup> The first attempt to set out a common European energy policy took place in 2006 by means of a Commission's Green Paper,<sup>102</sup> and was followed by a series of policy documents which enhanced the need for a coherent approach *vis-à-vis* third suppliers. This is because the external energy policy is very much the external projection of the internal market, which at that time was still under deep construction. The Lisbon Treaty codified most of the policy process that preceded it.<sup>103</sup> This was explicitly recognised in the 2020 programme, where we read:

A common EU energy policy has evolved around the common objective to ensure the uninterrupted physical availability of energy products and services on the market, at a price which is affordable for all consumers (private and industrial), while contributing to the EU's wider social and climate goals. The central goals for energy policy (security of supply, competitiveness, and sustainability) are now laid down in the Lisbon Treaty.<sup>104</sup>

When carefully analysed, the policy instruments and the related documents that predate the Lisbon Treaty outline a trend towards the security dimension of the EU energy policy. The centralisation of the energy competences to the EU is the key feature of the current approach to the energy sector of the European institutions and finds evidence in the legislation issued after Lisbon, which moves from the clauses of the Treaty and makes a step further. This trend is reflected in the 2016 legislative proposals analysed in the previous sections of this paper.

Thanks to the introduction of Article 194 TFEU and the application of the subsidiarity principle, the EU could take more ambitious policies in the energy field such as the Energy Union project, which, as seen above, extends the EU control not only to Member States' actions but also to non-binding measures and to private undertakings' commercial agreements.

The post-Lisbon approach could enhance investments in Europe, because the key aspects of the investments to be made will be increasingly negotiated with one single voice with the support of the EU institutions. With the full implementation of the new measures, the security of the EU energy supply will be guaranteed both at political and at commercial level through: (i) inter-state negotiation, with the application of new IGA Decision and Regulation 1219/2012, both concerning the negotiation and conclusion of international agreements; and (ii) company conducts' analysis, through the scrutiny of all security of

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<sup>101</sup> Van Vooren (n 63) 23. European Council, 'European Security Strategy - A Secure Europe in a Better World' EUCO (2003).

<sup>102</sup> European Commission, 'A European Strategy for Sustainable, Competitive and Secure Energy' COM (2006) 105 final.

<sup>103</sup> Van Vooren (n 63) 32.

<sup>104</sup> European Commission – Directorate General for Energy, 'A Strategy for Competitive, Sustainable and Secure Energy' COM (2010) 639 final.

supply relevant agreements (new SoS Regulation) and the possibility to adopt demand aggregation mechanisms.

Remarkably, the application of the new IGA Decision could indirectly extend the EU *acquis* to third countries. This is another example of export of EU law.<sup>105</sup> Indeed, the request for compliance with EU law as condition precedent for the signature of IGAs between a Member State and a third country forces third States to abide by EU law and its provisions. It is worth noting that the new IGA Decision does not require only the respect for EU competition rules, but also demands the compliance with all EU legislation by the IGA to be negotiated, extending this obligation to non-binding instruments.<sup>106</sup> The attempt to export the EU principles to neighbouring countries, typical of the post-2006 Green Paper period,<sup>107</sup> is based on the assumption that if all States adhere to these principles, then energy relations will improve and the market itself will ensure the security of the gas supply.<sup>108</sup> However, in a break from the past – where the EU action has driven third entities’ behaviours – the new IGA charges Member States with the obligation to make third countries abide by EU rules. MSs are thus treated as ‘agents of implementation’ of the EU external energy policy. This is a key aspect of the post-Lisbon approach to the energy sector and is reflected also by the choice of the legislative tools chosen: Under the security of supply perspective, the EU substituted a 2004 directive with a directly applicable instrument (SoS Regulation), eliminating the space of manoeuvre for EU Members.

In addition to Article 194 TFEU, which deals specifically with energy, the centralisation of foreign direct investments at the EU level through Article 207 TFEU and Regulation 2012/1219/EU could have a positive impact on the EU energy policy. Indeed, the CJEU explained that the exclusive competence of the EU in this area covers almost all aspects of FDIs, excluding only non-direct investments (portfolio investments) and ISDS mechanisms.<sup>109</sup>

In a field of exclusive EU competence, such as FDI, Member States are able to adopt a binding act only ‘if so empowered by the Union or for the implementation of Union acts’.<sup>110</sup> Instead, since energy under Article 194 TFEU is a shared competence, MSs are free to conclude international agreements as long as this is in compliance with the rules

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<sup>105</sup> See Jorrit J Rijpma and Marise Cremona, ‘The Extra-Territorialisation of EU Migration Policies and the Rule of Law’ (2007) EUI Working Paper 01/2007 <[http://cadmus.eui.eu/bitstream/handle/1814/6690/LAW\\_2007\\_01.pdf](http://cadmus.eui.eu/bitstream/handle/1814/6690/LAW_2007_01.pdf)> accessed 26 March 2018; Directorate-General for External Policies of the Union, *The Extraterritorial Effects of Legislation and Policies in the EU and US* (AFET 2012).

<sup>106</sup> European Parliament and the Council of the European Union, ‘Proposal of Decision of the European Parliament and of the Council on Establishing an Information Exchange Mechanism with Regard to Intergovernmental Agreements and non-binding Instruments Between Member States and Third Countries in the Field of Energy and Repealing Decision no 994/2012/EU’ COM (2016) 53 final, Article 5.

<sup>107</sup> See Thomas Cottier, Sofya Matteotti-Berkutova and Olga Nartova, ‘Third Country Relations in EU Unbundling of Natural Gas Markets: The ‘Gazprom Clause’ of Directive 2009/73/EC and WTO Law’ (2010) NCCR Trade Regulation Working Paper 6/2010, 6; Alexander Jouravlev, ‘The Effect of the European Union’s Unbundling Provisions on the EU-Russia Gas Relationship and Russia’s Accession to the World Trade Organization’ (2011) 16 <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1969502](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1969502)> accessed 17 June 2017.

<sup>108</sup> Victor Von Hoorn, ‘Unbundling’, ‘Reciprocity’ and the European Internal Energy Market: WTO Consistency and Broader Implications for Europe’ (2009) 18 *European Energy and Environmental Law Review* 55.

<sup>109</sup> Court of Justice of the European Union, ‘Opinion 2/15 of the Court (Full Court)’ (16 May 2017) ECLI:EU:C:2017:376, 238, 304. In section 2.2 we explained a possible way to circumvent the exclusion of ISDS from the EU’s FDI competence.

<sup>110</sup> TFEU, Article 2(1).

on competence allocation – i.e. insofar the Union did not rule on the matter.<sup>111</sup> Moreover, pursuant to Article 194(2) TFEU, MSs retain ‘the right to determine the conditions for exploiting energy resource, its choice between different energy sources, and the general structure of its supply’.

In principle, international energy agreements between the Union and third States would be mixed agreements which are negotiated, concluded and managed jointly by the EU and its MSs.<sup>112</sup> However, as the EU has occupied the field in the areas of electricity and gas to a large extent, it is reasonable to assume that in case of international agreements in these areas, the EU would have exclusive competence by now.<sup>113</sup> This is justified by Article 3 TFEU whereby ‘The Union shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence’.

Therefore, the EU could now sign international energy agreements with third countries both on the basis of the application of Article 194 combined with Article 3 TFEU and on the basis of Article 207 TFEU. Remarkably, the adoption of an international agreement has more burdensome procedures under Article 207 than under Article 194.<sup>114</sup> The dividing line between the two options is the following: to the extent in which the object and main focus of the agreement is to generally increase energy security, EU institutions must rely on Article 194. By contrast, insofar the action of the EU is primarily to facilitate, foster and regulate trade relations with third countries, the EU shall base its action on Article 207.<sup>115</sup>

In light of the above, with the adoption of the Lisbon Treaty, EU could improve its energy relationships with its suppliers by facilitating the negotiation of new agreements substituting those already existing (e.g. the PCA with Russia), as well as the single BITs signed by EU Members with their suppliers, through the mechanism described in Regulation 2012/1219/EU.<sup>116</sup>

The post-Lisbon centralisation process will be a crucial means to enhance the bargaining power of the EU in relation to the supplier countries sitting at the negotiating table. This was one of the weaknesses of the pre-Lisbon approach which derived from the disjunction between the ‘internal energy policy’, characterised by the pervasive regulation of the market operators combined with a strong antitrust enforcement, and the ‘external energy policy’,<sup>117</sup> characterised by bilateralism and inconsistency given that the energy field was an exclusive competence of EU Members.<sup>118</sup> In that period, the security of supply of the

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<sup>111</sup> See, among the others, Robert Schütze and Takis Tridimas, *Principles of European Law* (OUP 2018) 198.

<sup>112</sup> Panagiotis Delimatsis, ‘Services of General Interest and the EU External Energy Policy’ (2013) 25 TILEC Discussion Paper 8.

<sup>113</sup> *Ibid.*

<sup>114</sup> Article 207 requires the application of the procedure set out under Article 218 TFEU with the specific procedural requirements of Articles 207(2) and 207(3). Instead, Article 194 applies the ordinary legislative procedure (Article 194(2)).

<sup>115</sup> Alexander Proells, ‘Principles of EU Environmental Law: An Appraisal’ in Yumiko Nakanishi, *Contemporary Issues in Environmental Law: The EU and Japan* (Springer 2016) 29.

<sup>116</sup> See page 5.

<sup>117</sup> Natasha Georgiou and Andrea Rocco, ‘The Energy Union as an Instrument of Global Governance in EU-Russia Energy Relations: From Fragmentation to Coherence and Solidarity’ (2017) 9(1) *Geopolitics, History and International Relations* 245.

<sup>118</sup> *Ibid.*

Union was mainly left to the agreements between EU companies – often acting as representatives of their States – and third countries’ suppliers.<sup>119</sup> In this context, the conditions of the commercial agreements signed by market operators depended on the bargaining power of the parties involved, which, in case of European companies, was weakened by the antitrust and the regulatory interventions of the EU institutions.<sup>120</sup> Paradoxically, a more competitive EU internal energy market could worsen the security of supply of the Union because of the diminished bargaining power of the domestic operators *vis-à-vis* their suppliers.<sup>121</sup>

Things seem to have changed after the entry into force of the Lisbon Treaty, with the adoption of a more coherent external approach. Most obviously, it was the economically less powerful Members which have been limited in their negotiation capacities and consequently have been hampered in concluding advantageous investment treaties.<sup>122</sup> However, it is likely that the bargaining power of the EU as a whole will be maximised, resulting in advantages for all EU MSs. Moreover, good deals with clear investor protections could open the door to significant investments, also by entities not operating in the energy field.

The post-Lisbon centralisation process cannot succeed without the application of the principle of cooperation set out under Article 4(3) TFEU, which today is regarded as the panacea for cases regarding the division of powers between the EU and its Member States.<sup>123</sup> Indeed, cooperation is essential in ensuring coherence in the external action and the international representation of the EU, eliminating any incompatibility between EU law and the actions made or the agreements signed by MSs and third countries.<sup>124</sup> For this reason, the energy measures proposed after the Lisbon Treaty specifically mandate obligations of consultation and information.<sup>125</sup> In this respect, the CJEU has underlined

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<sup>119</sup> Russia has signed BITs with the following EU-countries: Austria (1990/1991), Belgium (1989/1991), Bulgaria (1993/2005), Czech Republic (1994), Denmark (1993/1996), Finland (1989/1991), France (1989/1991), Germany (1989/1991), Greece (1993/1997), Hungary (1995/1996), Italy (1996/1997), Lithuania (1999/2004), The Netherlands (1993/1996), Romania (1993/1996) Slovakia (1993/1996), Spain (1990/1991), Sweden (1995/1996), the UK (1989/1991).

<sup>120</sup> Between 2007 and 2010 the European Commission, through its Directorate General for Competition, opened up several proceedings against the major European natural gas incumbents for the breach of Articles 101 and 102 TFEU (former Articles 81 and 82 TEC): *Commission v RWE* (Case COMP/39.402) [2009] OJ C133; *Commission v E.ON* (Case COMP/39.388) [2009] OJ C36; *Commission v Gaz de France* (Case COMP/39.316) [2010] OJ C57; *Commission v ENI* (Case COMP/39.315) [2010] OJ C352. The behaviours put under investigation by the European officials in the course of EC’s three-year action can be classified in three main categories: exclusionary abuses, exploitative abuses and market partitioning. The European antitrust enforcement deeply influenced the structure of the undertakings involved. Among the others, the cases RWE Gas Foreclosure and ENI Gas Foreclosure exemplify the pro-competitive attitude of the Commission during that period. These cases have been closed with the EC’s acceptance of burdensome commitments proposed by the undertakings under investigation, consisting in the sale of the pipelines concerned. The analysis of these commitments is relevant because they are examples of so-called ‘ownership unbundling’ remedies. Noteworthy, their adoption witnesses the EC’s preference for the separation of the ownership of the transportation activities from the other sections of the natural gas supply chain. This preference was reflected also in the preparatory works of Directive 2009/73/EC, part of the third energy package regulating the EU internal gas market. .

<sup>121</sup> Jouravlev underlines that ‘the Commission did not go on to evaluate the risks and potential negative impacts of weakened coordination as a result of unbundling, nor how ‘missing links’ in the delivery of natural gas could affect consumers’ in Alexander Jouravlev (n 107) 16.

<sup>122</sup> Kazimirek (n 24) 46.

<sup>123</sup> Leal-Arcas (n 16) 30.

<sup>124</sup> Delimatsis (n 112) 8.

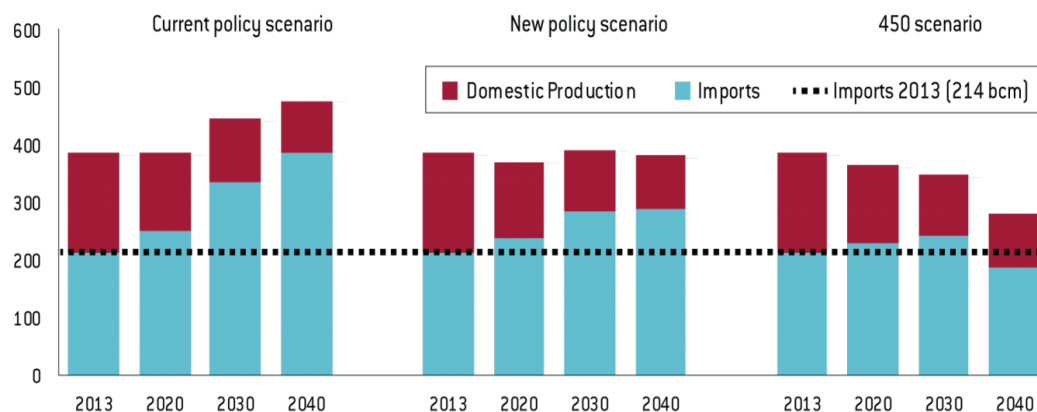
<sup>125</sup> See for example Article 6 of Regulation 1219/2012/EU, entitled ‘Duty of Cooperation’ and recital 7 of the proposal for the new IGA Decision.

that EU MSs and institutions are not only expected to try their best to inform and consult one another but also ‘must’ comply with these procedural obligations.<sup>126</sup>

## 6. The Way Forward

All available market data show that the EU will be increasingly dependent on foreign sources of gas in the future. According to British Petroleum, overall indigenous production of gas in Europe (EU plus Norway) has decreased from 299.5 bcm in 2004 to 236 bcm in 2016 (out of an overall consumption of about 400 bcm).<sup>127</sup> This number could fall further to 170 bcm in 2035.<sup>128</sup> The International Energy Agency forecasts that, even with the adoption of the energy efficiency and green production already planned,<sup>129</sup> in the near future the EU will need massive natural gas imports to fuel its economy (see Figure 1).

Figure 1: EU Production and Imports: Different Scenarios (Tagliapietra and Zachmann, Bruegel Institute)



<sup>126</sup> Case C-459/03 *Commission v Ireland* [2006] ECR I-4635 para 59.

<sup>127</sup> British Petroleum, ‘BP Statistical Review of World Energy June 2017’ (2017) 30 <<https://www.bp.com/content/dam/bp/en/corporate/pdf/energy-economics/statistical-review-2017/bp-statistical-review-of-world-energy-2017-full-report.pdf>> accessed 6 January 2018; European Commission, ‘Quarterly Report on European Gas Markets’ (2016) <[https://ec.europa.eu/energy/sites/ener/files/documents/quarterly\\_report\\_on\\_european\\_gas\\_markets\\_q4\\_2015-q1\\_2016.pdf](https://ec.europa.eu/energy/sites/ener/files/documents/quarterly_report_on_european_gas_markets_q4_2015-q1_2016.pdf)> accessed 10 January 2018. See also Henderson and Sharples (n 135) 9.

<sup>128</sup> Cedigaz, ‘Medium and Long-Term Natural Gas Outlook’ (2015) <[http://www.snam.it/opencms/handle404?exporturi=/export/sites/snam/repository/media/energymorning/allegati\\_energy\\_morning/20150217\\_1.pdf](http://www.snam.it/opencms/handle404?exporturi=/export/sites/snam/repository/media/energymorning/allegati_energy_morning/20150217_1.pdf)> accessed 6 January 2018.

<sup>129</sup> International Energy Agency, ‘World Energy Outlook 2016’ (2016) 32-37 <<https://www.iea.org/media/publications/weo/WEO2016Chapter1.pdf>> accessed 6 January 2018. The ‘Current Policies Scenario’ depicts a path for the global energy system shorn of the implementation of any new policies or measures beyond those already supported by specific implementing measures in place as of mid-2016. The ‘450 Scenario’, considers all the measures necessary to achieve the objective of limiting the average global temperature increase in 2100 to 2 degrees Celsius above pre-industrial levels. The charts have been elaborated by Simone Tagliapietra and Georg Zachmann in ‘Rethinking the security of the European Union’s gas supply’ (2016) Bruegel Policy Contributions <<http://bruegel.org/2016/01/rethinking-the-security-of-the-european-unions-gas-supply/>> accessed 8 January 2018.

Russia's supplies to Europe reached an all-time record in 2017,<sup>130</sup> which could be even improved in 2018.<sup>131</sup> With the construction of the Nord Stream and the plan to double its capacity through the Nord Stream 2, Russia can even benefit from the transit fees savings normally due to Ukraine.<sup>132</sup> Whether piped via Nord Stream or other routes, Russian gas can be priced more cheaply than international liquefied natural gas ('LNG'), which, in addition to the price of gas, includes the cost of liquefaction, ocean transportation, and regasification.<sup>133</sup>

The ability to procure non-Russian sourced gas from cargoes allows the EU to use LNG as a 'credible threat' only if Russian piped gas becomes too expensive.<sup>134</sup> This essentially puts a ceiling on Russian piped gas with respect to internationally sourced LNG.<sup>135</sup> In 2017, LNG imports made up only 14% of total extra-EU gas imports, with most of that coming from Qatar, Algeria and Nigeria (75% of LNG capacity remained unused).<sup>136</sup> Spain is the EU's largest LNG importer with 31% of total EU LNG imports, followed by France (20%), Italy (15%) and the UK (12%).<sup>137</sup>

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<sup>130</sup> Russia's gas exports to Europe and Turkey rose by 8.1% to a record high 193.9 billion cubic meters (Bcm) in 2017. *See* Reuters, 'Russian Gas Exports to Europe Hit All-Time High in 2017' (2018) <<https://www.epmag.com/russian-gas-exports-europe-hit-all-time-high-2017-1676781>> accessed 15 April 2018. For an accurate analysis of Gazprom pricing policies *see* James Henderson and Jack Sharples, 'Gazprom in Europe – Two 'Anni Mirabiles', but Can It Continue?' (2017) Oxford Institute for Energy Studies, 3 <<https://www.oxfordenergy.org/wpcms/wp-content/uploads/2018/03/Gazprom-in-Europe-%E2%80%93-two-Anni-Mirabiles-but-can-it-continue-Insight-29.pdf>> accessed 16 April 2018.

<sup>131</sup> S&P Global Platts, 'Gazprom's H1 2018 natural gas exports to Europe, Turkey at record 100.6 Bcm' (2018) <[https://www.spglobal.com/platts/en/market-insights/latest-news/natural-gas/081518-gazproms-h1-2018-natural-gas-exports-to-europe-turkey-at-record-1006-bcm?utm\\_source=twitter&utm\\_medium=social&utm\\_content=naturalgas&utm\\_term=news&utm\\_campaign=newsarticle&ho](https://www.spglobal.com/platts/en/market-insights/latest-news/natural-gas/081518-gazproms-h1-2018-natural-gas-exports-to-europe-turkey-at-record-1006-bcm?utm_source=twitter&utm_medium=social&utm_content=naturalgas&utm_term=news&utm_campaign=newsarticle&ho)> accessed 7 January 2019.

<sup>132</sup> In 2015 Gazprom paid to Naftogaz, the Ukraine gas monopolist, \$1.7bn transit fees for transiting 64.1 bcm of Russian natural gas to the EU. *See* Thierry Bros, 'Has Ukraine Scored an Own-Goal with its Transit Fee Proposal?' (2016) Oxford Institute for Energy Studies, 1 <<https://www.oxfordenergy.org/wpcms/wp-content/uploads/2016/11/Has-Ukraine-scored-an-own-goal-with-its-transit-fee-proposal.pdf>> accessed 5 January 2018.

<sup>133</sup> Nathalie Hinchey and Anna Mikulska, 'LNG Versus Russian Gas in Central and Eastern Europe: Playing Poker on A Continental Scale' (2017) <<https://www.forbes.com/sites/thebakersinstitute/2017/08/24/lng-versus-russian-gas-in-central-and-eastern-europe-playing-poker-on-a-continentialscale/#36de1ea22c3a>> accessed 5 January 2018.

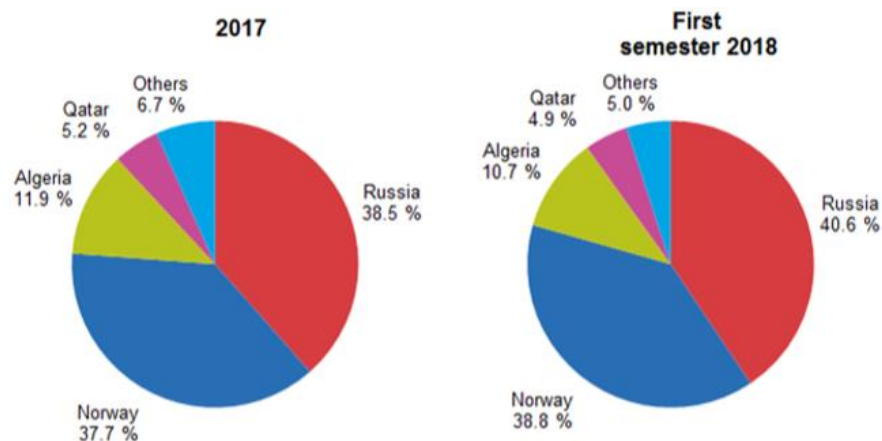
<sup>134</sup> EU shale gas production cannot be considered as a valuable substitute of piped gas. *See* Arthur Neslen and Frédéric Simon, 'Europe Abandons Hopes of US-Style Shale Gas Revolution' (2016) <<https://www.euractiv.com/section/trade-society/news/europe-abandons-hopes-of-us-style-shale-gas-revolution/>> accessed 3 March 2018. Nowadays, LNG costs some 30% more than Gazprom's gas in Europe supplied through its 'most expensive' route, via Ukraine. *See* Elena Mazneva and Anna Shiryaevskaya, 'Putin's Russia Seen Dominating European Gas for Two Decades' (2017) <<https://www.bloomberg.com/news/articles/2017-03-01/putin-s-russia-seen-dominating-european-energy-for-two-decades>> accessed 12 November 2017.

<sup>135</sup> Nathalie Hinchey and Anna Mikulska, 'LNG Versus Russian Gas in Central and Eastern Europe: Playing Poker on a Continental Scale' (2017) <<https://www.forbes.com/sites/thebakersinstitute/2017/08/24/lng-versus-russian-gas-in-central-and-eastern-europe-playing-poker-on-a-continental-scale/#36de1ea22c3a>> accessed 7 January 2018. As underlined by Henderson and Sharples, EU politicians concerned by the current market share of Gazprom in EU imports face a dilemma, since it is difficult to impose restrictions on a competitive source of energy when the European Commission and national governments have spent 20 years creating a liberalised market to encourage lower prices for consumers. *See* James Henderson and Jack Sharples (n 130) 16.

<sup>136</sup> European Commission, 'Liquefied Natural Gas' (2018) <<https://ec.europa.eu/energy/en/topics/oil-gas-and-coal/liquefied-natural-gas-lng>> accessed 21 December 2018.

<sup>137</sup> *Ibid.*

Figure 2: Breakdown of EU Natural Gas Imports, 2018 (Eurostat)



Given that the choice of a commodity is mainly driven by its price, it is likely that Russia, with its vast reserves and the possibility of serving the EU without the need to pay any additional transit fee, will be the main gas supplier of the Union also in the next 25 years.<sup>138</sup> Norway, which to date is the second largest EU supplier (see Figure 2),<sup>139</sup> in a few years will face declining production of gas,<sup>140</sup> and its state-owned company, Statoil, instead of focusing on the exploitation of new gas fields, recently announced massive investments in renewables sources of energy in the years to come.<sup>141</sup>

Therefore, except for an unexpected break in the international order, it appears that dependence from Russian gas will be a key feature characterising the EU energy future. This is in line with International Energy Agency's forecasts, which elect natural gas as 'the clear winner for the next 25 years' together with wind and solar powers.<sup>142</sup>

Notwithstanding to the above, while the EU security of gas supply debate is almost exclusively focused on Russia, it is in reality much wider because it potentially encompasses all gas suppliers, which might be interrupted for either technical or geopolitical reasons. A recent example of gas shortage happened in the case of Libya, because of the Arab Spring unrest.<sup>143</sup> For this reason, security of gas supply is an issue

<sup>138</sup> EurAsia Daily, 'What Will Russia Lose Refusing from Gas Pipelines Bypassing Ukraine?' (2017) <<https://easaily.com/en/news/2017/08/04/what-will-russia-lose-refusing-from-gas-pipelines-bypassing-ukraine>> accessed 10 January 2018. Russia estimated reserves amount to 1,688 trillion cubic feet (Tcf) (approximately 23850 billion cubic metres), as of January 2017. See US Energy Information Administration, 'Russia' (2017) <<https://www.eia.gov/beta/international/analysis.cfm?iso=RUS>> accessed 27 November 2017.

<sup>139</sup> Eurostat, 'EU Imports of Energy Products – Recent Developments' (2018) <<https://ec.europa.eu/eurostat/statistics-explained/pdfscache/46126.pdf>> accessed 7 January 2019.

<sup>140</sup> Marshall Hall, 'Norwegian Gas Exports: Assessment of Resources and Supply to 2035' (2018) Oxford Institute for Energy Studies Paper 128, 2 <<https://www.oxfordenergy.org/wpcms/wp-content/uploads/2018/03/Norwegian-Gas-Exports-Assessment-of-Resources-and-Supply-to-2035-NG-127.pdf>> accessed 7 April 2018.

<sup>141</sup> Jude Clemente, 'Norway's Natural Gas Problems Help U.S. LNG in Europe' (2016) <<https://www.forbes.com/sites/judeclemente/2016/03/02/norways-natural-gas-problems-help-u-s-lng-in-europe/#42a1dc551bcf>> accessed 6 January 2018.

<sup>142</sup> International Energy Agency, 'World Energy Outlook 2016 Sees Broad Transformations in the Global Energy Landscape' (2016) <<https://www.iea.org/newsroom/news/2016/november/world-energy-outlook-2016.html>> accessed 7 January 2018.

<sup>143</sup> Ali Shuaib and Marie-Louise Gumuchian, 'Libya Stops Gas Exports to Italy After Militia Fight' (2013) <<https://www.reuters.com/article/us-libya-gas-italy/libya-stops-gas-exports-to-italy-after-militia-fight-idUS SBRE92203A20130303?irpc=932>> accessed 7 January 2018.



that concerns all EU Member States, unrelated to their actual dependence from Russian imports.<sup>144</sup> Therefore, the EU should think of security of supply ‘globally’ and should not be overly concerned by the presence of a few key suppliers in its import portfolio, as it has at its disposal alternative supplies that can flexibly and rapidly be employed in case of unexpected shortages.

With that in mind, from a legal perspective the EU should fully profit from the tools made available under the Lisbon Treaty and the ensuing regulations to consolidate the partnerships established with all its energy suppliers and prevent security of supply disruptions. Among the measures to take, the EU should:

- (i) sign intergovernmental investment agreements with its current and potential supplier countries, which set out precise market access standards, investment incentives and guarantees for the undertakings willing to operate in the territory of the other party,<sup>145</sup>
- (ii) keep on investigating market operators’ commercial agreements (through which third countries can pursue their foreign policy objectives) in a way to guarantee their transparency, the absence of anti-competitive measures and backup mechanisms in case of energy shortages,
- (iii) fortify energy cooperation (e.g. in the form of memorandum of understanding, joint declaration etc.) with neighbouring countries, and, in particular, increasing the engagement with the Union for the Mediterranean – also in light of the possibility to exploit offshore gas discoveries between Egypt and Cyprus.<sup>146</sup>

These actions will have to go along with business initiatives aimed at securing EU energy supply either directly (e.g. the development of the Southern Corridor)<sup>147</sup> or indirectly (e.g. the exploitation of infrastructure unused capacity,<sup>148</sup> investments in research and technology, a further push to renewable energy production and energy efficiency). In this respect, the Energy Union strategy seems to pave the way for the achievement of EU security of supply interests, albeit its implementation by EU Members will require future analysis.

With specific focus on Russia, the EU should firstly demonstrate the political will to renegotiate a new Partnership and Cooperation Agreement, now stopped as a sanction for the 2014 occupation of Crimea. The new agreement should cover not only trade but also investments, with the guarantees typical of BITs (most favoured nation, national treatment, fair and equitable treatment, prohibition of unlawful expropriations, guarantee of free transfer of funds, ISDS mechanisms etc.).

In the opinion of the author, a common EU energy policy, facilitated by the Lisbon Treaty, is indeed the only a way to surpass the tit-for-tat behaviours which characterised the

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<sup>144</sup> 2018 data can be retrieved from Eurostat, ‘EU Imports of Energy Products - Recent Developments’ (2018) <<https://ec.europa.eu/eurostat/statistics-explained/pdfscache/46126.pdf>> accessed 7 January 2019.

<sup>145</sup> These agreements could be characterised by the limitation of dispute settlement provisions as described in section 2.2.

<sup>146</sup> Tareq Baconi, ‘Pipelines and Pipedreams: How the EU Can Support a Regional Gas Hub in the Eastern Mediterranean’ (2017) <[http://www.ecfr.eu/publications/summary/pipelines\\_and\\_pipedreams\\_how\\_the\\_eu\\_can\\_support\\_a\\_regional\\_gas\\_hub\\_in\\_7276](http://www.ecfr.eu/publications/summary/pipelines_and_pipedreams_how_the_eu_can_support_a_regional_gas_hub_in_7276)> accessed 8 January 2018.

<sup>147</sup> The ‘Southern Gas Corridor’ is a term used to describe planned infrastructure projects aimed at improving the security and diversity of the EU’s energy supply by bringing natural gas from the Caspian region to Europe.

<sup>148</sup> Simone Tagliapietra and Georg Zachmann (n 129).

past,<sup>149</sup> guaranteeing a framework to secure investments both for EU and Russian companies willing to invest in the territory of the other party. This would be coherent with the Energy Union plan – one of the most important pledges of the current European executive – which put ‘security of the energy supply’ as the cornerstone of the EU energy strategy, and would be beneficial also for Russia, since it would secure the operation of its companies in Europe.<sup>150</sup> The possibility to negotiate with one party only representing the stances of all EU countries could make it easier both for the EU and for Russia to strike a proper balance between their sovereign interests and the protection of the investments made by their nationals abroad. This negotiation path would share the same logic adopted by the EU in the agreements with Canada (CETA) and Singapore (EUSFTA). This process will imply the restart of the negotiations stopped and the non-adoption of harsher sanctions against Russia, such as the ones voted by the US Congress in July 2017 and the others subsequently envisioned.

Clearly, this proposal could call into question the EU alliance with Washington over the Ukrainian crisis, which extends to the interests and relations between the EU and the US going beyond the energy field. However, given the strategic importance of Russian gas for the current and future energy security of the EU – a situation markedly different from the one of the US, which have no energy imports from Russia and are likely to become a natural gas net exporter in the next years –<sup>151</sup> a more pragmatic approach by the European would be welcome to enhance the welfare of EU citizens.

## 7. Conclusion

With the Lisbon Treaty, the EU adopted a new approach to the energy sector. Thanks to the introduction in the TFEU of a specific section on energy and the extension of EU competences under the Common Commercial Policy – which currently cover foreign direct investments – the EU can now negotiate on equal footing its energy interests with third countries. In this way, the EU could overcome the inconsistencies characterising the pre-Lisbon period, and extend EU law standards to third countries and their undertakings willing to operate in the Union.

The post-Lisbon energy legislation focuses on the security of supply, through the regulation of EU Members’ energy agreements (through the IGA Decision and its amendments) and the scrutiny of commercial agreements between undertakings (through the SoS Regulation and its amendments). The recent EU measures are based on the extensive application of the subsidiarity principle, which, combined with Article 194 TFEU, is the cornerstone of the new EU energy policy. This approach is reflected also in the recent proposal to amend Directive 2009/73/EC, currently under discussion.<sup>152</sup> In

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<sup>149</sup> Natasha Georgiou and Andrea Rocco, ‘The Energy Union as an Instrument of Global Governance in EU-Russia Energy Relations: From Fragmentation to Coherence and Solidarity’ (2017) 9(1) *Geopolitics, History and International Relations* 245.

<sup>150</sup> To date, roughly 75% of Russia’s FDI stems from the EU and do not find sufficient protection. See European Commission, ‘Countries and Regions’ (2017) <<http://ec.europa.eu/trade/policy/countries-and-regions/countries/russia/>> accessed 23 April 2017.

<sup>151</sup> International Energy Agency, ‘World Energy Outlook 2017’ (2017) <<https://www.iea.org/weo2017/>> accessed 20 April 2018.

<sup>152</sup> European Commission, ‘Commission proposal for a Directive amending Directive 2009/73/EC’ COM (2017) 660. The proposal made aims at clarifying the applicability of Directive 2009/73/EC in the case of pipelines entering the European Union from third countries. The European Commission underlines that ‘following legal analysis’ of the legal service - dated 27 September 2017 - existing pipelines connecting the EU to third countries fall outside the scope of Directive 2009/73/EC. The proposal extends the

addition to the above, specific solidarity mechanisms and cooperation duties are distinctive features of the post-Lisbon approach to energy.

The centralisation approach taken by the EU theoretically enhances investment guarantees because all aspects related to non-EU companies can be regulated *ex ante* with the State of origin (through bilateral treaties negotiated by the Commission and intergovernmental agreements in compliance with EU law principles), without the need to adopt discriminatory market behaviours or halt the investments decisions already taken. All of this represents a step forward in the EU energy policy which should be fully exploited. The extension of Union's power in the sector is so wide that after Lisbon energy could be defined as a *de facto* exclusive competence of the Union.

Remarkably, the centralisation process which characterises the post-Lisbon approach reflects the worldwide tendency to regulate the energy matters at the supra-national level. In principle, this process allows the EU to become one of the leading parties of the international energy arena, as it can negotiate the energy needs of 500 million high-spending consumers. This is key to put downward pressure on the prices negotiated with suppliers and, consequently, enhance the welfare and the security of final consumers.

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provisions of Directive 2009/73/EC also to those pipelines. Again, this proposal does not seem to be a suitable tool to guarantee foreign investors. The EU itself, through Commissioner Sefcovic, warned Gazprom that this proposal could impact on the Nord Stream 2 pipeline. In particular, the Commissioner ironically affirmed 'I would really think twice, or many more times [to invest in Nord Stream 2], simply because there are a lot of uncertainties'. See Andrew Rettman, 'Russia Pipeline Is Investment Risk, EU Commissioner Warns' (2017) <<https://euobserver.com/energy/140404>> accessed 12 April 2018.